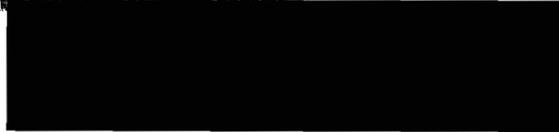


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



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

File: WAC 02 276 50564

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 15 2003**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 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

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto body repair firm. It seeks to employ the beneficiary permanently in the United States as a painter of transportation equipment. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

Eligibility in this matter hinges on 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). The petition's priority date in this instance is July 27, 2000. The beneficiary's salary as stated on the labor certification is \$15 per hour or \$31,200 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 2, 2003, the director required additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's completed and signed federal income tax returns, annual reports, or audited financial statements from 2000, as well as the petitioner's wage and tax statements (Forms W-2) for payments to the beneficiary from 1997 to 2000, if any.

The petitioner submitted the 2000 Form 1040, U.S. Individual Income Tax Return of FG and LVG, including Schedule C, reporting adjusted gross income (agi) of \$14,710, less than the proffered wage. The 2001 Form 1040 of FG and LVG reported agi of \$21,586, less than the proffered wage.

The individuals' federal tax returns included no balance sheet or evidence of additional assets available to pay the proffered wage. Forms W-2 reported wages that other employers had paid to the beneficiary and were irrelevant to the petitioner's ability to pay the proffered wage.

The director determined that the tax returns did not establish that the petitioner had the ability to pay the proffered wage, at the priority date and continuing to the present, and denied the petition.

On appeal, the petitioner states that its submission of personal income tax returns in response to the RFE was an error. The petitioner presents "the business income tax report" (report). The petitioner offers no further tax return, audited financial statement, or annual report, as required by the RFE. See 8 C.F.R. § 204.5(g)(2).

Instead, the report consists of unaudited profit and loss statements in the name of the petitioner for periods ending December 31, 2000, 2001, and 2002 and a balance sheet for only December 31, 2002, said to prove the ability to pay the proffered wage at the priority date and continuing to the present. The statements are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Furthermore, the RFE clearly required the tax returns or audited financial statements of the petitioner. The unavailability of a required document creates a presumption of ineligibility.

8 C.F.R. § 103.2(b) provides that:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

(2) Submitting secondary evidence and affidavits - (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner offered Form 1065 for 2001 with ordinary income in the amount of \$367, disavowed federal tax returns for 2000 and 2001, and offered no audited financial statements for any year, as required by the RFE in accord with 8 C.F.R. § 204.5(g)(2). Consequently, no probative evidence supports the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau (formerly the Service). *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the federal tax returns, Form 1065, unaudited financial statements, and representations of the petitioner, it is concluded 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 until the beneficiary obtains lawful permanent residence.

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.