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

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



File: EAC 02 068 53550 Office: Vermont Service Center

Date: **AUG 12 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)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 (Bureau) 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 that 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an opto-electronic manufacturer. It seeks to employ the beneficiary permanently in the United States as a opto-electronic technician. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment 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 as of the priority date of the visa petition.

On appeal, 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 wage offered 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 accepted for processing on February 14, 1997. The proffered salary as stated on the labor certification is \$21.73 per hour which equals \$45,198.40 annually.

With the petition, counsel submitted copies of the petitioner's 1997 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The 2000 tax return showed that the petitioner had an ordinary income from trade or business of \$52,764. The 1997 income tax return showed that the petitioner suffered a loss of \$14,107 during that year.

Counsel also submitted a 1997 Federal Form W-2 Wage and Tax Statement showing that the petitioner paid \$28,171.11 to [REDACTED] during that year.

The petitioner's 1997 and 2000 tax returns did not list any wages or salaries paid. The director found that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On February 12, 2002, in a Request for Evidence, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the director requested a copy of the beneficiary's 1997 income tax return.

In response, counsel submitted the 1997 joint income tax transcripts for [REDACTED] and [REDACTED]. Counsel represented those to be the beneficiary's tax transcripts, though he did not state how he knew that to be so. Those transcripts show that Mr. and Mrs. [REDACTED] received an adjusted gross income of \$48,629 and listed their social security numbers.

Counsel also submitted a letter from the petitioner's president. The letter states that the petitioner's accountant listed the wages paid by the petitioner on Schedule A, Line 3, Cost of Labor, and that wages totalled \$36,524 during 1997, \$35,849 during 1998, \$58,536 during 1999, and \$119,476 during 2000. The letter further explains that no social security number was placed on the petition because the petitioner learned, prior to filing, that the beneficiary had no valid social security number, although she had originally provided them with one.

On June 28, 2002, the Director, Vermont Service Center, denied the petition. The director found that the petitioner presented no evidence that the amount shown on the W-2 form provided was paid to the beneficiary, rather than someone else. The director noted that, without the amount shown on that W-2 form, the record does not show that the petitioner was able to pay the proffered wage during 1997.

On appeal, counsel stated that the 1997 W-2 form is genuine, and accurately reports amounts paid to the beneficiary during that year. Counsel stated that the petitioner has additional evidence

to corroborate that statement, but did not provide it.

Counsel further stated that the petitioner's ability to pay the proffered wage is demonstrated by the petitioner's tax returns. Counsel stated that the petitioner paid more than \$19,000 to shareholders during 1997, and included that amount in the amount shown at Line 7, Compensation of Officers on its 1997 tax return. Counsel states that the petitioner could have withheld that amount if it was obliged, during 1997, to pay the proffered wage.

Further still, counsel stated that the petitioner prepaid rent in the amount of \$8,068 during 1997 for tax planning purposes. Counsel stated that, if the petitioner had been obliged, during 1997, to pay the proffered wage, it could have also expended that amount toward paying the proffered wage, rather than prepaying its rent.

Counsel is correct that insufficient reason exists to disregard the amount shown on the 1997 W-2 Form. That form was issued in the beneficiary's name as shown on the petition. The assertion of the petitioner, that the company initially used the social security number provided by the beneficiary, then found that it was invalid, and declined to include it on the petition, is credible.

Discrepancies exist between the beneficiary's name as shown on the petitioner's 1997 income tax transcripts, [REDACTED] and that shown on the W-2 Form and the petition, [REDACTED]. However, that transcript indicates that [REDACTED] is the beneficiary's husband's surname. The beneficiary is Mexican, and Mexican women often retain their maiden names after marriage, or alternate between their maiden names and their husbands' surnames as context and convenience dictate. Likewise, use of two different spellings of the beneficiary's given name is not inherently suspicious.

Further, the same social security number was used on both the beneficiary's taxes, under the name [REDACTED] and on the beneficiary's W-2 form, under the name [REDACTED]. This indicates that those forms both apparently pertain to the same person. The name discrepancies, even coupled with the illegitimate social security number, are insufficient reasons to disregard the amount shown on the W-2 form, absent additional evidence.

Counsel also alleged that \$8,068 in prepaid rent was paid during 1997, along with over \$19,000 paid to shareholders. Counsel argues, in essence, that those amounts should be added to the amount shown on the W-2 form to determine the petitioner's ability to pay the proffered wage.

However, counsel has submitted no evidence of his allegation that those amounts were paid to shareholders and in prepaid rents. Line 11 of the 1997 tax return shows that petitioner paid \$19,252 in rent during that year, but counsel has submitted no evidence that \$8,068 of that amount was prepaid rent. Line 7 of that return shows that \$76,800 was paid toward Compensation of Officers, but counsel submitted no evidence that over \$19,000 of that was an optional payment to shareholders. The assertions of counsel are not evidence. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, had the petitioner withheld the alleged \$8,068 in prepaid rent and the more than \$19,000 allegedly paid to shareholders, those amounts would have offset the petitioner's loss during 1997 of \$14,107, and resulted in a profit of approximately \$13,000. That profit, which counsel alleges the petitioner might have declared, if it had been in its interest to do so, when added to the \$28,171 shown on the 1997 W-2 form, equals less than \$42,000, an amount less than the proffered wage. Even if counsel's allegations were taken as fact, counsel has offered no reason that the insufficiency of that amount to pay the proffered wage ought to be disregarded.

The petitioner failed to submit sufficient evidence that it had the ability to pay the proffered wage during 1997. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the present.

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.