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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
[illegible] I Street N.W.
Washington, D.C. 20536

[redacted]

FEB 02 2004

File: WAC 02 090 51585 Office: California Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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 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 Citizenship and Immigration Services (CIS) 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.

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 on appeal. The appeal will be dismissed.

The petitioner is a television production company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 priority date of the visa petition, and continuing.

On appeal, counsel submits a brief.

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, and continuing. Here, the petition's priority date is November 13, 1997. The beneficiary's salary as stated on the labor certification is $14.75 per hour or $30,680.00 per annum.

Counsel submitted copies of the petitioner's 1997, 1999, 2000, and 2001 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for fiscal year July 24, 1997 through December 31, 1997 reflected gross receipts of $545,856; gross profit of $545,856; compensation of officers of $132,000; salaries and wages paid of $84,120; and an ordinary income (loss) from trade or business activities of $844. The tax return for 1999 reflected gross receipts of $828,461; gross profit of $780,599; compensation of officers of $421,998; salaries and wages paid of $55,850; and an ordinary income (loss) from trade or business activities of $44,875.

The tax return for 2000 reflected gross receipts of $710,123; gross profit of $683,122; compensation of officers of $257,573; salaries and wages paid of $52,000; and an ordinary income (loss) from trade or business activities of $214,243. The tax return for 2001 reflected gross receipts of $192,575; gross profit of $172,210; compensation of officers of $61,778; salaries and wages paid of $19,527; and an ordinary income (loss) from trade or business activities of -$17,939.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted the omission of the petitioner's 1998 tax return although the director had requested it.

On appeal, counsel asserts that the director erroneously gave greater weight to the petitioner's negative taxable income over salaries and wages paid.

Counsel's argument is not persuasive. The director had properly considered the taxable income over the salary and wages actually paid because the evidence of salaries paid does not establish that the petitioner has the ability to pay the proffered salary and still remain a financially viable business. The 2001 IRS Form 1120S tax return indicates that the petitioner had paid total salaries of $19,527 for all the staff in the year 2001. None of the submitted evidence specifically indicates that the beneficiary was paid a salary. Since no evidence was provided to show that the beneficiary had in fact been paid a salary, CIS must assume that the beneficiary's salary is not included in the total figure for salaries paid, and, therefore, it must be considered an additional expense. The ordinary income of $844 for fiscal year from July 24, 1997 through December 31, 1997 clearly could not have covered the beneficiary's salary of $30,680.00 per annum. Similarly, the petitioner's 2001 ordinary income of -$17,939 would not cover the proffered wage.

While the petitioner has established the ability to pay the wage offered in 1999 and 2000, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. The evidence fails to show that the proffered wage could have been met in 1997, 1998, and 2001. *See* 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the federal tax returns submitted, 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 filing of the petition and continuing.

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.