



U.S. Citizenship
and Immigration
Services

B-2



JUL 8 2004

FILE: WAC 02 144 52493 Office: CALIFORNIA SERVICE CENTER Date:

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]

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

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prevent clearly unwarranted
disclosure of information

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DISCUSSION: The employment-based 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 sustained.

The petitioner is a textile dyeing and finishing company. It seeks to employ the beneficiary permanently in the United States as a supervisor. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary's proffered wage as of the petition's priority date.

On appeal, counsel argued that an incorrect test was applied in determining the petitioner's ability to pay the proffered wage.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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. Here, the petition's priority date is November 1, 2000. The beneficiary's salary as stated on the labor certification is \$3,710 per month or \$44,520 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation for the period August 1, 2000 through December 31, 2000. The return states that the petitioner reported ordinary income of \$22,535 during the year. The corresponding Schedule L shows that, at the end of the year, the petitioner's current liabilities were greater than its current assets.

Counsel also submitted photocopies of the petitioner's California Form DE-6 wage reports for all four quarters of 2000 and for all four quarters of 2001. Those reports reveal that the petitioner did not employ the beneficiary during any of those quarters. Those reports also reveal that the petitioner employed 78 people during the first quarter, 82 people during the second quarter, 74 people during the third quarter, and 142

during the first quarter, 82 people during the second quarter, 74 people during the third quarter, and 142 people during the last quarter of 2000; and 125 people during the first quarter, 190 people during the second quarter, 158 people during the third quarter, and 57 people during the last quarter of 2001.

Finally, counsel submitted photocopies of the petitioner's bank account statements.

On May 18, 2002, the California Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Specifically, the Service Center requested, consistent with the requirements of 8 C.F.R. § 204.5(g), that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements. The request also stipulated that if the petitioner employed 100 or more workers, an officer of the petitioning corporation might instead provide a statement that the petitioner is able to pay the proffered wage.

In response, counsel submitted a letter from the petitioner's CFO stating, "although the work is seasonal, the company typically employs far more than 100 workers." The CFO also stated that the petitioner was continuously able to pay the proffered wage beginning on the priority date.

Counsel also provided a photocopy of the petitioner's California Form DE-6 for the first quarter of 2002. The form demonstrates that the petitioner did not employ the beneficiary during that quarter. During that quarter, the petitioner employed 157 people.

On August 2, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's ordinary income during 2000 was insufficient to pay the proffered wage.

On appeal, counsel argued that the director applied an inappropriate calculation to determine the petitioner's ability to pay the proffered wage. We agree.

The evidence demonstrates that during 2000, 2001, and the first quarter of 2002 the petitioner employed an average of 118 people per quarter. The priority date occurred during the last quarter of 2000. During that quarter and subsequent quarters, the petitioner employed an average of 138 people per quarter. The letter from the petitioner's CFO states that the petitioner "typically employs far more than 100 workers" and the evidence submitted supports that assertion. The director cited no reason pursuant to which the petitioner should not be accorded the optional benefit of 8 C.F.R. § 204.5(g)(2) which is available to employers of 100 or more workers and this office is aware of no such reason.

The evidence demonstrates that the petitioner generally employs more than 100 people. The petitioner's CFO has stated that the petitioner has the ability to pay the proffered wage. In the absence of any enunciated reason to doubt the import of that evidence, the petitioner has submitted sufficient evidence of its requirements of 8 C.F.R. § 204.5(g)(2). In addition, the petitioner need only pay the proffered wage in 2000 from the priority date until the end of the year. At \$3,710 per month, the petitioner must establish that it had sufficient funds to pay the \$7,420 needed for that year. The ordinary income of \$22,535 is more than enough to cover the wages for the two-month period in the year 2000.

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.

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ORDER: The appeal is sustained.