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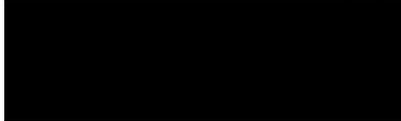
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536

*B6*



File: LIN 01 275 53367

Office: NEBRASKA SERVICE CENTER

Date: **NOV 18 2003**

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**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 Citizenship and Immigration Services (CIS) 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

In a letter submitted with the appeal, the petitioner requested oral argument. That letter stated that:

. . . oral argument is necessary because it will provide us with an opportunity to explain orally the evidence submitted as part of our appeal and to offer further proof that (the petitioner) had the ability to pay (the beneficiary) the proffered wage . . . .

The evidence submitted does not appear to require any explanation, and the issue central to this appeal is amenable to disposition on the briefs. The petitioner implies that "further proof" is available, but was withheld pending oral argument. Whatever that further proof might be, it should have been submitted on appeal.

A request for oral argument must set forth facts explaining why such argument is necessary to supplement the appeal. 8 C.F.R. § 103.3(b). Oral argument will be denied in any case where the appeal is found to be frivolous, where oral argument will serve no useful purpose or where written material or representations will appropriately serve the interests of the applicant. The applicant's request did not demonstrate that written material could not appropriately serve the interests of the petitioner. Accordingly, the request for oral argument is denied.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a legal secretary. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner 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 on the petitioner's continuing ability to pay the wage offered beginning on the 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 May 1, 2000. The proffered salary as stated on the labor certification is \$25,000 per year.

With the petition, the petitioner submitted a copy of the first page of its Form 1120 U.S. Corporation Income Tax Return for the 2000 calendar year. The tax return shows that the petitioner declared a loss of \$707,57 as its taxable income before net operating loss deduction and special deductions. On January 14, 2002, the Nebraska Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage.

In response, the petitioner submitted a complete copy of the petitioner's 2000 tax return. The attached Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

The petitioner also submitted a letter from the assistant vice president of a bank. That letter states that the petitioner maintains a checking account at that institution with a "high five figure average balance."

Finally, the petitioner provided a copy of a balance sheet and income statement. A cover sheet by the petitioner's president states that the president certifies that the balance sheet and income statement provided are true and correct copies of the petitioner's balance sheet and income statement as of December 31, 2000. The balance sheet and income statement are unaudited. The

income statement shows a loss for that year of \$4,127.

On May 31, 2002, the Director, Nebraska Service Center, found that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage and denied the petition. Although the decision does not specify, it appears to be based on the inability of the petitioner to pay the proffered wage during the year 2000.

On appeal, the petitioner submits an affidavit from a loan assistant at the petitioner's bank. That loan assistant avers that the petitioner maintained a bank balance of approximately \$100,000 between January 1, and June 26, 2002. That loan assistant further attests that the petitioner had a line of credit in the amount of \$130,000 with that bank, that the available amount of that line of credit was \$130,000 on May 1, 2000, and that the petitioner had a \$150,000 line of credit during 2002 with \$150,000 available on June 26, 2002.

In addition, the petitioner submits a letter from a certified public accountant expressing the opinion that a true measure of the petitioner's profitability would include the amount shown on line 12, Compensation of Officers, of the petitioner's Form 1120 tax return. In 2000, that amount was \$260,000. That accountant states that the officers of the corporation are its principals, and have personal discretion in setting the amount of their own compensation.

Finally, the petitioner included copies of its listings in the Martindale-Hubbel Law Directory. The petitioner notes that it is accorded a grade of A in legal ability and a grade of V for adherence to professional standards of conduct. The proposition for which the petitioner cites those listings is unclear.

Subsequently, the petitioner submitted a supplemental statement in support of the appeal. In that statement, the petitioner noted that during 2000 it had paid salaries of \$119,396, made profit-sharing contributions of \$53,578, and paid insurance premiums of \$38,312.22. In addition, the petitioner again noted that it had paid \$260,000 in compensation of officers. The petitioner stated that the \$260,000 was available, if necessary, to pay the proffered wage.

With that statement, the petitioner submitted 2000 and 2001 Federal Form W-2 wage and tax statements. Two of those statements demonstrate that the \$260,000 the petitioner paid to officers during 2000 was split between the petitioner's two owners.

The petitioner's 2000 tax return shows that the petitioner suffered

a loss during that year. The petitioner's net current assets at the end of that year were also negative.

The petitioner has submitted evidence of its monthly bank balances, but submitted no evidence to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. Further, 8 C.F.R. § 204.5(g)(2) lists annual reports, federal tax returns, and audited financial statements as the three types of documents competent to show the ability to pay the proffered wage. The petitioner's bank balances shall not be considered.

The financial statements the petitioner submitted are unaudited, and so do not meet the criterion of 8 C.F.R. § 204.5(g)(2). Those unaudited financial statements will not be considered.

The petitioner cited amounts it paid for insurance, salaries, and profit-sharing contributions, apparently as evidence of its ability to pay the proffered wage. Those expenses might be included in the calculation of the funds available to pay the proffered wage if the petitioner had submitted evidence to demonstrate that the expenses were unnecessary; that hiring the beneficiary would have obviated them, or some portion of them; or that they were in some other way relevant to the issue of ability to pay the proffered wage. The petitioner has submitted no such evidence, and those amounts will not be included in the calculation.

The line of credit available to the petitioner is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The petitioner emphasizes that it paid \$260,000 during 2000 as compensation of its officers. The petitioner implies that it was under no obligation to pay that compensation and further implies that it could have used a portion of that money to pay the proffered wage. The petitioner provided no evidence of its implicit assertion that it was under no obligation to compensate its officers. As such, the record does not demonstrate that the petitioner could have used any portion of the \$260,000 it paid to its officers to pay the proffered wage, and no portion of that money will be included in the calculation of the petitioner's ability to pay that wage.

The proffered wage is \$25,000 per year. The priority date is May

1, 2000. During 2000, the petitioner declared a loss. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay the proffered wage during 2000. Therefore, the petitioner has not demonstrated that it had the continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2).

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.