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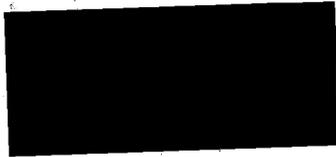
U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 29 Mass, 3/F
Washington, D.C. 20536



JUL 24 2003

File: WAC 02 273 53550 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



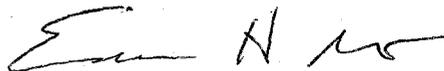
INSTRUCTIONS:

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 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 employment-based immigrant 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 originally sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(2) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner is an advertising agency. It seeks to employ the beneficiary permanently in the United States as an account executive. The petitioner subsequently amended the petition and requested classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker, professional, or other worker. 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 the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the petitioner's "cash on hand" as shown on its tax returns establishes its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 January 20, 1998. The beneficiary's salary as stated on the labor certification is \$5900 per month (\$70,800 annually).

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 12, 2002, the director requested additional evidence in the form of copies of annual reports, federal tax returns, or audited financial statements pursuant to the evidentiary requirements of 8 C.F.R. § 204.5(g)(2) to establish that the petitioner had the ability to pay the proffered wage. The director noted that the tax returns previously submitted were not signed and requested that the petitioner submit copies of signed returns. The director also found that the labor certification submitted with the petition did not demonstrate that the position required an advanced degree or its equivalent. He asked whether

the petitioner would like to amend the petition to reflect the appropriate classification under section 203(b)(3)(A)(i) or 203(b)(3)(A)(ii) of the Act.

In response, the petitioner requested that the petition be amended to reflect the beneficiary's consideration for classification under section 203(b)(3)(A)(i) of the Act. The petitioner also submitted copies of signed federal Form(s) 1120S U.S. Corporation Income Tax Return(s) for the tax years of 1999 through 2001.

The director concluded that the financial information contained in the petitioner's tax returns did not establish its ability to pay the proffered wage. He noted that the 1998 federal tax return reflected an ordinary income of \$12,867. The 1999, 2000 and 2001 tax returns showed, respectively, ordinary income at - \$31,850, \$47,689 and \$10,673. The director also noted that the petitioner's net current assets on all of the submitted tax returns reflected negative balances.

On appeal, counsel contends that the petitioner's "cash on hand" as reflected on line 1 of Schedule L of the tax returns supports the petitioner's ability to pay the proffered wage. He argues that the tax return for 1998 showed cash on hand at \$76,715; for the year 2000, schedule L showed \$444,806; and for 2001, schedule L showed \$195,474.

Counsel's argument is not persuasive. Cash on hand as set forth on schedule L of the corporate tax return reflects only a portion of the petitioner's financial status. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). The petitioner must establish its ability to pay the proffered wage as of the priority date. Here, the petitioner's 1998 net income of \$12,867 does not cover the proffered wage of \$70,800. The evidence also indicates that the petitioner has employed the beneficiary since 1999. Copies of the beneficiary's W-2's contained in the record show that she was paid \$40,950 in 1999, \$37,900 in 2000, and \$38,202.50 in 2001. With the exception of the year 2000, the petitioner's net income shown on its corporate tax returns was insufficient to cover the difference between the petitioner's actual salary and the proffered wage.

Accordingly, after a review of the evidence submitted, we conclude 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 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.