



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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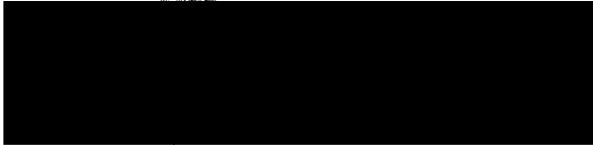
FEB 27 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

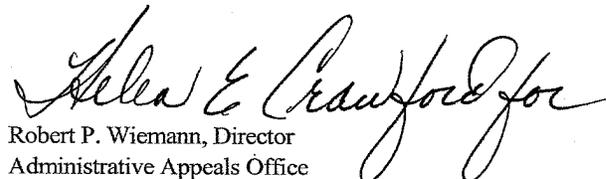
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the acting Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical transportation business. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements...

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$25.97 per hour or \$54,017.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage, at the priority date and continuing until the beneficiary obtains lawful permanent residence. The director specifically requested federal tax returns for 1999 and 2000 and copies, including the preparer's

signature, of quarterly wage reports for all employees for the four quarters of 2001.

Counsel submitted copies of the petitioner's 1999 and 2000 Form 1120A U.S. Corporation Short-Form Income Tax Returns, including page 2, Part III (the 2000 balance sheet). The federal tax return for 2000 reflected taxable income before net operating loss deduction and special deductions of \$10,407 and that for 1999 showed \$9,228, both less than the proffered wage.

In addition, executed copies of the quarterly wage reports stated wage payments to the beneficiary in 2001 of \$1,152, less than the proffered wage. No wage payments were made in the quarter including the priority date or any before.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief and the petitioner's "Balance Sheet, December 31, 2001 Unaudited-For Management Purposes Only" (herein the unaudited 2001 balance sheet). Also included, all from 2002, are two selected bank statements and a business card line of credit incurring 25% interest plus transaction fees.

Counsel's brief states,

Petitioner submits that it has the ability to pay the proffered wage because it consistently maintains balances in its bank account which match or exceed the Beneficiary's entire yearly proffered wage. (See Petitioner's February 2002 bank statement...).

Petitioner maintains a second, independent bank account which maintains thousands of dollars in daily balances. (See Petitioner's March 2002 bank statement...).

Further, in its [unaudited 2001 balance sheet], the petitioner reports ... net income of \$114,319.47, with company assets totaling \$217,047.84... Should the petitioner divert the approximately \$24,000 given in yearly employee advances, plus collect on the \$35,500 in yearly notes receivable, the Petitioner would have \$59,000 in additional assets; more than enough to provide for the beneficiary's proffered wage.

... With the addition of the Beneficiary as an accountant, the Petitioner will have the chance to more significantly streamline and redirect costs in order to

make Petitioner run at its most efficient....

Counsel's submissions on appeal are not persuasive. Of them, only the unaudited 2001 balance sheet pertains to the priority date of the petition. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145; *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require the same result. 8 C.F.R. 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12). Unaudited financial statements, such as the unaudited 2001 balance sheet, are of little evidentiary value as proof of the ability to pay the proffered wage. They are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Even though the petitioner submitted commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds which the tax returns and audited financial statements do not. The bank statements from 2002 do not pertain, in any event, to the priority date of the petition. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel calls attention to the 2002 account of a line of credit. The privilege to borrow at 25% interest bespeaks no particular confidence of creditors to make the proffered wage available. The statement in exhibit D on appeal reflects insignificant borrowing, a credit limit of \$7,500, and no availability for salary expenses.

Counsel, similarly, proposes certain diversions and collections to construe more than enough assets available to pay the proffered wage. Since the funds were already expended or committed at the priority date of the petition, April 27, 2001, the petitioner could not apply them to the proffered wage.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not

demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

After a review of all of the evidence, including the quarterly wage reports and federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present. Therefore, the petitioner has not overcome the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.