U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

B6

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

[redacted]

File: WAC 02 276 50237 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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)

ON BEHALF OF PETITIONER:

[redacted]

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 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.

Helen E Crawford for

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 (AAO) on appeal. The appeal will be sustained.

The petitioner is an international ocean and air freight firm. It seeks to employ the beneficiary permanently in the United States as an operations manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), 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). The petition's priority date in this instance is November 10, 1998. The beneficiary's salary as stated on the labor certification is $3,161 per month or $37,932 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence (RFE) dated December 16, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax return, annual report or audited financial statement for 1998-2001. The RFE, also, required verification of the job duties of the beneficiary for two (2) years of experience in the job offered.

Counsel submitted the petitioner's 1998-2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The 1998 tax return, covering the priority date, reported ordinary income from trade or business activities of $6,759, less than the proffered wage. Schedule L reported the difference of current assets of $31,475, minus current liabilities of $14,202, as net current assets of $17,273, less than the proffered wage.

The director observed that net current assets established the ability to pay the proffered wage from 1999-2001, but not at the priority date. Consequently, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

Counsel's overly broad contention on appeal states:

> Petitioner has increased its payroll over the years, always meeting its payroll obligations. In such, the gross income and net income has increased every year since its commencement. The projection for business and income once the beneficiary commences his employment further evidences that it has the ability to pay the proffered wages.

Although Citizenship and Immigration Services (CIS), formerly the Service or INS, will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the present case, the petitioner is a corporation that had been in business for almost five (5) years at the priority date. The petitioner then had $479,630 in gross receipts and paid out $90,663 in wages and salaries. By 2001 gross receipts were $582,586, and salaries and wages were $233,750. Upon the filing of the Immigrant Petition for Alien Worker (Form I-140) in 2002,

the petitioner claimed seven (7) employees.

It may be remarked that the petitioner did not establish the priority date until November 20, 1998, with only 51 days of 365 remaining. They represent 13.97 per cent (13.97%) of the days of 1998, and 13.97% of the proffered wage is $5300.09. Both the ordinary income from trade or business activities and the net current assets for 1998 are equal to, or greater than, the proffered wage.

A review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Other contentions are not determinative of this case. Some are in error, but do not change the result.

After a review of the federal tax returns and business record of the petitioner, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.