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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: EAC 99 267 52123 Office: VERMONT SERVICE CENTER Date: 25 JAN 2002

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: SELF-REPRESENTED

**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.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

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

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

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a turf grass production manager. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, the petitioner submits a statement.

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 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 March 19, 1999. The beneficiary's salary as stated on the labor certification is \$ 13.75 per hour or \$28,600.00 per annum.

The petitioner initially submitted a copy of its 1998 Form 1040 U.S. Individual Income Tax Return which reflected an adjusted gross income of -\$100,714. Schedule F reflected gross receipts of \$298,488; gross profit of \$298,488; depreciation of \$37,199; labor hired of \$121,407; and net farm profit of -\$100,856. The director determined that the documentation was insufficient to establish

that the petitioner had the ability to pay the proffered wage. On July 3, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of March 19, 1999, to include the 1998 and 1999 income tax returns and all supporting schedules for the petitioning entity.

In response, the petitioner submitted a copy of its 1999 Form 1040A U.S. Individual Income Tax Return which reflected an adjusted gross income of -\$84,550. Schedule F reflected gross receipts of \$413,005; gross profit of \$413,000; depreciation of \$23,160; labor hired of \$150,808; and net farm profit of -\$17,762.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner states:

As to reference my tax returns for the 1999 season. It is important to understand that our company is in the turf management business. Unfortunately, those years in the late 1998, 1999, 2000 seasons were the worst they could be for turf management. The reason for this was a three year drought that had severe consequences on our trade. With improved conditions in the last year and now more business than we have seen in many years, I ask that you can please reconsider your original opinion, and allow [the beneficiary] to work with our company for the next few years. The good people of Bestland will greatly appreciate his direction and experience. Also [the beneficiary] position would only be seasonal.

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present. In addition, since the position is considered to be of a seasonal nature, it does not qualify as a skilled position under section 203(b)(3) of the Act.

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.