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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 141 50727 Office: CALIFORNIA SERVICE CENTER Date: DEC 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of electronic equipment and supplies. It seeks to employ the beneficiary permanently in the United States as an electroplater. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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). The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $12.85 per hour or $26,728 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 10, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1998-2001. The RFE specified, in addition, the petitioner's last four (4) quarterly wage reports (DE-6).

The petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for the fiscal year (FY) 1998, from July 1, 1998 to June 30, 1999. The petitioner omitted the DE-6. The FY 1998 federal income tax return reflected a deficit of taxable income, ($73,926), less than the proffered wage. Also, in Schedule L, current assets minus current liabilities reflected a deficit of net current assets, ($174,265), less than the proffered wage. Compiled financial statements covered the priority date and periods from July 1, 1999.

Though the director's decision, dated August 8, 2002, misnamed the petitioner, it noted the absence of any Form DE-6. It considered that compiled financial statements, being based solely on the representations of management, are not credible evidence. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, the petitioner only asserts error in that the decision misnamed the petitioner. No prejudice is apparent, since the RFE was precise, and the petitioner presents its own DE-6 forms for FY 2001, but only on appeal. These Forms DE-6 report wages paid to the beneficiary of $26,942.11, equal to, or greater than, the proffered wage, in FY 2001. The petitioner, however, made no attempt to support payments to the beneficiary in any other year.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The petitioner offered compiled financial reports in response to the RFE. Unaudited financial statements are of little evidentiary value as proof of the ability to pay the proffered wage because

they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2).

Finally, the RFE specified the federal tax return, annual report or audited financial statement for the priority date in accord with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the federal tax return, compiled financial statements, and Forms DE-6, 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 until the beneficiary obtains lawful permanent residence.

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.