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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS AAO, 20 Mass, 3/F
450 Eye Street N.W.
Washington, D.C. 20536

B6

JAN 27 2004

File: WAC-02-193-52435 Office: California Service Center

Date:

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:

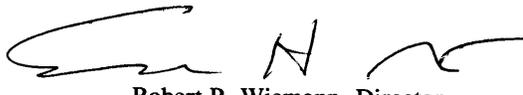
INSTRUCTIONS:

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.

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.


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, and the petition will be approved.

The petitioner is a wine import business. It seeks to employ the beneficiary permanently in the United States as a wine wholesaler. 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.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 wage offered 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on April 26, 2001. The proffered salary as stated on the labor certification is \$33.94 per hour which equals \$70,595 annually.

With the petition, counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for calendar year 2000 reflected that the petitioner's taxable income before net operating loss deduction and special deductions was \$19,794 during that year. The accompanying Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

On August 14, 2002, the Director, California Service Center, issued a Notice of Action in this matter. The director indicated that the petitioner's tax return did not appear to show the ability to pay the proffered wage and requested that the petitioner submit additional evidence covering the years 2000 and 2001.

In response, the petitioner's counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax return. The tax return for calendar year 2001 reflected that the petitioner's taxable income before net operating loss deduction and special deductions was (-) \$2,522. The accompanying Schedule L shows that the petitioner's current liabilities (lines 16 through 18) were \$186,884, which exceeded its assets (line 1 through 6) of \$175,502 at the end of that year. In addition, counsel submitted the petitioner's bank statements for the period May 2001 through August 2002 (excluding January 2002). The statements reflected that the petitioner had monthly bank balances of \$34,153.65, \$61,298.86, \$170,592.78, \$11,662.01, \$53,726.07, \$44,285.12, \$46,344.57, \$36,210.43 for the period May through December 2001, inclusive. Counsel also submitted the petitioner's monthly bank statements reflecting month ending balances of \$36,763.96, \$55,707.96, \$81,139.66, \$36,648.76, \$45,780.75, \$38,012.87, and \$25,889.71 for the period February 2002 through August 2002.

Counsel also indicated that "the compensation of officers (page 1, line 12 of the tax return) includes the salary for the offered position, the duties of which have been performed by shareholders Markus Friedlin and Joan Brandt (please see page 2, Schedule E-Compensation of Officers)."

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director did not comment on the assertion by counsel that the beneficiary would be assuming duties now performed by two shareholders.

On appeal, counsel argues that CIS misinterpreted the petitioner's tax returns in determining that the petitioner had negative assets

during 2001. Counsel further states that the petitioner had assets in excess of \$186,000 during 2001 and that the petitioner does have the ability to pay the proffered wage. Counsel also repeated the argument regarding the beneficiary assuming duties currently performed by two shareholders.

Counsel urged that corporate assets including liquid capital (bank accounts) and amounts of wages paid should be considered in determining the ability to pay, rather than profits.

Information found on the website of the Internal Revenue Service indicates that "Compensation of Officers (page 1, line 12 of Form 1120) may only include compensation for services rendered, not dividends." This would support the assertion of counsel regarding the assumption of duties by the beneficiary.

The AAO has stated in previous decisions that any claim that a beneficiary would replace a current employee should be supported by documentation regarding the identity, position, duties, salary, and termination of the employee. In this case, the shareholders/employees to be replaced have been identified as [REDACTED] and [REDACTED]. It is noted that [REDACTED] signed both the petition and the Application for Alien Employment Certification as President of the petitioner, certifying under penalty of perjury that the facts of both documents were true and correct. Both [REDACTED] and [REDACTED] are identified on Schedule E as officers of the corporation. As well as being corporate officers, they are said to be performing the proffered duties described in the labor certification and the petition. Schedule E Form 1120 indicates that [REDACTED] took a salary of \$28,000 in 2000 and \$48,000 in 2001; for those same years [REDACTED] took \$55,786 and \$79,144, respectively. The totals of these salaries were \$83,785 in 2000 and \$127,144 in 2001. The proposed salary of \$70,595 for the beneficiary could be met from these totals.

The petitioner in this case was established in 1986. In 2000, it did \$1,386,376 in business; in 2001, it did \$1,305,642. As such, it is a well established business in a prominent United States market. A review of the record confirms that the job offer is realistic and the wage offer can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm.1977). It is concluded that the petitioner has established that it had the ability to pay the beneficiary the proffered wage as of the priority date and continuing.

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.