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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC-01-281-52352 Office: VERMONT SERVICE CENTER Date: JUN 28 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. On appeal to the Administrative Appeals Office (AAO), the appeal was dismissed. The petition is again before the AAO on a motion to reopen or reconsider. The motion will be granted, the AAO's decision of January 23, 2003 will be affirmed, the petition will be denied.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a stucco mason. 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.

The director determined that the evidence failed to establish the ability of the petitioner to pay the proffered wage. That finding was affirmed by the AAO on appeal. In the motion to reopen or reconsider counsel states that additional evidence submitted with the motion establishes the ability of the petitioner to pay the proffered wage.

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.

The regulation at 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 turns, in part, 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 23, 2001. The beneficiary's salary as stated on the labor certification is $14.66 per hour or $30,492.80 per year.

The evidence in the record before the AAO relevant to the petitioner's ability to pay the proffered wage consisted of the following: two copies of the petitioner's Pennsylvania Schedule CO showing the names of the petitioner's corporate officers; two copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000; a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2000; a copy of the beneficiary's Virginia Form 760 Individual Income Tax Return for 2000; a copy the beneficiary's Form W-2 for 2000 showing income from [redacted] of Bowie, Maryland; a copy of the beneficiary's Form 1099-Misc for 2000 showing income from Cathay & Company of Warrenton, Virginia; two copies of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2001; a copy of the beneficiary's Virginia Form 760CG Individual Income Tax Return for 2001; a copy of the beneficiary's Form 1099-Misc for 2001 showing income from [redacted] Virginia; an unaudited financial statement of the petitioner for the period January 1 through March 29, 2002; a Form I-797 approval notice dated April 19, 2002 for a different I-140 petition submitted by the petitioner for a different beneficiary; and a letter dated May 20, 2002 from the petitioner.

Based on the foregoing documents, the AAO determined that the evidence failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

With his motion to reopen or reconsider counsel submits the following evidence: a copy of an unaudited financial report for the petitioner for the period January 1, 2002 through December 31, 2002; and additional copies of documents previously submitted for the record.

Even assuming that the petitioner's financial report for calendar year 2002 contains information relevant to reopening the petitioner's appeal, that report is not an acceptable form of evidence, since it is an unaudited report. Unaudited financial reports are of little evidentiary value because they are based solely on the representations of management. The regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Even if the information in that report established the ability of the petitioner to pay the proffered wage during the year 2002, that fact would not change the AAO's decision on the appeal. The AAO decision found that the petitioner's tax return for 2000 failed to establish the petitioner's ability to pay the proffered wage. The petitioner's tax return for 2000 was apparently considered relevant because the priority date of February 23, 2001 was early in the following year. The petitioner did not submit a copy of its tax return for the year 2001, even though that return should have been available before June 13, 2002, when the record on appeal closed. Nor has the petitioner submitted a copy of its tax return for 2001 with its present motion to reopen or reconsider.

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 AAO's decision of January 23, 2003 is affirmed. The petition is denied.