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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]

File: LIN 02 106 53432 Office: NEBRASKA SERVICE CENTER Date: JAN 07 2004

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 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition is approved.

The petitioner is a museum. It seeks to employ the beneficiary permanently in the United States as its Director, Artistic and Educational Programs. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $67,900 per year.

With the petition, which was submitted on February 8, 2002, counsel submitted audited comparative balance sheets (financial statements) for 1997 and 1998, 1998 and 1999, and 1999 and 2000. Those comparative balance sheets show that the petitioner had net current assets of $96,343 at the end of 1997, $80,874 at the end of 1998, $78,812 at the end of 1999, and $97,534 at the end of 2000.

On April 3, 2002, the Director, Nebraska Service Center, issued a Request for Evidence in this matter. The director requested that the petitioner submit audited financial statements for 2001. The director also noted that the petitioner appeared to have had a negative net annual income during each of the years for which financial statements were provided, which negative net annual income was offset by a $70,000 contribution. The director stated that the petition would not be approved unless the petitioner submitted evidence that the beneficiary would replace a current director who was earning over $60,000 annually.

In response, counsel submitted a letter, dated June 25, 2002, asking for additional time to prepare the requested audited financial statements for 2001. Counsel provided no additional documents, information, or argument in response to the Request for Evidence.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 17, 2002, denied the petition. The director noted that, pursuant to 8 C.F.R. § 103.2(b)(8), the petitioner could not be granted additional time to submit the requested evidence. The director further noted that, even if the petitioner had provided the requested 2001 financial statements, they would not have demonstrated the petitioner's ability to pay the proffered wage during 1997, 1998, 1999, and 2000.

On appeal, counsel notes that the petitioner has been awarded a $200,000 grant from the Illinois Department of Commerce and Community Affairs. Counsel provides a letter, dated August 20, 2002, from the Illinois Department of Commerce and Community Affairs, evincing that grant.

Counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), permits this office to discount the petitioner's perceived poor performance during individual years. Finally, counsel asserts that the ability of the beneficiary to generate income for the petitioner must be considered.

Counsel's assertions are not persuasive. The AAO, however, need not dwell on counsel's legal arguments in light of the other evidence in the file. The audited financial statements submitted with the petitioner's initial petition show that the petitioner was able to pay the proffered wage out of its net current assets

during 1997, 1998, 1999, and 2000. The petitioner, therefore, has established the ability to pay the proffered wage during each of those years. The director's position that the petitioner must show that the beneficiary would replace an existing director was misguided.

The Request for Evidence was issued on April 3, 2002. The audited financial records previously submitted had demonstrated the petitioner's ability to pay the proffered wage during the previous four years. The director cited no reason for his request that the petitioner provide the additional financial statement. No reason exists to believe that the petitioner had completed audited financial statements in its possession at that time or that it could obtain those statements by the deadline imposed. Under these circumstances, the insistence on submission of 2001 financial statements was unreasonable. Denial on the basis of the petitioner's failure to submit its 2001 financial statements shall not stand based on these circumstances.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.