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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 22 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a private school. It seeks to employ the beneficiary permanently in the United States as a bilingual instructor. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's financial information.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) also provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is July 17, 2001. The beneficiary's salary as stated on the labor certification is $34,170 per annum. The visa petition indicates that the petitioner was established in 1980 and employs fifteen people. The record reflects that it has employed the beneficiary since 1997.

The petitioner initially submitted a copy of its federal tax Form 990, Return of Organization Exempt from Income Tax for the calendar year 2001 as evidence of its ability to pay the proffered wage. It was signed May 14, 2002. It reveals that the petitioner declared total revenue of $730,009 and total expenses of $902,006, producing a deficit of $171,997. Its balance sheet found at Part IV of the return reflects that the petitioner's total liabilities exceeded its total assets. On January 22, 2003, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit annual reports, complete federal tax returns, or audited financial statements covering the period from July 17, 2001 to the present.

The director instructed the petitioner to submit a copy of the beneficiary's Wage and Tax Statement (W-2) or copies of the beneficiary's pay stubs. The director also instructed the petitioner to submit copies of its state quarterly wage reports for the most recent four quarters filed.

The petitioner, through counsel, submitted copies of the beneficiary's 2002 W-2s. They show that the petitioner paid the beneficiary $29,812.95 in 2002. This represents $14,904 for a six-month period and is $4,357.05 less than the proffered wage. Three of the beneficiary's pay stubs that were also submitted reflect that by January 2003, the petitioner was paying her $1,250 every two weeks, representing $32,500 per year, and $1,670 less than the proffered annual salary. Counsel also submitted a copy of the petitioner's state registration of a fictitious business name and a second copy of the petitioner's federal tax Form 990, Return of Organization Exempt from Income Tax for the year 2001. It reflects that the petitioner's figures cover a tax year beginning December 31, 2001 and ending June 30th, 2002. This return is not dated and is signed by a different person than the May 14, 2002 return. On this return, the petitioner declared total revenue of $868,616 and total expenses of $880,413, resulting in a deficit of $11,797. The balance sheet attached as Part IV of the return, reflects that the petitioner's total liabilities exceeded its total assets during that period.

Counsel also submitted an accountant's report covering the petitioner's financial status for the year ending June 30, 2002. The report indicates that that while the petitioner's data was not audited, it was reviewed. A review is less in scope than an audit and represents analytical procedures performed by a CPA based on inquiries of the petitioner's personnel responsible for financial and accounting matters. The petitioner's total current assets reflected in the accountant's "Statement of Financial Position" were $163,784. Current liabilities are given as $618,064, producing net current assets of -$454,280 in 2002.

The director denied the petition, noting the discrepancy in amounts reflected on both the 2001, Form 990s submitted by the petitioner. The director concluded that neither the petitioner's net assets, nor the amounts shown on the accountant's review support the petitioner's ability to pay the proffered wage. The AAO cannot conclude that the director erred in this conclusion. It is noted that $2,181, representing the difference between six months of wages paid to the beneficiary in 2002 and six months of the proffered wage, could not be covered out of either the petitioner's deficit or its net current assets.

On appeal, counsel submits an unsigned copy of a letter from the same CPA who prepared the reviewed financial statements. The letter states that the petitioner changed its filing year, which accounts for the two 2001 returns contained in the record. The letter also states that if the petitioner's note of $376,471 were removed from the consideration of its liabilities, then the petitioner could show positive net assets of $33,708. A copy of a March resolution signed by the petitioner's board of directors is submitted on appeal, indicating that the note of $376,471 was converted to a non-interest bearing note with payments not commencing until 2012. This resolution was signed on March 31, 2003. Thus, it appears that the conversion of this obligation to a long-term liability did not occur until well after the date of filing the petition. Eligibility for the visa classification must be established at the time of filing the petition. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *Matter of Great Wall,* 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.