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U.S. Department of Justice  
Immigration and Naturalization Service

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



MAR 12 2001

File: [Redacted] Office: Texas 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:  
[Redacted]

Public Copy

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.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

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

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a exporter of natural products. The petitioner 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 director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage.

On appeal, counsel provides a statement 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 filing 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 filing date is September 22, 1997. The beneficiary's salary as stated on the petition is \$25,000 per annum.

Counsel submitted the petitioner's 1997 and 1998 U.S. Income Tax Return for an S Corporation. The 1997 tax return indicated gross

income of \$533,762; salaries and wages paid of \$87,795; depreciation of \$8,013; and an ordinary income from trade or business activities of \$34,872. The 1998 tax return indicated a gross income of \$267,479; salaries and wages paid of \$96,671; depreciation of \$5,850; and an ordinary income loss from trade or business activities of -\$22,940. The director denied the petition noting that the documentation submitted for 1998 indicated that the petitioner made half as much money as in 1997 and paid one third as much in salaries.

On appeal, counsel submits a letter from Josef Silny, CPA, who states in pertinent part:

The IRS Forms indicate a decline in gross receipts in 1998 with respect to 1997. Total deductions exceeded income in 1998, resulting in a loss. No IRS Forms have been provided for the 1999 tax year. However, the compiled 1999 financial statements strongly suggest a change in the business results attained by CRA International Company. The 1999 Income Statement reports \$412,104 in net revenues (vs \$315,388 gross receipts reported on the 1998 Form 1120S), an approximately one third increase. Additionally, the operating expenses reported in the 1999 Income Statement were \$299,708, merely about \$9,000 above the total deductions reported on the 1998 Form 1120S. Accordingly, in 1999 the Net Income reported in the Income Statement is positive (\$61,779) and over \$80,000 greater than the amount reported on the 1998 Form 1120S (a \$22,940 net loss).

Mr. Silney asserts that the petitioner can now pay the proffered wage, however, the petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage in 1998 as required by 8 C.F.R. 204.5(g)(2).

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.