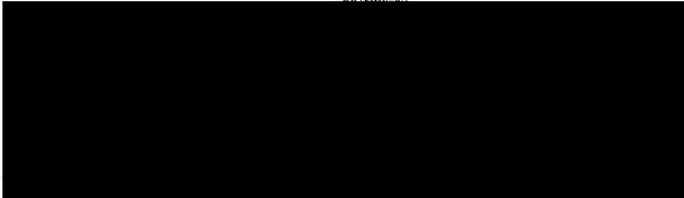


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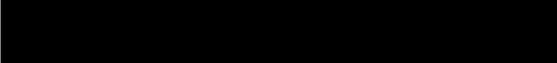
U.S. Citizenship
and Immigration
Services

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



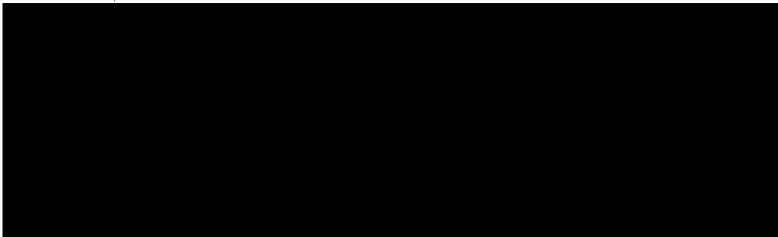
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FILE: WAC 02 198 52854 Office: CALIFORNIA SERVICE CENTER Date: **JUL 12 2004**

IN RE: Petitioner: 
Beneficiary: 

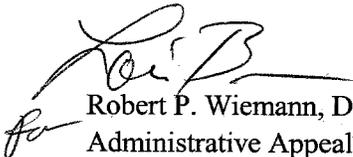
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom painting company. It seeks to employ the beneficiary permanently in the United States as a painter. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 18, 1997. The beneficiary's salary as stated on the labor certification is \$23.17 per hour or \$48,193.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 5, 2002, 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 exacted, for 1997 to the present, the petitioner's signed federal income tax returns with all related submissions, annual reports, or audited financial statements, as well as Wage and Tax Statements (Forms W-2) evidencing wage payments to the beneficiary. The AAO notes that ETA 750, Part B, block 15 states that the petitioner employed the beneficiary from March of 1994

Counsel submitted 1997-2001 Forms 1040, U.S. Individual Income Tax Returns of the petitioner's sole proprietor, including Schedule C, Profit and Loss from Business (Sole Proprietorship), relating to the petitioner. The federal tax returns for 1997-2001 reported adjusted gross income (AGI) less than the proffered wage in every respective year except 1999, i.e., \$9,130, \$36,269, \$60,040, \$45,784, and \$41,135. The petitioner submitted quarterly wage report summaries for the third and fourth quarters of 2001 and the first and second quarters of 2002, but they did not name the beneficiary as the recipient of any wages, nor did any schedule, attachment, note, or work sheet of any tax return.

The director considered the total income, rather than AGI, and, moreover, miscalculated the proffered wage. Nonetheless, the director determined that the evidence did not establish that the petitioner continuously had the ability to pay the proffered wage from the priority date until the present and denied the petition.

The petitioner did not demonstrate the ability to pay the proffered wage in any year.¹ The record, as presently constituted, contains no evidence on the salient fact of the employment of, and the wages paid to, the beneficiary. The discussion will dispose of the speculation of counsel's paralegal in this regard.

In response to the RFE, counsel's office stated:

Please be advised that because the beneficiary does not have the right legal right to work the petitioner cannot add him to the payroll.

On appeal, counsel, instead, submits copies of the petitioner's profit and loss statements, for years ending December 31, 1997 to December 31, 2002, and avers:

These documents indicate that the Petitioner earned more than sufficient income to have met the Beneficiary's proffered wage from the time of the issuance [sic] of the priority date to the date of the [denial].

The record lays no foundation to establish who prepared these documents, if they were audited, or, even, how the petitioner came into possession of them. These unaudited statements, at best, only reflect representations of management, but they do not bear even that minimal legend. The regulations provide specifically for audited financial documents. See 8 C.F.R. § 204.5(g)(2). Other statements are of little evidentiary value as proof of the ability to pay the proffered wage.

These unaudited statements cover 1997 to 2002, but they seriously diminish the petitioner's credibility. For example, the petitioner's Schedule C of the 1997 Form 1040 reports gross income of \$109,847. The unaudited statement for 1997, however, claims gross income more than twice that, \$245,328.62, and, thus materially contradicts the federal tax return. Moreover, the 1997 Form 1040 reflected Schedule C business income of \$11,578, but the 1997 unaudited statement stated net income more than twelve times that, \$141,160.19. Counsel makes no effort to explain these significant contradictions. The petitioner has not offered any amended tax returns to reflect the payment of additional taxes.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

¹ The tax returns do not establish the petitioner's ability to pay the proffered wage in 1999 even though the sole proprietor's adjusted gross income is above the proffered wage by \$11,846.40 because the petitioner has not demonstrated that the sole proprietor can pay all his own personal expenses out of the difference between his adjusted gross income and the proffered wage. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

All of the unaudited statements display such inconsistencies with the federal tax returns. The unaudited statements contain no explanation to ameliorate the appearance that the petitioner willfully underreported income on Forms 1040 and Schedules C. Similarly, counsel offered no alternative proof of wages paid to the beneficiary.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If Citizenship and Immigration Services (CIS), formerly the Service or the INS, fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

After a review of the federal tax returns, unaudited statements, paralegal advice, and payroll summaries for 2002, 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.