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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

11 08 2002

File: EAC 00 273 51349 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 the Bureau 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an import-export firm. 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, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is October 11, 1995. The beneficiary's salary as stated on the labor certification is \$51,800 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence dated May 24, 2001 (RFE), the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date **and continuing to the present** and to show evidence of wage payments to the beneficiary in 1996, if any.

The petitioner submitted a list entitled "Cash Balances from 1991 to 2000" as of December 31 of each year, as prepared by a CPA, and a letter from a Korean company endorsing the beneficiary for employment. Counsel stated that the petitioner had never employed the beneficiary. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief and some evidence not already of record. These included a new list from the petitioner entitled "Adjusted tax income and cash balances from 1991 to 2000" (unaudited statements) and a letter dated January 14, 2002 from a CPA (CPA letter).

Counsel's brief on appeal advises:

Moreover, for the year 1995, [the petitioner] showed a cash balance of \$757,810 as submitted by a Certified Public Accountant. Exhibit G. ... [The CPA letter] states that [the petitioner] was able to pay the proffered wage at the time the petition was filed and each year thereafter, based on his preparation of a list of cash balances for the years 1991-2000...

The 1995 Form 1120S, U.S. Income Tax Return for an S Corporation, proves only the ability to pay for 1995. The regulation requires evidence of the ability to pay until the beneficiary obtains lawful permanent residence in the form of annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2). Counsel and the petitioner offer no explanation for the lack of a federal tax return or other acceptable evidence for any year except 1995. Consequently, the petitioner must be presumed to be ineligible for the benefit sought.

8 C.F.R. § 103.2 (b) states in part,

Evidence and processing - (1) *General*. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is

considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Counsel admits that the petitioner did not present the primary evidence it might have:

.... Further, that audited financial statements did support the readily available cash balances. This simply cannot be the only standard by which a small corporation can prove its ability to pay the offered wage.

On the contrary, it is the standard. See 8 C.F.R. § 204.5(g)(2), *supra*, at page 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Unaudited statements are of little evidentiary value because they are based solely on the representations of management.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel cites no authority for the proposition that audited statements are only required where publicly held stock is available on the market to protect the interests of the public. The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage, but they are not primary evidence. 8 C.F.R. § 103.2(b), *supra*.

Counsel, also, enunciates a principle that requires the acceptance of secondary evidence, especially in the case of small businesses, and, therefore, the approval of this petition.

Counsel does not provide any published citation. While 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the federal tax return and the evidence of the financial condition of the petitioner, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and **continuing until the beneficiary obtains lawful permanent residence.**

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.