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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.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 280 52292 Office: CALIFORNIA SERVICE CENTER Date: APR 09 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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:

PUBLIC COPY

[redacted]

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.

Helen E Crawford for
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 distributor of name brand electronic equipment. It seeks to employ the beneficiary permanently in the United States as an electronic test engineer. 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). In this case, the petition's priority date is July 15, 1997. The beneficiary's salary as stated on the labor certification is $18 per hour or $37,440 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of Action dated January 10, 2002 (Form I-797), the director requested federal tax returns from 1997 to 1999 to establish the ability to

pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

It is important to understand that the director specified certified copies of the petitioner's federal tax returns with all schedules and tables. The federal tax return of record, with the Form ETA 750, was the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. It lacked the preparer's signature and any date of execution. The petitioner's balance sheet (Schedule L) and other elements were illegible. Form 1120S reported an ordinary (loss) of ($372,183) for 2000, less than the proffered wage.

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.

In response to the Form I-797, counsel submitted the petitioner's 1997 to 2000 Forms 1120S, U.S. Income Tax Return for a U.S. Corporation. None was dated or certified, and the preparer, identified as a CPA, had not signed them. They reflected ordinary income for 1997 to 2000 as $9,160, $42,347, $54,787, and $32,562. Only the 1998 and 1999 ordinary income at $42,347 and $54,787 were equal to or greater than the proffered wage. The federal tax return for 2000 now contradicted the one already in the record, showing a (loss) of ($372,183), but did contain a legible Schedule L. It reflected that the difference of current assets, $382,877, minus current liabilities, $24,522, as net current assets of $358,355, more than the proffered wage. Net current assets for other years were similarly sufficient to pay the proffered wage.

The director determined that the taxable income 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, counsel adds the petitioner's 2001 tax return showing ordinary income of $35,674, less than the proffered wage. The petitioner dated it, but it was not signed by the preparer or certified. The record contains no explanation of the failure to produce certified, or even dated and executed, copies of federal income tax returns, especially of the contradictory submissions for 2000.

On the appeal dated July 17, 2002, counsel promises:

> We need approximately sixty more days in order to file the brief and the appeal. The CPA handling the affairs for the [petitioner] has been in Russia for the last three weeks. The accountant is going to prepare an audited balance sheet along with the brief, but they need sufficient time for preparation.

The petitioner produces no audited financial statement. Instead, counsel supplements the appeal with a brief and documents filed January 24, 2003. Counsel now revises the claim of ordinary income in 2000 and concedes the reason for the director's decision to deny the petition, the (loss) of ($372,183). Counsel offers no circumstances to reconcile the loss in that year.

Counsel rebuts the effect of the loss and states:

> However, we seek to rebut this contention by proving that the beneficiary was employed from July 2001 until January 2002…. We are submitting the [Forms DE-6] for the quarterlies beginning June 30, 2001 to January 31, 2002…. Furthermore, we are also submitting [the beneficiary's] W-2 forms….

The offer of proof of the W-2 Form for 2001 does not apply to 2000, when the ordinary loss occurred. The W-2 form for 2001 reveals that the petitioner paid the beneficiary $10,080, less than the proffered wage. The net income does not suffice for 1997, 2000, and 2001. Counsel does not provide any explanation of the conflicting reports of net current assets in 2000, especially to reconcile the altered Schedule L with the later legible copy.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Beyond the director's decision and counsel's contentions, the AAO notes that the stated net current assets in every year sufficed to pay the proffered wage, except for the evidence for 2000. Counsel persists with unsigned and undated tax returns and without any explanation of the defects both as to ordinary income or (loss) and as to the critical net current assets in the 2000 tax return.

Matter of Ho, 19 I&N Dec. 582 (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.

After a review of the federal tax returns and Forms W-2 pertaining to the beneficiary, 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.