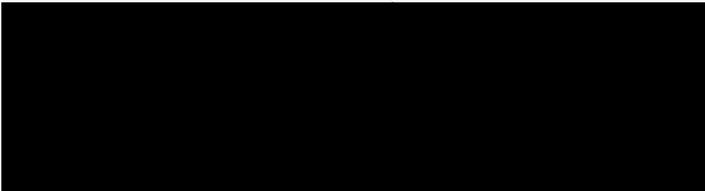


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 035 54492 Office: CALIFORNIA SERVICE CENTER Date:

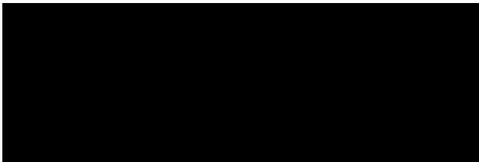
IN RE: Petitioner:
Beneficiary:



MAR 12 2004

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:



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 on appeal. The appeal will be dismissed.

The petitioner is a school. It seeks to employ the beneficiary permanently in the United States as an English as a Second Language Instructor. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

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 July 7, 1997. The beneficiary's salary as stated on the labor certification is \$26,715.52 per year.

With the petition, counsel submitted copies of monthly statements of the petitioner's checking account and copies of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$16,988 for that year. The accompanying Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The 1999 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$301 for that year. The accompanying Schedule L shows that at the end of that year, the petitioner had current assets of \$20,345 and current liabilities of \$3,377, which yields net current assets of \$16,968.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$13,462 for that year. The accompanying Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on June 6, 2002, requested additional evidence pertinent to that ability.

The Service Center requested that the petitioner provide evidence that it had the ability to pay the proffered wage from 1997 through 2001. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence must be either copies of annual reports, federal tax returns, or audited financial statements. The Service Center also requested copies of the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters.

In response, counsel submitted copies of the petitioner's California Form DE-6 quarterly wage reports for all four quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner did not employ the beneficiary during any of those quarters.

Counsel also submitted a copy of Form 7004 application for automatic extension of time to file corporation income tax return. The application asked permission to delay filing the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return until September 15, 2002.

Finally, counsel submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1997. The tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$97 dollars for that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$6,063 and current liabilities of \$3,520, which yields net current assets of \$2,543.

On August 5, 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.

On appeal, counsel submitted the petitioner's California Form DE-6 quarterly wage report for the second quarter of 2002 and its California Form DE-88 payroll tax deposit form for the first and second quarters of 2002. The proposition in support of why counsel submitted those documents is unknown.

Counsel argued that the petitioner's 2001 Form 1120 shows that the petitioner is able to pay the proffered wage. Counsel urges that the petitioner's ability to pay the proffered wage should be computed by adding its taxable income before net operating loss deduction and special deductions, its net current assets, and its year-end retained earnings.

Counsel is correct that the taxable income and net current assets are part of determining the ability to pay the proffered wage. However, the petitioner's retained earnings may not be appropriately included in this calculation because they do not represent funds, in addition to income and assets that are available for disposition.

The petitioner's 1998 tax return shows that it had \$16,988 in taxable income during that year and negative net current assets. The evidence does not demonstrate that the petitioner was able to pay the proffered wage of \$26,715.52 during 1998.

The 1999 tax return shows income of \$301 and net current assets of \$16,968. The evidence does not demonstrate that the petitioner was able to pay the proffered salary during 1999.

The 2000 tax return shows income of \$13,642 and negative net current assets. The evidence does not demonstrate that the petitioner was able to pay the proffered salary during 2000.

The 1997 tax return shows income of \$97 and net current assets of \$2,543. The evidence does not demonstrate that the petitioner was able to pay the proffered salary during 1997.

The 2001 tax return shows income of \$14,873 and negative net current assets. The evidence does not demonstrate that the petitioner was able to pay the proffered salary during 2001.

Counsel also submitted copies of the petitioner's checking account statement. Although counsel did not state the proposition that he intended them to support, this office induces that they were meant as evidence of the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R § 204.5(g)(2) enumerates the types of evidence competent to show the ability to pay the proffered wage. Bank balances are not among the types of evidence enumerated. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the petitioner's tax returns.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on 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 not met that burden.

ORDER: The appeal is dismissed.