

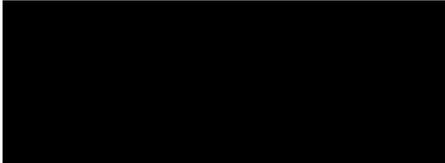


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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FEB 11 2003

File [redacted] 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 § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §1153(b)(3)

IN BEHALF OF PETITIONER:



date deleted to
warrant
protection of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. §103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Residence or to Adjust Status (Form I-485), the director served the Petitioner with notice of intent to revoke the approval of the petition. The director ultimately revoked approval of the Immigrant Petition of Alien Worker (Form I-140). The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an import/export company. It seeks to employ the beneficiary permanently in the United States as an export manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The petition was approved on January 16, 2001. When the beneficiary filed Form I-485, Application to Register Permanent Residence or Adjust Status, the director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage and that the petition had been approved in error. The approval of the petition was revoked on April 11, 2002.

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.

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 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 December 16, 1996. The beneficiary's salary as stated on the labor certification is \$6,291.67 per month which equals \$75,500.04 annually.

With the petition, counsel submitted a copy of the petitioner's 1999 Form 1120 U.S. Corporate Income Tax Return. That tax return, which covers the petitioner's fiscal year from July 1, 1999 to June 30, 2000, states that during that fiscal year the petitioner's taxable income before net operating loss deductions and special deductions was a loss of \$30,319.

The petition was approved on January 16, 2001. However, on February 9, 2002, the director found that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage, and requested additional evidence. The director requested the petitioner's 1997, 1998, 1999, 2000, and 2001 tax returns, in addition to other documents.

In response, counsel submitted tax documents, including the petitioner's 1997, 1998, 1999, and 2000 tax returns. The petitioner did not provide its nominal 2001 tax returns. Because it provided this response on February 27, 2002, and the petitioner's nominal 2001 fiscal year ends on June 30, 2002, that return was unavailable.

The petitioner's Form 1120 for 1997 indicates that the petitioner's taxable income before net operating loss deductions and special deductions was a loss of \$9,320. The Form 1120 for 1998 indicates a taxable income before net operating loss deductions and special deductions of \$2,149. As was stated above, the petitioner's Form 1120 for 1999 indicates a loss of \$30,319. The Form 1120 for 2000 indicates that the petitioner's taxable income before net operating loss deductions and special deductions was \$29,833.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and issued a Notice of Intent to Revoke on March 8, 2002.

In response, counsel submitted evidence of the petitioner's bank balances during the pendency of this petition and evidence that the petitioner has a line of credit. Counsel noted that tax returns are not the only acceptable evidence of ability to pay. Counsel argued that the petitioner's monthly bank balances indicate that the petitioner had the ability to pay the proffered wage and that,

in any event, the petitioner could have borrowed money pursuant to its line of credit to pay the wage. In addition, counsel argued that the beneficiary had generated additional income during the period since approval of the petition, and that additional income must also be taken into account. Finally, counsel presented the petitioner's balance sheet, accompanied by a report.

On April 11, 2002, the director found that the petitioner had failed to demonstrate the ability to pay the proffered wage and issued a Notice of Revocation.

On appeal, counsel reiterates the previous arguments, that the monthly bank balances establish the ability to pay the proffered wage and that, in the alternative, the petitioner could draw upon the line of credit to pay that wage.

8 C.F.R. §204.5(g)(2) makes clear that evidence other than tax returns may be submitted and, in fact, enumerates the other acceptable types of evidence. 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 tax return.

Evidence of a line of credit is also not included in the types of evidence enumerated in the regulations as acceptable as proof of the petitioner's ability to pay the proffered wage. A line of credit is not evidence of a sustainable ability to pay the proffered wage, because any amount the petitioner borrows against the line of credit becomes a liability.

The accountant's report submitted with the petitioner's balance sheets emphasizes that it is a compilation report, not an audited report. The accountant specified that he or she had compiled information presented by the petitioner and presented it in the form of a financial statement, but that he or she had not audited or reviewed the financial statements and that he or she expressed no opinion or any other form of assurance pertinent to the accuracy of the information. As such, the unaudited balance sheet merely restates the petitioner's representations, and is not evidence of their veracity. Also, because that report was not audited, it does not meet the requirement of 8 C.F.R. §204.5(g)(2).

Counsel's argument that the beneficiary had generated additional income during the period since approval of the petition, and that this additional income must also be taken into account as proof of the ability to pay the proffered wage, is unpersuasive. Instead, that argument is refuted by tax returns which show a decrease in

gross receipts for fiscal years 1999 and 2000. Gross receipts were \$2,368,773 in fiscal year 1998, \$644,522 in fiscal year 1999, and \$432,858 in fiscal year 2000. This equates to a 72.74% decrease and a 32.84% decrease, respectively. In addition, an increase in sales or gross receipts is not automatically attributable to the hiring of a particular employee. Documentation must be presented which clearly corroborates this assertion. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner must demonstrate that it had the ability to pay the proffered wage beginning on the priority date and continuing to the present. The petitioner's tax returns indicate that it was unable to pay the proffered wage during its 1997, 1998, and 1999 fiscal years.

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.