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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: 28 JUN 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a junior plant engineer, construction. 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 financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel provides a statement and requests 120 days in which to submit a brief and/or additional evidence. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 filing 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 filing date is

December 7, 1998. The beneficiary's salary as stated on the labor certification is $60,485.55 per annum.

Counsel initially submitted a statement from the petitioner's accountant who stated that the president of the company's personal federal income tax return was not completed.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On April 5, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a statement from the petitioner's accountant, copies of the president of the company's personal income tax returns for 1998 through 2000, and copies of unaudited financial statements for other companies for 1998 through 2000.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that:

> The accountant's statement indicates that the company's president personal tax returns reflect a loss carried forward from prior years from other real estate investments. The unaudited financial statements submitted appear to be the real estate investments referenced in the statement. It is noted that financial statements for the petitioning entity do not appear in the evidence. It is reasonable that since the petitioning firm was established in 1979, financial statements and tax returns for it would exist. Federal income tax returns for the petitioning entity have not been submitted. There is no guarantee that any available money from the other real estate investments will be used for the petitioning firm's expenses whether to pay salaries or other expenses.

On appeal, counsel states:

> 1. The denial indicated that federal income taxes for the petitioning entity have not been submitted, which was contrary to the fact that it listed in para. 4 of the denial that personal copies of the company president's federal tax returns for 1998, 1999, and 2000 were submitted which were the company income tax records, which demonstrated loss carried forward for income tax purposes created an income tax deficit, along with a fax

letter from the company accountant indicating loss carried forward demonstrated an improper unfavorable tax picture, since the company is solvent, and [redacted] is one of the richest men in the Chaldean community, and related to the Garmos, who are well known in Michigan to possess substantial real estate holdings in shopping centers throughout the Detroit Metro Area, as well as being well known immigration lawyers. He regularly does business with Taubman, and builds for him.

2. That audited financial statements were submitted which supported the federal income taxes which are legally binding documents, and the company president chooses not to have audited financial statements, balance sheets, profit and loss sheets because the President indicated that "audited" is an unnecessary expense, and since he holds numerous properties all worth in excess of millions dollars-shopping centers throughout Michigan; his accounting bill would be atrocious; he also uses Iraqi accounting methods and systems since he is Chaldean, and has family members who are accountants. Therefore, it is not "reasonable that such would exist since the firm was established" in 1979. Initial statement with respect to income was correct...$800,000 net income would encompass the alien beneficiary salary of $60,465.55.

3. There is no guarantee that any available money would be used from other real estate investments for the petitioning firm's expenses and salaries, seems to ignore the fact that the company has been existence (sic) and fully staffed since 1979, and generates business good will in the millions of dollars from rentals, and that all shopping centers are fully operational, and are also in the process of still being buildt, (sic) in excess of millions of dollars of working capital.

4. Bank account records for the company, will show enormous working capital; due to the length of time necessary to obtain records going back three years or more will require a minimum of four months, and were not requested in the additional request for additional information; otherwise, they would have been provided. Once, more it says "the record is void of evidence in the petitioner's name such as federal tax returns" when 1998, 1999, and 2000 were provided. The officer clearly made an error, which should not have to be resolved on appeal; another request for additional information should

have been issued, and should be issued now.

A review of the record shows that the Service did request, among other types of financial evidence, copies of bank account statements on April 5, 2001.

In Elatos Restaurant Corp., etc. v. Sava, 632 F. Supp. 1049 (S.D.N.Y. 1986), the court held that the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage.

No additional evidence has been received to date. Accordingly, after a review of the documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

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.