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

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



File: WAC 02 023 56275 Office: California Service Center Date: DEC 16 2003

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)

ON BEHALF OF PETITIONER:  
[Redacted]

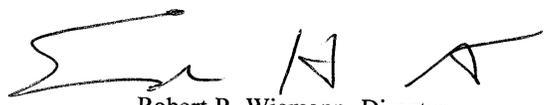
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INSTRUCTIONS:  
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 painting business. It seeks to employ the beneficiary permanently in the United States as a color matcher. As required by statute, the petition is accompanied by an individual labor 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 and continuing.

On appeal, the petitioner 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 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 priority 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 priority date is May 9, 1997. The beneficiary's salary as stated on the labor certification is \$9.64 per hour which equates to \$20,051.20 per annum.

As evidence of its ability to pay the offered salary, the petitioner offered copies of its sole proprietor's 1997 through 2000 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Returns including Schedule C, Profit and Loss from Business statements. The sole proprietor's Forms 1040 reflected adjusted gross incomes of \$10,020; \$9,126; \$7,758; and \$5,520 respectively. The petitioner also submitted a copy of a Form 1065, U.S. Partnership Return of Income for the year 1997. This return indicated that it was filed in the petitioner's name but with a different address than that given on the immigrant visa petition. It is unclear whether the petitioner is organized as a partnership or sole proprietorship. In any event, the amount declared as ordinary income in 1997 for this partnership was \$1,871, far less than the offered salary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. We concur. None of the figures noted above were sufficient to cover the beneficiary's proffered salary in any of the pertinent years.

On appeal, counsel submits a letter from the petitioner which states, in pertinent part:

A-Z Painting currently has no employees. The business is growing and I am unable to keep up with the work, hence I have to turn down jobs. By hiring an employee I will no longer be turning down contracts.

Enclosed is a projected Profit or Loss statement. This statement reflects sales an additional employee would create. It also reflects the wages, payroll taxes, workman's compensation insurance and other operating expenses that would be additional and/or increase.

The petitioner argues that the beneficiary's employment will result in more income for the business. The petitioner does not explain, however, the basis for such a conclusion. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as the petitioner's personal opinion. Consequently, CIS is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

It is also noted that the record contains a letter dated September 25, 2001, signed by the beneficiary and counsel which states that

the beneficiary had been working for the petitioner as a color matcher since 1997. The petitioner provided no documentary evidence of this employment. As such, we cannot include the payment or the beneficiary's services in the calculation of the ability to pay. It is also observed that the income figures on the tax returns submitted do not particularly support the argument that the beneficiary's services generated substantial extra income.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to 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.