



U.S. Citizenship
and Immigration
Services

[Handwritten signature]

[Redacted]

FILE: WAC 02 169 51928 Office: CALIFORNIA SERVICE CENTER Date: APR 27 2004

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

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:
[Redacted]

PUBLIC COPY

APR 27 2004

**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.

[Handwritten signature]
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 visa petition will be approved.

The petitioner is an entertainment production and marketing company. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

Counsel submits a appeal brief and a Motion to Reopen/Reconsider, both of which are accompanied by additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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. The petitioner's priority date in this instance is July 15, 1997. The beneficiary's salary as stated on the labor certification is \$17,243 per year.

Counsel for the petitioner initially submitted copies of the petitioner's federal tax returns for the years 1997, 1998, 1999, 2000, and 2001. No evidence, however, was submitted in support of the beneficiary's education and experience. On July 23, 2002, the director issued a request for evidence, which required the petitioner to submit evidence that the beneficiary possessed the education and training required for the position. Counsel submitted appropriate documentation.

On January 28, 2003, the director denied the petition, concluding that the petitioner's ability to pay the proffered wage during the relevant period had not been established. Specifically, the director relied on the petitioner's net income and cash assets as displayed on its tax returns, which was less than the proffered wage for each of the years provided.

On appeal, counsel submits copies of the beneficiary's W-2 forms and tax statements for the years 1997, 1998, 1999, 2000, 2001, and 2002, which show that the petitioner employed the beneficiary and paid his salary at the time the priority date was established and continuing until the present. Counsel additionally submits copies of the petitioner's bank statements for 2002.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In this case, the W-2 forms submitted on appeal demonstrate that the petitioner paid the beneficiary the following salaries:

1997: \$27,984	1999: \$62,980	2001: \$69,600
1998: \$33,960	2000: \$67,092	2002: \$69,600

Since the proffered wage set forth on the labor certification is \$17,243 per year, the petitioner has clearly established its ability to pay the beneficiary the proffered wage during the relevant period.

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). In addition, the purpose of the director's request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In this case, however, the director's request for evidence was restricted solely to evidence in support of the beneficiary's qualifications. Since the director failed to notify the petitioner that its ability to pay the proffered wage was also in question, the petitioner's submission of new financial evidence on appeal that establishes such an ability is appropriate.

Upon reviewing the record and the evidence submitted on appeal, the AAO concludes that the petitioner has demonstrated a continuing ability to pay the proffered wage as of 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 met that burden.

ORDER: The appeal is sustained. The visa petition is approved.