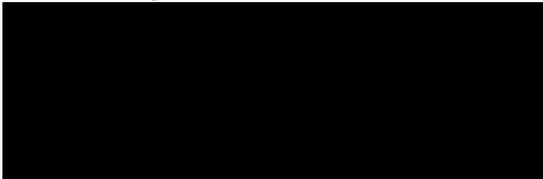




U.S. Citizenship
and Immigration
Services

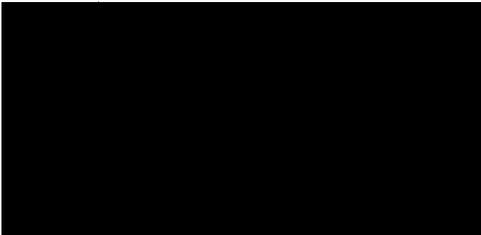


FILE: WAC-02-141-51018 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

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 goldsmith and watchmaker firm. It seeks to employ the beneficiary permanently in the United States as a watch repairer. 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 January 12, 1998. The beneficiary's salary as stated on the labor certification is \$15.64 per hour for a 35-hour work week, or \$28,483.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence submitted initially on the issue of the ability to pay consisted of copies of Form 941 U.S. employer's quarterly federal tax return for the owner of the petitioner for the first three quarters of 2001; copies of Form 1040 U.S. individual income tax joint returns for the owner of the petitioner and his wife for the years 1998, 1999 and 2000, with corresponding California income tax joint returns; and a summary analysis of the income tax returns apparently prepared by counsel. The evidence submitted initially on the issue of the beneficiary's experience consisted of statements from three of the beneficiary's former employers in Brazil.

In a request for evidence (RFE) dated May 10, 2002, the director requested 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 director also requested additional evidence of the beneficiary's prior experience.

Counsel responded to the RFE with a letter dated July 30, 2002, accompanied by additional evidence consisting of computer printouts of California Form DE-6 quarterly wage reports submitted by the petitioner for the second, third and fourth quarters of 2001 and the first quarter of 2002; Internal Revenue Service computer printouts of the Form 1040 individual income tax joint returns for the petitioner's owner and his wife for the years 1998, 1999 and 2000; a copy of the Form 1040 individual income tax joint return for the petitioner's owner and his wife for 2001; and additional statements from the three former employers of the beneficiary in Brazil who had previously submitted statements.

The director issued a second RFE dated September 6, 2002 requesting copies of the beneficiary's federal tax returns for the years 1998 to 2001, years during which, according to documentation in the file, the beneficiary was working for the petitioner.

Counsel responded to the second RFE with a letter dated October 9, 2002, accompanied by copies of the U.S. individual joint tax returns for the beneficiary and his wife for the years 1998 through 2001, along with copies of corresponding California state joint tax returns for the beneficiary and his wife.

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 indicating that a brief and/or evidence would be submitted to the AAO within 30 days. Nonetheless, to date no additional documentation is in the file.

Counsel states on appeal that no notice of intent to deny was issued before the director issued his decision and that the petitioner was therefore denied the opportunity to present documentation and to respond with additional evidence.

In his decision the director found that the proffered wage was \$32,552.00 per year. The director incorrectly calculated that figure. The proffered wage as stated on the Form ETA 750 is \$15.65 per year and the total hours per week are stated to be 35 hours, figures which yield an annual proffered wage of \$28,483.00. The director's figure of \$32,552.00 is the result of a calculation based on a 40-hour week, rather than a 35-hour week.

The director found that the petitioner's tax returns, as stated on IRS computer printouts, showed the following amounts for adjusted gross income: \$30,909 for 1998, \$26,981 for 1999 and \$27,854 for 2000. The director correctly stated those figures. The director stated that no tax return for 2001 was submitted. Though no IRS computer printout of the owner's 2001 return was submitted, a photocopy of that return was submitted, which shows adjusted gross income as \$1,262 for 2001. The household size of the owner and his wife is shown on the tax returns to be four persons.

The director found that the W-2 forms for the beneficiary showed the following amounts paid by the petitioner to the beneficiary: \$14,250 for 1998, \$17,850 for 1999, \$20,315 for 2000 and \$20,100 for 2001. The director correctly cited those figures.

The director found that, even crediting the amounts received by the beneficiary from the petitioner toward the proffered wage, the adjusted gross income of the owner and his wife was insufficient to pay the proffered wage and also to pay the reasonable living expenses of the owner and his household during each of those years. The director found that the evidence failed to establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the present.

Although the director used the erroneous figure of \$32,552 as the proffered wage, this error did not significantly affect the director's analysis. Even using the correct proffered wage of \$28,483, the adjusted gross income of the petitioner's owner and his wife was insufficient during the relevant time period to pay the proffered wage and to meet the owner's reasonable household expenses. The petitioner submitted no statement of the monthly household expenses of the owner and his wife. Calculations based on the above figures for the adjusted gross income of the owner and his wife and on the W-2 forms of the beneficiary yield the following amounts which after paying the proffered wage would have remained for the owner and his wife to meet the expenses of their four-person household: \$16,767 for 1998; \$16,348 for 1999; \$19,686 for 2000 and -\$7,121 for 2001. These amounts are found to be insufficient to cover the owner's reasonable household expenses for those years.

In a similar case where the petitioner's adjusted gross income was \$20,000, his net taxable income was \$13,000, and the proffered wage was \$6,000 a year, the court agreed with INS (now CIS) finding "it highly unlikely that the petitioner can, in fact, compensate the beneficiary in an amount which totals such a high percentage of his income. Clearly, the petitioner is unable to afford this rate of compensation." *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 182), aff'd., 703 F. 2d 571 (7th Cir. 1983).

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.