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

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

File: WAC 00 200 51321 Office: California Service Center

Date: **AUG 07 2003**

IN RE: Petitioner:
Beneficiary:

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:

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 Bureau of Citizenship and Immigration Services 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reconsider or to reopen. The motion will be granted, the previous decisions of the director and Associate Commissioner will be affirmed, and the petition will be denied.

The petitioner is an auto repair shop. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a auto mechanic. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on September 6, 1996, the priority date of the visa petition. The Associate Commissioner affirmed that decision, dismissing the appeal.

On motion, counsel submits a brief.

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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was filed on September 6, 1996. The proffered salary as stated on the labor certification is \$18.36 per hour which equals \$38,188.80 annually.

With the petition, counsel submitted what purports to be the petitioner's unaudited cash flow report for 1998.

On November 16, 2000, in a Request for Evidence, the California Service Center requested additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted unaudited cash flow reports for 1997 and 1999, and a 1999 Form 1120 showing that the taxable income of Luna Landscape Services, Inc. during that year was a loss of \$34,355.

In addition, counsel submitted a letter, dated December 22, 2000, from the president of Luna Landscape Services stating that the company conducts both Luna Tree Service and Luna Auto Repair, and files only one return for both businesses.

On June 15, 2001, the Director, California Service Center, denied the petition, finding that the petitioner had submitted insufficient evidence of its ability to pay the proffered wage.

On appeal, counsel submitted photocopies of Luna Landscape Service's 1997 and 1998 1120 U.S. Corporate Income Tax Returns. The 1997 return shows that, during that year, that company suffered an \$89,429 loss. The 1998 return shows that, during that year, that company suffered a loss of \$89,429. In the appeal brief, counsel argued that the director had erred in finding that the petitioner's taxable income had been a loss.

On May 30, 2002, the Associate Commissioner for Examinations dismissed the appeal, noting that the director had correctly observed that the tax returns submitted by counsel show losses for 1997, 1998, and 1999.

On motion, counsel argues that, despite the petitioner's tax returns showing losses, the petitioner had the ability to pay the proffered wage. Counsel observes that corporations, in accordance with tax law, list all legitimate expenses to reduce tax liability, and that the corporations' taxable income does not, therefore, reflect their actual financial condition. Counsel urges that other factors must be considered when determining ability to pay the proffered wage.

Assuming that the deductions claimed by the petitioner are, as

fairly indicates the petitioner's ability, or inability, to pay the proffered wage. In any event, if the petitioner possesses other funds, not reflected on those returns, which are available to pay the proffered wage, then the onus is on the petitioner to demonstrate that fact.

The only other evidence pertinent to the petitioner's finances are the cash flow reports, mentioned above. Those reports are not audited, as required by 8 C.F.R. § 204.5(g)(2). Further, two of those reports show losses. The sole exception, the unaudited cash flow report for 1997, shows a profit of \$140.15, which is insufficient to pay the proffered wage.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the proffered wage during 1997, 1998, or 1999. Therefore, the objection of the Associate Commissioner has not been overcome on the motion.

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 May 30, 2002 is affirmed. The petition is denied.