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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

[Redacted]

File: [Redacted] Office: TEXAS SERVICE CENTER

Date: MAR 22 2001

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)

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, Acting Director
Administrative Appeals Office

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

The petitioner is a photography studio which seeks to employ the beneficiary permanently in the United States as a photographer. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director found that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of April 14, 1997, the filing date of the visa petition.

On appeal, the petitioner states that the Service did not consider evidence regarding the hiring of contract workers.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 service 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 April 14, 1997. The beneficiary's salary as stated on the labor certification is \$6.50 per hour which equates to \$13,520 annually.

On July 15, 1999, the director requested that the petitioner submit additional evidence to establish that it had the financial ability

to pay the offered wage. The petitioner responded on October 14, 1999. It provided a copy of an application for extension to file the 1998 tax return of the owner of the petitioner, the 1997 individual tax return, a letter from the petitioner, copies of W-2s for 1998 and copies of Form 941 quarterly tax for 1999.

According to the letter from the petitioner, it did not have any employees in the first six months of 1998 and it did not apply for an Employer Identification Number until June 1998. The ETA-750 indicates that the beneficiary worked for the petitioner since September 1993. The director found that there was no evidence to support the petitioner's claim regarding this employment.

The director found that the 1997 tax return indicates that the business' profit was \$17,797 which represented the owner's income for himself and his dependents. According to the director, no wages were paid in 1997. In addition, because the petitioner did not have any employees in 1997 and the entire profit was the owner's personal income, the director could not find that the petitioner had the ability to pay the offered wage in 1997. Consequently, the director denied the petition.

On appeal, counsel submits a brief. Counsel states that the director ignored the fact that contract workers had been hired by the petitioner during 1997 and 1998. The petitioner also claims that the Service incorrectly determined that a business could not hire any workers if the business operated at less than profitable level.

The petitioner's October 7, 1999 letter states it did not have any employees in the first six months of that year. The petitioner stated that as a result it did not have any W-2 forms for that period. On appeal, the petitioner claims that although it stated that it did not hire any employees until June 1998, this did not include contract workers. The only evidence the petitioner has provided regarding the hiring of contract workers in 1997 is on the Schedule C for 1997 where it lists the expense of \$21,950 for outside contract labor. There is no evidence that contract workers were hired in 1998. Moreover, the petitioner contends that the hiring of contract workers demonstrates that it had the financial ability to pay the proffered wage. These funds, however, were not retained by the petitioner for future use. Instead, these funds were expended on compensating workers and therefore not readily available for payment of the beneficiary's salary in 1997. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage. Further, the petitioner has not documented the positions, duties and termination of the workers who performed the duties of the proffered position. If they performed other kinds of



work, then the beneficiary could not have replaced them.

In addition, the petitioner contends that the director incorrectly assumed that a business could not hire any workers if the business was not profitable. Despite the petitioner's claim, the director is limited to the evidence in the record on which to base his decision. The petitioner has only provided a copy of an individual 1997 income tax return, a copy of a request for an extension to file the 1998 tax return and a copy of a Form 941 Employer's Quarterly Federal Tax Return. Thus, the director is limited to the financial information provided in these documents on which to grant or deny the petition. It should be noted that the petitioner requested an extension to file the 1998 tax return until October 1999. However, the petitioner to date, has failed to provide a copy of this tax return.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the record does not contain any evidence of the petitioner's personal expenses nor does it show that the petitioner had other income or assets with which to pay the proffered wage. Therefore, it is impossible to determine if the petitioner had income sufficient to pay the beneficiary and meet any expenses incurred by the petitioner and his family.

The information provided by the petitioner has failed to demonstrate that the petitioner has the financial ability to pay the wage at the time the priority date is established 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.