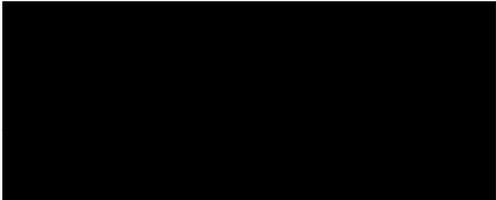


Bb

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

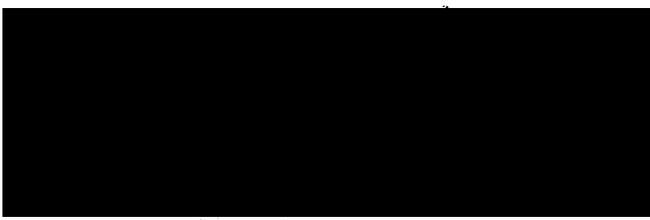


FILE: WAC-02-056-52034 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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.

The regulation at 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 turns, in part, 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. The petition's priority date in this instance is February 16, 2001. The beneficiary's salary as stated on the labor certification is \$14.71 per hour or \$30,596.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated July 11, 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.

Counsel responded to the RFE with a letter dated September 29, 2002 accompanied by additional evidence consisting of a copy of Form 1040, U.S. individual tax return for the owner of the petitioner for the year 2001; a copy of California Form 540 individual income tax return for the owner of the petitioner for the year 2001; and copies of monthly bank statements for the owner of the petitioner for the year 2001, except that the statement for the month of September 2001, the month of the priority date, was not included.

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 continuing until the present, and denied the petition.

On the Form I-290B Notice of Appeal counsel checked the box which states that a brief and/or evidence will be submitted to the AAO within 30 days, and counsel also made statements to the same effect in block three of the Form I-290B. Nonetheless, to date, no additional documentation is in the file.

Counsel states on appeal that the additional documents the petitioner intends to submit would prove that "the notice to deny is not factual."

In his decision the director found that the adjusted gross income shown on the owner's tax return for 2001 was \$13,817.00. The director found that this amount was insufficient to pay the proffered wage of \$30,597 per year. The director also noted that after paying the beneficiary's proffered wage the owner would have insufficient funds

remaining to support the owner's three household members. The director's analysis of the petitioner's tax return was correct.

The director noted that the monthly bank statements submitted for the year 2001, the year of filing, were lacking a statement for the month of September 2001, and that in any event the bank statements were insufficient to establish the ability of the petitioner to pay the proffered wage from the priority date through the present. The bank statements show closing monthly balances ranging from a high of \$9,755.23 at the end of August 2001 to a low of \$4,503.52 at the end of October 2001. The October 2001 statement shows an opening balance of \$2,424.73 as of September 25, 2001. The opening date for the October 2001 banks statement coincides with the priority date. The balance in the petitioner's bank account as of that date was far below the beneficiary's proffered wage. The director was therefore correct in finding that bank statements in evidence fail to establish the petitioner's ability to pay the proffered wage.

Also in evidence are financial statements for the petitioner's business for the period January 1, 2001 to October 1, 2001. The director did not consider these financial statements in his analysis.

The cover letter accompanying the financial statements is on letterhead which reads "United International Financial Co.," with an address in Encino, California. The signature on the letter is illegible and no printed name appears under the signature. Rather, under the signature appear the words "United International & Financial Corp., October 1, 2001, ID # 95-4297090." The letter contains no explanation for the discrepancy between the two versions of the name of the company. On the letterhead the final abbreviation is "Co.," which is an abbreviation for "Company," while under the signature the final abbreviation is "Corp.," which is an abbreviation for "Corporation." Also on the letterhead only a space separates the words "International" and "Financial," while under the signature those two words are separated by the ampersand character "&." Nothing in the text of the letter identifies the author as a certified public accountant, nor the firm as an accounting firm.

The text of the letter contains several grammatical errors, including lack of agreement in number between subjects and predicates. The text also contains a factual inconsistency, stating, "We have audited the accompanying balance sheet of [the petitioner] as of SEPTEMBER 7, 1998 and the related statements of Income, Retained Earnings, and Cash Flow for the year then ended." (Capital letters in the original). The date of September 7, 1998 is inconsistent with a later reference in the letter stating that the financial statements show the financial position of the petitioner as of October 1, 2001. The September 7, 1998 date is also inconsistent with the dates appearing on an attached document labeled "Balance Sheet, 01/01/01 to 10/01/01." Moreover, the dates on the "Balance Sheet" reflect a period of time, rather than a single date, a practice which is inconsistent with basic accounting principles.

For the foregoing reasons, despite the claim in the cover letter dated October 1, 2001 that the attached financial statements are the result of an audit, the cover letter and the accompanying financial statements fail to establish that the financial statements are in fact audited financial statements.

The regulation at 8 C.F.R. § 204.5(g)(2), quoted in pertinent part on page two above, requires any financial statements submitted in evidence to be audited financial statements. That regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management.

For the foregoing reasons, the financial statements submitted by the petitioner are found not to be acceptable evidence.

Moreover, even if the financial statements were audited ones they would not be sufficient to establish the petitioner's ability to pay the proffered wage, because the petitioner in this case is a sole proprietorship and the financial statements analyze only matters pertaining to the petitioning business, without considering the owner's overall financial situation. To be complete, any analysis of the petitioner's ability to pay the proffered wage would have to consider the overall financial situation of the owner of the petitioner, including the owner's household expenses and the owner's liabilities other than those relating to the petitioning business. The financial statements in evidence fail to address those matters.

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.