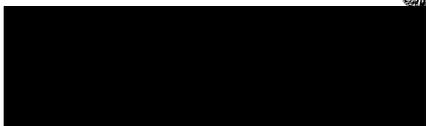


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invasion of personal privacy**

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

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 253 53609 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 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:

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 Citizenship and Immigration Services (CIS) 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer component wholesaler. It seeks to employ the beneficiary permanently in the United States as a supervisor of electronic testing and repair. 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 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 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 day the Form ETA 750 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 on January 19, 2000. The proffered salary as stated on the labor certification is \$2,850 per month, which equals \$34,200 per year.

With the petition counsel submitted financial statements. Those financial statements include an apparently unaudited income statement for March of 2002 and an apparently unaudited balance

sheet as of March 31, 2002. 8 C.F.R. § 204.5(g)(2) requires that financial statements be audited in order to be used as evidence of the petitioner's ability to pay the proffered wage. Because no evidence was submitted to show that those financial statements were audited, they are not competent evidence pursuant to 8 C.F.R. § 204.5(g)(2), and shall not be considered.

Counsel also provided a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return, which shows that the petitioner declared a loss of \$1,186,233 as its taxable income before net operating loss deduction and special deductions during 2000. The corresponding Schedule L shows that at the end of the year the petitioner's current liabilities were greater than its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 29, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a taxable income before net operating deductions and special deductions of \$349,041 during that year.

Counsel also submitted copies of the petitioner's income statements and year-to-date balance sheet for various months during 2002. In his accompanying letter, dated December 12, 2002, counsel described those financial statements as audited financial statements and states that they were prepared by in-house auditors.

In order to be competent evidence, financial statements must be audited. This is so that an accountant who is independent of the company's management will confirm their accuracy. Generally, internal auditors monitor and test to verify compliance with company accounting and operating policies and procedures. Normally, internal auditors do not produce financial statements but, in any event, an internal auditor is either an employee, a member of management, or an owner. As such, an internal auditor is not independent. Lack of independence precludes a person or firm from issuing an audit opinion. A financial statement produced pursuant to an in-house audit is not an audited financial statement within the meaning of 8 C.F.R. § 204.5(g)(2). Pursuant to 8 C.F.R. § 204.5(g)(2) the financial statements submitted by counsel are not competent evidence and shall not be considered.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on January 9, 2003, denied the petition.

On appeal, counsel provided additional financial statements and again stated that they were produced pursuant to an internal audit. Counsel argued that those financial statements are better indices of the petitioner's ability to pay the proffered wage than the petitioner's tax returns. As was stated above, those financial statements are not competent evidence and, pursuant to 8 C.F.R. § 204.5(g)(2), will not be considered.

As to 2000, counsel conceded that the petitioner had suffered a loss but stated that the petitioner remained a viable company able to pay the proffered wage. Counsel implied that the loss should be disregarded in the calculation of the petitioner's ability to pay the proffered wage.

Counsel is correct that, if the petitioner can demonstrate that it merely suffered an uncharacteristically bad year within a framework of profitable years, then the bad year might properly be disregarded. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this case, however, counsel has submitted competent evidence pertinent to only two years, 2000 and 2001. During 2000 the petitioner suffered a loss. During 2001 the petitioner declared a profit. No competent evidence has been submitted that the loss, rather than the profit, was uncharacteristic.

During 2000, the petitioner's taxable income before net operating loss deduction and special deductions was a loss of \$1,186,233 and the petitioner had negative net current assets. The petitioner was unable to pay the proffered wage either out of its income or its assets. The petitioner has submitted no competent evidence that it was able to pay the proffered wage during 2000.

As to 2001, counsel argued that the Net Operating Loss deduction is not an expense attributable to the year taken and should not be seen as detracting from the petitioner's ability to pay the proffered wage during that year. Counsel is correct. The petitioner's Line 28, taxable income before net operating loss deduction and special deductions, is the appropriate index of the amount of the petitioner's income that was available to pay the proffered wage.

During 2001, the petitioner's taxable income before net operating loss deduction and special deductions was \$349,041. The petitioner has demonstrated that it had the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000.

Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.