



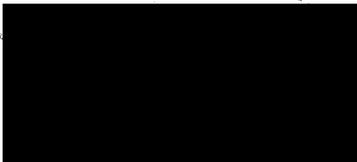
U.S. Department of Justice

Immigration and Naturalization Service

B6

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 02 072 52514 Office: California Service Center

Date:

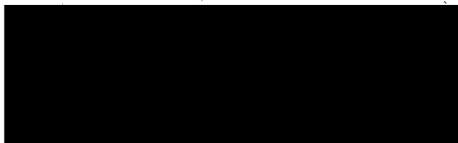
IN RE: Petitioner:
Beneficiary:



FEB 27 2003

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:



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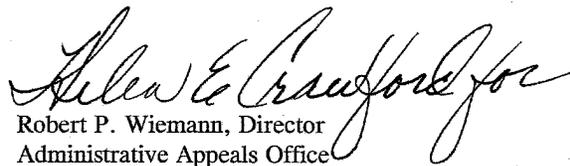
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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 Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a gem cutter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief.

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 upon the petitioner's ability to pay the wage offered beginning on priority date, 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 request for labor certification was accepted for processing on April 23, 2001. The beneficiary's salary as stated on the labor certification is \$11.00 per hour which equals \$22,880 annually.

With the petition, counsel submitted a copy of the 2000 Form 1040

Personal Income Tax Return of the owner of the petitioner. That return indicated that the petitioner is a sole proprietorship, and that the owner's income is derived solely from the petitioner's profits. The petitioner's net profit, shown on line 22 of that Form 1040 return as the owner's total income, was \$25,131.

The California Service Center sent the petitioner a Request For Evidence, dated March 13, 2002. That request noted that, although the petitioner's profits were sufficient to pay the proffered wage, the difference between those profits and the proffered wage did not appear sufficient for the petitioner's owner to support his household. The petitioner's owner was ordered to provide a statement of his monthly expenses. The petitioner was also asked to identify any additional assets available to pay the proffered wage.

In response, the petitioner's owner submitted a copy of his wife's 2000 and 2001 Form 1040 Personal Income Tax Returns and a business license. Those returns and business license state that the petitioner's owner's wife owns a separate business at the same address as the petitioner, and that she receives income from that business. That return shows that the petitioner's wife's business yielded her \$28,124 during 2000 and \$33,415 during 2001.

In addition, the petitioner's owner provided a copy of his own 2001 Form 1040 return, showing that, during that year, he received \$29,776 in income from the petitioner.

On June 19, 2002, the Director, California Service Center, issued a decision in this matter. The director reiterated that the income which the petitioner's owner derives from the petitioner, minus the proffered wage, appears to be insufficient to support the household of the petitioner's owner. The director denied the petition on that basis. The director did not address the information contained in the petitioner's owner's wife's income tax returns.

On appeal, counsel noted that the director apparently did not consider the additional income available to the petitioner's household from the business of the petitioner's wife. Counsel stated that the additional money is available to pay the expenses of the household of the petitioner's owner and that the income is available to pay the proffered wage.

The sole basis for denying the petition in this matter was the director's finding that, after paying the proffered wage, the petitioner's owner would have insufficient funds to support his household. The tax returns of the petitioner's owner's wife demonstrate that the petitioner's owner's household has additional

income not taken into account by the director in issuing that finding. The petitioner has, therefore, overcome the sole basis for denying the petition.

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 met that burden.

ORDER: The appeal is sustained.