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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: WAC 01 287 52484 Office: California Service Center Date: JAN 27 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a women's garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a floor supervisor. 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.

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 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). Here, the petition's priority date is August 9, 1996. The beneficiary's salary as stated on the labor certification is $17.43 per hour which equates to $36,254.40 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1120 for fiscal years 1996 through 2001. The tax return for fiscal year from July 1, 1996 through June 30, 1997 showed a taxable income of -$4,552. The tax return for fiscal year from July 1, 1997 through June 30, 1998 showed a taxable income of $55,854. The tax return for fiscal year from July 1, 1998 through June 30, 1999 showed a taxable income of -$183,634. The tax return for fiscal year from July 1, 1999 through June 30, 2000 showed a taxable income of -$59,611. The tax return for fiscal year from July 1, 2000 through June 30, 2001 showed a taxable income of $3,675.

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.

On appeal, counsel re-submits copies of the petitioner's federal tax returns and argues that:

> Of even greater concern is the INS's failure to correctly interpret Petitioner's assets. While relying on taxable income, without stated authority, the INS ignored the Petitioner's significant total assets and specifically Petitioner's cash on hand. Petitioner's Forms 1120S, with attachments indicate that Petitioner's total assets were:
>
> 1996 $347,677
> 1997 $380,535
> 1998 $208,231
> 1999 $132,778
> 2000 $127,701

Counsel's argument is not persuasive. The petitioner's cash on hand is included within the consideration of current assets. Current liabilities measured against current assets yields net current assets. It is noted that the petitioner had sufficient net current assets or sufficient taxable income to pay the beneficiary's salary in 1996, 1997, and 1998, however, during fiscal year from July 1, 1999 through June 30, 2000, the petitioner suffered a loss. None of the proffered wage could have come from income. During that same year, current assets exceeded current liabilities by only $21,915. Also, in 2001, the petitioner had a taxable income of $3,675 and net current assets of $27,150. Neither amount was sufficient to pay the yearly salary of $36,254.40.

It is noted that the record indicates the petitioner may have

employed the beneficiary. Although the director requested additional evidence from the petitioner including the names and social security numbers of all employees as set forth in the state quarterly wage reports, the petitioner failed to provide this evidence. As such, it is unclear how much the petitioner paid the beneficiary and this consideration cannot be included in the determination of the petitioner's ability to pay.

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. *See* 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the record, 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.

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.