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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
425 I Street, N.W.
Washington, DC 20536

[redacted]

FEB 26 2004

File: WAC 02 110 51166 Office: CALIFORNIA SERVICE CENTER Date:

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 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 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 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. The petitioner is a dairy market. It seeks to employ the beneficiary permanently in the United States as a dairy manager. 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 contends that the sole proprietor's real estate holdings should be considered when determining the petitioner's financial ability to pay the proffered wage.

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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

> (2) *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 [CIS].

Eligibility in this case rests upon the petitioner's continuing 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is November 13, 1997. The beneficiary's salary as stated on the approved labor certification is $3924.27 per month or $47,091,24 annually. The evidence in the record suggests that the petitioner has employed the beneficiary since 1991.

The immigrant visa petition was filed on February 8, 2002. The petitioner submitted copies of the petitioner's Form 1040, U.S. Individual Income Tax Returns filed by the sole proprietor owner as evidence of its ability to pay the beneficiary's proposed salary. The tax returns contain financial information for the years 1997 through 2000. The data indicates the following:

Year	Business Income	Adjusted Gross Income (including business income)
1997	$ 111	$ 7,005
1998	- 181	4,669
1999	-12,618	- 6,881
2000	- 2112	2,164

The petitioner also submitted copies of the beneficiary's W-2s for the years 1997 through 2001. The 1997 W-2 is almost illegible, but appears to indicate that the petitioner paid the beneficiary $13,800. The petitioner paid the beneficiary $15,600 in wages in 1998, $13,800 in 1999, $13,200 in 2000, and $11,000 in 2001. These figures reflect that the petitioner paid the beneficiary $33,291.24 less than the proffered wage in 1997 and 1999, $31,491.24 less than the proffered wage in 1998, $33,891.24 less in 2000, and $36,091.24 less than the proposed salary in 2001.

Along with the federal tax returns, the record contains a copy of the petitioner's application for extension of time to file its 2001 federal tax return and a copy of three letters from a real estate broker dated January 22, 2002. They express the opinion that three of the sole proprietor's real property holdings have a market value of $450,000, $300,000, and $280,000, respectively.

The director denied the petition. He determined that the petitioner had not established its continuing ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. The AAO concurs. As shown by the tax returns and the beneficiary's W-2s, the petitioner's adjusted gross income could not cover the difference between the wages actually paid to the beneficiary and the proffered salary in any of the years contained in the record. As noted above, the record does not contain the petitioner's 2001 tax return or any of the other forms of evidence described by 8 C.F.R. § 204.5(g)(2).

On appeal, counsel asserts that the petitioner's real estate holdings represent its ability to pay the beneficiary's proposed salary. The AAO notes that real property is not representative of assets that can easily be converted to cash. Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage. The willingness of a petitioner to borrow against real property, thereby creating a debt which must be repaid, or the willingness to sell real estate to cover the proposed salary does not establish a petitioner's financial ability to meet the proffered wage as of the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) examines the net income figure set forth on the tax return. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080 (S.D.N.Y. 1985). In this case, as noted by the director, the petitioner's income for every year that records were submitted fell well short of covering the difference between the proffered salary and the wages actually paid to the

beneficiary.

Based on the financial data contained in the record, the petitioner has not demonstrated the continuing ability to pay the proffered wage 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.