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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

BCIS, AAO, 20 Mass, 3/F

425 Eye Street N.W.

Washington, D.C. 20536



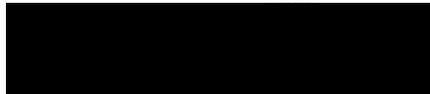
File: WAC 02 009 52819

Office: California Service Center

Date:

DEC 18 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:



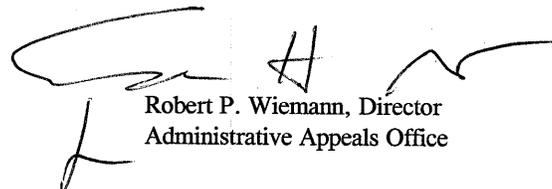
INSTRUCTIONS:

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 an accountancy corporation. It seeks to employ the beneficiary permanently in the United States as an auditor. 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.

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 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 December 29, 1997. The beneficiary's salary as stated on the labor certification is \$40,872.00 per annum.

Counsel submitted copies of the petitioner's 1996 through 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's tax return for calendar year 1997 reflected gross receipts of \$247,958; gross profit of \$247,958; compensation of officers of \$30,000; salaries and wages paid of \$57,400; and an ordinary income (loss) from trade or business activities of -\$118,984. The tax return for calendar year 1998 reflected gross receipts of \$211,510; gross profit of \$211,510; compensation of officers of \$21,000; salaries and wages paid of \$56,456; and an ordinary income (loss) from trade or business activities of \$11,870.

The tax return for 1999 reflected gross receipts of \$442,939; gross profit of \$442,939; compensation of officers of \$41,500; salaries and wages paid of \$139,360; and an ordinary income (loss) from trade or business activities of \$4,047. The tax return for 2000 reflects gross receipts of \$472,202; gross profit of \$472,202; compensation of officers of \$40,500; salaries and wages paid of \$122,030; and an ordinary income (loss) from trade or business activities of \$30,631.

Counsel also submits a draft of the petitioner's tax return for 2001. Although this return indicates that the petitioner's ordinary income for 2001 was sufficient to cover the beneficiary's proffered wage, it is only a draft and cannot be considered as having the same evidentiary value as a final record that has been filed with IRS. We do note that counsel's assertion that the petitioner has paid the proffered salary to the beneficiary since September 2001 is supported by the wage records submitted on appeal.

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.

On appeal, counsel submits copies of the petitioner's principal shareholder's 1997 and 1998 Form 1040 U.S. Individual Income Tax Return and states that the business was a sole proprietorship from July 1997 to June 1998. It is noted, however, that the petitioner's 1997 and 1998 corporate tax returns state that it was incorporated on January 6, 1995, and the petitioner named on the labor certification and the petition is a corporation.

Counsel argues that in 1997, "the large net loss was a result of a large write-off of leasehold improvements when the company relocated to another office." Counsel further argues that "the Service should take into consideration the income generated from

[the beneficiary's] employment in considering the company's ability to pay his salary. See *Masonry Master, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) (INS should consider employee's ability to generate income when determining employer's ability to pay salary.)"

Matter of Masonry Masters, Inc. v. Thornburg, 875 F.2d 898. (D.C. Cir. 1989) does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The court held that the Service should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not provided evidence that there is a difference between the proffered wage and the prevailing wage in this proceeding.

The petitioner's Form 1120S for calendar year 1997 shows an ordinary income of -\$118,985. The petitioner could not pay a proffered salary of \$40,872.00 out of this income.

In addition, the petitioner's 1998 through 2000 federal tax returns continue to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns, 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.

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.