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Citizenship and Immigration Services

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

OCT 28 2003

File: WAC 02 056 52681 Office: CALIFORNIA SERVICE CENTER

Date:

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:

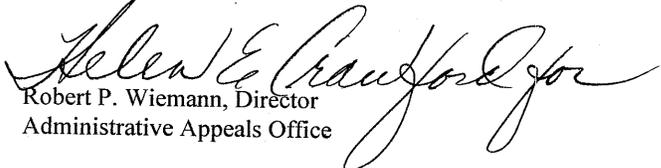
INSTRUCTIONS:

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 a horse breeding and training company. It seeks to employ the beneficiary permanently in the United States as head horse keeper. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on 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 nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on August 25, 1997. The proffered wage as stated on the Form ETA 750 is \$13.58 per hour, which equals \$28,246.40 per year.

The petition states that the petitioner employs 25 workers. With the petition counsel submitted the 1997, 1998, 1999, and 2000, Schedule F Profit or Loss from Farming from the petitioner's owner's Form 1040 U.S. Individual Income Tax Returns* for the same years. Those schedules show Line 38 Net Farm Profit or (loss) of (\$490,078), (\$775,733), (\$1,115,902) and \$1,092,682, respectively. The remaining parts of those tax returns were not provided.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 13, 2002, requested additional evidence pertinent to that ability.

The Request for Evidence observed that, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petitioner was further advised that, if it wished to rely on Federal tax returns to demonstrate the ability to pay the proffered wage, it must submit complete tax returns.

The notice observed that Part B of the Form ETA 750 states that the beneficiary worked for the petitioner. The notice requested that the petitioner provide a history of the beneficiary's employment for the petitioner and copies of the petitioner's Form W-2 Wage and Tax Statements.

In response, counsel submitted a letter, dated May 16, 2002. The letter states that the petitioner has employed the beneficiary since November 1988, that his position is "Horse Keeper Head" and describes his duties.

Counsel also submitted a letter dated June 3, 2002. This letter states that it is intended to establish the petitioner's ability to pay the proffered wage. The letter continues that the petitioner is a 1,000 acre racehorse facility which has been in business for 25 years, and has over 250 horses, 160 of which are

* Counsel provided no evidence that Ernest Auerbach, whose Schedule F is provided, owns the petitioner, E A Ranches. The Schedule F does not contain the name E A Ranches. The assumption that Ernest Auerbach owns the petitioner is based on counsel's assertion that he does and on a comparison of the petitioner's name to Ernest Auerbach's initials. Counsel's failure to provide that evidence is moot, however, given the decision in this case.

boarders. The letter further states that the petitioner has adequate cash reserves and well-established customer relationships.

Counsel did not submit any of the requested evidence. The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 22, 2002, denied the petition.

On appeal, counsel stated, "The petitioner has the ability to pay the proffered wage."

Subsequently, counsel submitted a brief. In that brief, counsel stated that the petitioner's owner owns other companies and properties, including residential, industrial, and commercial properties. As evidence of those holdings, counsel submitted a complete copy of the 2001 Form 1040 joint income tax return of petitioner's owner and the petitioner's owner's spouse. Counsel stated that the other requested tax returns were not provided because of their size.

Counsel notes that 8 C.F.R. § 204.5(g)(2) states, in part:

In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Counsel states that although the petitioner employs only 30 workers, the petitioner's owner employs more than 100. Counsel submits no evidence of that assertion. Counsel states that the petitioner's owner therefore qualifies for the benefit of the provision of 8 C.F.R. § 204.5(g)(2) which is set out above. Counsel observes that a letter was previously provided from the petitioner's general manager stating that the petitioner has the ability to pay the proffered wage. Counsel further noted that the petitioner is not required to provide Form W-2 Wage and Tax Statements to demonstrate the ability to pay the proffered wage.

Schedule F of the 2001 Form 1040 of the petitioner's owner and the owner's wife, provided on appeal, shows that the petitioner sustained a loss of \$1,015,859 during that year. Page one of the return shows that the petitioner's owner and owner's wife declared a loss of \$265,718 as their adjusted gross income during that year.

The petitioner in this case is E A Ranches. The petitioner is a sole proprietorship, as evidenced by the tax returns submitted. The petitioner's owner is obliged, therefore, to pay the petitioner's debts and obligations out of his own income and assets. The income of the petitioner and those assets that are

sufficiently liquid to be used to pay wages may be considered in determining the ability of the petitioner to pay the proffered wage.

However, this obligation of the petitioner's owner to pay the petitioner's debts and obligations does not render the petitioner and the petitioner's owner a single entity. If the petitioner wishes to take advantage of the provision of 8 C.F.R. § 204.5(g)(2) set out above, the petitioner must demonstrate, rather than merely allege, that the petitioner itself has 100 or more employees. Counsel concedes that it does not. The petitioner is obliged, therefore, to demonstrate that it has the ability to pay the proffered wage. As is stated in 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to show this ability using copies of annual reports, federal tax returns, or audited financial statements.

Although the Request for Evidence issued on March 13, 2002 made clear that the petitioner was required to comply with 8 C.F.R. § 204.5(g)(2), the petitioner has not provided copies of annual reports, federal tax returns, or audited financial statements for 1997, 1998, 1999, or 2000. The Schedule F provided for each of those years is insufficient, especially in the face of a plain request for complete copies of the petitioner's owner's tax returns for each of those years. Counsel states that the returns were not provided because of their size. 8 C.F.R. § 204.5(g)(2) does not except those with cumbersome returns.

In addition, those Schedules F show that during three of those four years, the petitioner sustained large losses. Even if a Schedule F were sufficient in itself, those losses would not indicate the ability to pay the proffered wage.

During 2001, the petitioner's adjusted gross income was a loss of \$265,718. The petitioner sustained a loss of \$1,015,859. The petitioner has not shown that it was able to pay the proffered wage out of its own income or that the petitioner's owner had income with which to pay the proffered wage.

Counsel is correct that the petitioner is not obliged to provide copies of W-2 forms showing the amounts paid to the beneficiary. Without the requested evidence, however, the Service Center apparently found insufficient evidence to demonstrate that the beneficiary was paid any amount of wages. This office concurs. The letter of May 16, 2002 does not state the beneficiary's wages. No evidence of any wages paid to the beneficiary is in the record, and wages paid to the beneficiary shall not be included in the calculation of the funds the petitioner had available to pay the proffered wage.

Although counsel demonstrated that the petitioner's owner owns considerable real estate, the record contains no evidence of the

that any of the petitioner's owner's assets are sufficiently liquid to be used to pay wages.

The petitioner has not demonstrated the ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.