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Citizenship and Immigration Services

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

[REDACTED]

OCT 02 2003

File: WAC 01 242 50918 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as an Other Worker 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. A subsequent appeal was dismissed. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed and the petition will be denied.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a housekeeper/live out pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(iii), which provides visas to qualified immigrants performing unskilled labor for which qualified workers are not available in the United States. 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 of \$9360 as of the priority date of the visa petition of October 31, 1988, and continuing until the beneficiary obtained lawful permanent residence.

On September 26, 2002, the AAO affirmed the director's decision to deny the petition. It noted that counsel submitted a letter from the petitioner's accountant stating that the petitioner had a "modified adjusted gross income" of \$360,500 in the tax year 2000. The petitioner's 2000 tax return originally showed an adjusted gross income already sufficient to cover the proffered wage. The AAO's decision summarized the petitioner's 1040 U.S. Individual Income Tax Returns for the years 1988 through 2000. The AAO noted that the petitioner's adjusted gross income figures showed that it had the ability to pay the wage offered from 1988 through 1992, and then from 1999 through 2000. But the six years of tax returns from 1993 through 1998 reflected losses. The adjusted gross incomes all showed negative figures of -\$444,966, -\$334,031, -\$201,437, -\$149,244, -\$127,835, and -\$48,257, respectively. The AAO concluded that the petitioner had failed to establish that it had the ability to pay the proffered wage at the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent resident status pursuant to the regulatory requirements at 8 C.F.R. § 204.5(g)(2).

On motion, counsel submits a copy of a cover sheet of the petitioner's 2001 U.S. Individual Income Tax Return claiming an adjusted gross income of \$180,074. Counsel also submits a letter from an accountant accompanied by an attachment of the petitioner's "modified adjusted gross income" for the years 1993 through 1998. This attachment purports to show "modified adjusted gross income" figures of -\$291,819, \$196,824, \$166,020, \$164,959, \$138,517, \$186,391, respectively, for those years. The accountant's letter specifically disclaims any audit or review of the individual income tax returns and accompanying attachment. Counsel makes no specific argument relevant to how these documents overcome the basis of the AAO's previous decision.

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.

As noted above, the regulation 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 evidentiary requirements. The accountant's letter does not suffice to overcome the previous AAO finding and is not the primary evidence that the regulation requires. We note that even this reconstituted submission of the petitioner's financial status includes evidence that the petitioner had insufficient income in 1993 to cover the beneficiary's offered wage.

We find that upon review, the petitioner has not submitted sufficient evidence to establish that the petitioner has shown that it has had the ability to pay the offered wage as of the visa priority date of October 31, 1988, and continuing until the beneficiary obtains lawful permanent residence. As such, the petitioner has not overcome the basis of the previous decisions of the director or the AAO.

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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.