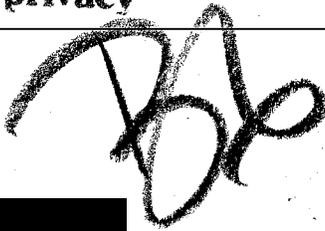


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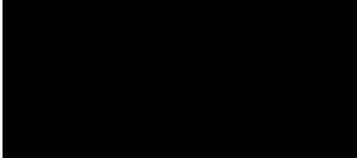
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prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security

Citizenship and Immigration Services



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



File: WAC 02 092 51627 Office: California Service Center

Date: **APR 13 2004**

IN RE: Petitioner:
Beneficiary:



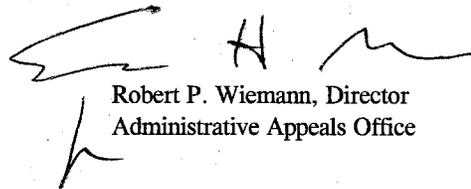
Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.



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 dismissed.

The petitioner is an automobile repair and service center. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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, counsel submits a brief and additional evidence.

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 proffered wage 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. Here, the request for labor certification was accepted for processing on February 6, 1998. The proffered wage as stated on the labor certification is \$18.36 per hour which equals \$38,188.80 annually.

With the petition, counsel submitted copies of the petitioner's 2000 Form 1065, U.S. return of partnership income. That return shows that the petitioner declared an ordinary income from trade or business activities of \$44,351 during that year. The corresponding Form 565 indicates that the petitioner is a general partnership.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 21, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested evidence showing the ability to pay the proffered wage from February 6, 1998 through 2001. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence consist of federal income tax returns, copies of annual reports, or audited financial statements.

The Service Center also requested that the petitioner provide copies of its California Form DE-6 quarterly wage reports for the preceding four quarters.

In response, counsel submitted copies of the petitioner's California Form DE-6 quarterly wage reports for the last three quarters of 2001 and the first quarter of 2002. Counsel's cover letter, dated May 28, 2002, stated that counsel was submitting the petitioner's 1999, 2000, and 2001 tax returns. Counsel did, in fact, submit copies of the petitioner's 1999, 2000, and 2001 Forms 1065 U.S. return of partnership income. Counsel did not provide any evidence of the petitioner's ability to pay the proffered wage during 1998 although the California Service Center specifically requested it on March 21, 2002.

The tax returns show that during 1999 and 2001 the petitioner declared ordinary income of \$40,034 and \$47,812, respectively. The DE-6 forms show that during those four quarters, the petitioner had one employee and did not employ the beneficiary.

On August 20, 2002, the Director, California Service Center, denied the petition, noting that the petitioner had provided no evidence pertinent to 1998 and had failed, therefore, to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel states that the petitioner had previously submitted income tax returns for 1998. Counsel submits a copy of the petitioner's Form 1065 for 1998 and a copy of Form 1040, U.S.

Individual Tax Return, for 1998 for one of the petitioner's partners. Counsel reiterates the position that the petitioner had the ability to pay the proffered wage since the priority date.

As stated above, on March 21, 2002, the petitioner was requested to submit evidence of the ability to pay the wage from February 6, 1998, through 2001. Contrary to counsel's assertion on appeal, no 1998 tax returns were submitted to the director. Tax returns for 1998 are now submitted on appeal. Where the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated on the record of proceeding before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record before the director shows that the petitioner could have paid the proffered wage of \$38,188.80 during 1999, 2000, and 2001. The petitioner has not demonstrated the same ability for 1998, the year of the priority date. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered wage beginning on the priority date.

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.