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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: VERMONT 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 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, Vermont Service Center. In the subsequent appeal and motion, the Associate Commissioner for Examinations affirmed the director's decision to deny the visa petition. The matter is now before the Associate Commissioner on a third motion to reopen. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is an architect and design firm for commercial construction. It seeks classification for the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3). The petitioner seeks to employ the beneficiary as a civil drafter/expediter. The director found that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition, February 21, 1995. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief.

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 February 21, 1995. The beneficiary's salary as stated on the labor certification is \$32,052.80 annually.

On motion, counsel submits a brief.

Counsel argues:

The decision incorrectly calculated the amount of funds available to pay the proffered wage. On page 3 of the decision, it states: "Therefore, even if the unreported income of \$18,867 were added to the \$10,960, the resulting figure of \$29,827 is still insufficient to pay the proffered wage of \$32,052.80." However, use of the figure of \$10,960 is not correct.

As indicated in the annexed letter from the accountant for the petitioner, that figure was only for ordinary income, cash on hand and depreciation. It did not include the rental income \$12,800. By adding the said rental, the resulting figure would be would be (sic) \$42,627. That income is sufficient to pay the proffered wage in this case. The rental income is clearly income to the petitioner corporation, and is clearly indicated in the 1995 tax return (see form 8825, "real estate income and expenses of a partnership or an S Corporation").

In determining ability to pay, the director looks at ordinary income, depreciation and cash on hand (to the extent that total current assets exceed total current liabilities). A review of the petitioner's 1995 Form 1120S U.S. Income Tax Return for an S Corporation reflects that when one adds the ordinary income, the depreciation, and the cash on hand at the end of the year, the result is \$10,960, \$21,092.80 less than the proffered wage.

The unreported income in 1995 cannot be considered as proof of the petitioner's ability to pay the proffered wage. Those funds were not available at the time of filing of the petition to pay the beneficiary's wages.

Even though counsel claims that the rental income of \$12,800 as shown on schedule K should be considered in determining the petitioner's ability to pay the wage, those funds were listed as income on the petitioner's 1995 personal tax form (Form 1040, U.S. Individual Income Tax Return). Therefore, those funds may not be used to establish the ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) as explained in a prior decision dated October 14, 1999.

After a review of the federal tax return it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered in 1995. Therefore, the objection of the Associate Commissioner has not been overcome on motion.

The burden of proof in these proceedings rests solely with the

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of February 29, 2000 is affirmed. The petition is denied.