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

BB

[REDACTED]

File: WAC 02 146 51196 Office: CALIFORNIA SERVICE CENTER

Date:

OCT 02 2003

IN RE: Petitioner:
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]

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
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 stamped receipt date of the appeal raises a question as to the timeliness of the California Service Center's processing. In the interest of due process and fairness, however, the case will be considered on certification pursuant to 8 C.F.R. § 103.4.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional. The petitioner is an import/export company. It seeks to employ the beneficiary permanently in the United States as a management analyst. 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 additional evidence and contends that the petitioner has established its ability to pay the beneficiary's offered wage

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 March 20, 1998. The beneficiary's salary as stated on the labor certification is \$17.64 per hour, representing an annual salary of \$36,691.20.

In support of its ability to pay the beneficiary's proffered wage, the petitioner submits copies of its tax returns filed on Form 1120, U.S. Corporation Income Tax Return for the years, 1998, 1999, and 2000.

The petitioner's 1998 tax return shows \$5,430,276 in gross receipts or sales, \$78,750 officers' compensation, \$92,985 salaries and wages, and -\$35,542 taxable income before taking the net operating loss deduction (NOL). Schedule L attached to the 1998 tax return indicates that the petitioner had -\$17,716 net current assets that year.

The petitioner's 1999 tax return shows \$7,062,666 in gross receipts or sales, \$107,720 officers' compensation, \$123,358 salaries and wages, and -\$80,008 taxable income before the NOL deduction. Schedule L shows that the petitioner had -\$101,336 in net current assets that year.

The 2000 corporate tax return shows that the petitioner claimed \$10,722,554 in gross receipts or sales, \$120,000 officers' compensation, \$145,737 salaries and wages, and \$2,992 taxable income before the NOL deduction. Schedule L indicates that the petitioner's 2000 net current assets were -\$81,491.

The petitioner also submitted quarterly payroll reports showing that it paid the beneficiary \$6,100 for the quarter ending September 30, 2001, \$10,715 for the quarter ending December 31, 2001, and \$6,225 for the quarter ending March 31, 2002.

The director concluded that the evidence failed to establish that the petitioner had established its ability to pay the proffered wage. The director noted that the quarterly wage reports failed to indicate that the petitioner had employed the beneficiary at the proffered wage. We agree and further note that the neither the figures shown as taxable income before the NOL deduction nor the petitioner's net current assets were sufficient to cover the proffered wage of \$36,691.20 during the period of time for which tax returns were submitted.

On appeal, counsel re-submits copies of the petitioner's 1998, 1999 and 2000 tax returns, as well as copies of the petitioner's bank statements representing the following ending balances:

September 30, 1998	\$ 33,215.68
September 30, 1999	5,578.39
September 30, 2000	139,772.14
July 31, 2002	19,519.31

Counsel asserts that the petitioner's average monthly cash balances demonstrate its ability to pay. The regulation at 8 C.F.R. § 204.5(g) requires copies of annual reports, federal tax returns, or audited financial statements. While additional material may be considered, such documentation generally cannot substitute for the primary evidentiary requirements. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). It is also noted that even though counsel submitted the petitioner's bank statements as evidence of its cash flow, there is no proof that they somehow represent additional funds available to pay the beneficiary's wage beyond those shown in the pertinent tax returns.

Based on the evidence contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary

obtains lawful permanent resident status.

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.