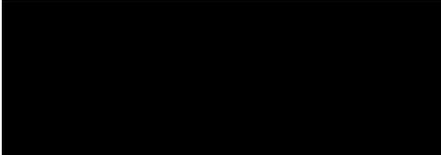


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U.S. Department of Homeland Security
Citizenship and Immigration Services

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prevent clearly unwarranted
invasion of personal privacy**

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



File: EAC 02 032 56227 Office: VERMONT SERVICE CENTER

Date: OCT 23 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:



PUBLIC COPY

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The director's denial was based on abandonment. The director reopened the petition on September 18, 2002 and denied it on other grounds. The case is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a construction foreman. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

On June 20, 2002, the director denied the petition pursuant to 8 C.F.R. § 103.2(b)(13). The denial was based upon the petitioner's apparent failure to respond to the director's request for evidence issued January 7, 2002. The director subsequently reopened the petition after discovering that the petitioner had submitted a timely response to the request for evidence. The director subsequently determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits further evidence and contends that the petitioner has established its financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 March 14, 2001. The

beneficiary's salary as stated on the approved labor certification is \$17.50 per hour or \$36,400 annually.

In support of its ability to pay the beneficiary's annual wage of \$36,400, the petitioner submitted two types of evidence. The first was copies of the petitioner's bank statements representing periods from December 1, 2000 through March 31, 2001 and from December 1, 2001 through January 31, 2002. The second was a copy of the beneficiary's Form 1040, U.S. Individual Income Tax Return for 2000.

The director denied the petition. He concluded that the bank statements were not reliable evidence of the petitioner's continuing ability to pay the offered wage because they do not reflect liabilities that must be paid by the petitioner during the same period and because of the fluctuations that may occur. We concur and would note that bank accounts are not among the three types of primary evidence enumerated in 8 C.F.R. § 204.5(g)(2) that must be submitted in order to establish a petitioner's ability to pay the offered wage.

The beneficiary's individual tax return also does not support the petitioner's ability to pay the proffered wage, as it was not submitted with W-2s. It contains no indication that the beneficiary derived any of his income from the petitioner.

The evidence submitted on appeal, however, overcomes the basis for the director's denial. Counsel submitted a copy of the petitioning owner's 2001 individual tax return along with a copy of an accountant's letter explaining that the 2001 petitioning business' income is reported on the sole proprietor's individual income tax return. In 2001, his adjusted gross income was \$268,141, which is sufficient to cover the beneficiary's offered wage of \$36,400.

Based on the evidence contained in the record, it can be concluded that the petitioner has submitted sufficient persuasive evidence to establish its ability to pay the beneficiary's offered wage as of the visa priority date of March 14, 2001 and continuing until the present.

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.