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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[Redacted]

File: [Redacted] AC 02 025 56186 Office: CALIFORNIA SERVICE CENTER

Date: OCT 21 2003

IN RE: Petitioner: [Redacted]
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]

PUBLIC COPY

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 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 skilled worker. The petitioner is a wholesale importer of diamonds. It seeks to employ the beneficiary permanently in the United States as a gem appraiser. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel argues that the petitioner's total assets and retained earnings should be considered when determining the petitioner's financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

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 9, 1998. The beneficiary's salary as stated on the labor certification is \$20.87 per hour or \$43,409.60 annually.

The petition was filed on October 4, 2001. As evidence of its ability to pay, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 1999. As indicated on the return, the financial information covers a fiscal year from April 1st to March 31st of the following year. Thus, the 1999 corporate tax return covers a period from April 1, 1999 to March 31, 2000. Although it shows a taxable income before net operating loss deduction (NOL) and other special deductions of

only \$2,756, it also reflects that the petitioner had \$185,476 in net current assets that year. This amount would be sufficient to cover the beneficiary's offered wage for that period.

On February 11, 2002, the director requested further evidence relevant to the petitioner's ability to pay. He noted that the 1999 tax return had been received, but instructed the petitioner to submit evidence in the form of annual reports, federal tax returns, or audited financial statements which show the petitioner's ability to pay the proffered wage as of the visa priority date continuing until the beneficiary obtains lawful permanent residence.

The petitioner responded by submitting copies of its 1997 and 1998 Form 1120 corporate tax returns. Although the petitioner declared negative or very low figures as its taxable income before the NOL deduction in both years, the returns also reflected that the petitioner had \$224,845 and \$203,537 in net current assets for 1997 and 1998, respectively. These figures represent funds that could be utilized to meet the beneficiary's offered wage of \$43,409.60.

It is noted that although the petitioner's response to the director's request for evidence was submitted with a cover letter dated March 13, 2002, the response did not contain the petitioner's 2000 federal tax return, an annual report, or audited financial statement that would have covered the period from April 1, 2000 to March 31, 2001. The record does contain a June 14, 2001 copy of the petitioner's Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return covering the same period, but this extension expired December 15, 2001.

The director denied the petition, noting that the petitioner's taxable income was too low to cover the beneficiary's wage as shown by the 1997, 1998, and 1999 tax returns. While we agree with this observation, but as noted above, the petitioner's net current assets could meet the beneficiary's wage of \$43,409.60 for each of these years. We find that at least as to the period of time covered by the financial data reflected on these tax returns, the petitioner established its ability to pay the beneficiary's offered wage.

The regulation at 8 C.F.R. § 204.5(g)(2), however, requires that the petitioner establish a continuing ability to pay the proffered wage. In this case, as noted by the director, the petitioner failed to submit any competent evidence establishing its ability to pay from April 1, 2000 to the present. The petitioner's 2000 corporate tax return, an audited financial statement, or an annual report could have provided this data. No explanation for its absence was offered. The lack of such evidence cannot be ignored. The petitioner failed to demonstrate its ongoing ability to pay the proffered wage of \$43,409.60.

On appeal, counsel submits a balance sheet and a profit and loss sheet reflecting various figures generated by the petitioner as of March 31, 2002. Neither document indicates that it is an audited financial statement in conformance with 8 C.F.R. § 204.5(g)(2). As such, they carry little evidentiary value and do not persuasively show that the petitioner has the continuing ability to pay the beneficiary's proffered wage.

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.