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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 00 199 54700 Office: CALIFORNIA SERVICE CENTER Date: 28 JAN 2002

IN RE: Petitioner: [Redacted]  
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)

IN BEHALF OF PETITIONER:  
[Redacted]

*Identifying data deleted to prevent clearly unwarranted invasion of personal privacy*

**INSTRUCTIONS:**  
This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS  
*Robert P. Wiemann*  
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a liquor store. It seeks to employ the beneficiary permanently as a 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 financial ability to pay the proffered wage as of the filing date of the petition.

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 filing 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 filing date is January 26, 1996. The beneficiary's salary as stated on the labor certification is \$10.33 per hour or \$21,486.40 annually.

Counsel initially submitted a copy of the petitioner's 1999 Form 1065 U.S. Partnership Return of Income. The tax return indicated gross receipts of \$405,013, gross profit of \$100,062, salaries and wages paid of \$0, guaranteed payment to partners of \$42,200; depreciation of \$1,634, and an ordinary income (loss) from trade or business activities of \$20,905. Schedule L reflected total current

assets of \$85,535 with \$20,083 in cash and total current liabilities of \$0.

The director determined that this documentation did not establish the petitioner's ability to pay the proffered wage at the time of filing the petition. On November 15, 2000, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of January 26, 1996.

In response, counsel submitted copies of the petitioner's 1995, 1996, 1997, and 1998 Form 1065 U.S. Partnership Return of Income. The 1995 federal tax return reflected gross receipts of \$319,884; gross profit of \$117,682; salaries and wages paid of \$7,344; guaranteed payment to partners of \$55,000; depreciation of \$971; and an ordinary income (loss) from trade or business activities of \$1,371. Schedule L reflected total current assets of \$69,336 with \$30,768 in cash and total current liabilities of \$0. The 1996 federal tax return reflected gross receipts of \$316,615; gross profit of \$112,168; salaries and wages paid of \$0; guaranteed payment to partners of \$58,000; depreciation of \$562; and an ordinary income (loss) from trade or business activities of -\$1,891. Schedule L reflected total current assets of \$59,759 with \$2,909 in cash and total current liabilities of \$12,501.

The 1997 federal tax return reflected gross receipts of \$321,419; gross profit of \$91,143; salaries and wages paid of \$1,901; guaranteed payment to partners of \$23,000; depreciation of \$247; and an ordinary income (loss) from trade or business activities of \$21,130. Schedule L reflected total current assets of \$57,477 with \$4,932 in cash and total current liabilities of \$0. The 1998 federal tax return reflected gross receipts of \$345,456; gross profit of \$94,079; salaries and wages of \$4,025; guaranteed payment to partners of \$27,500; depreciation of \$247; and an ordinary income (loss) from trade or business activities of \$33,957. Schedule L reflected total current assets of \$73,351 with \$10,831 in cash and total current liabilities of \$0.

The director denied the petition, noting that the petitioner had not demonstrated its ability to pay the proffered wage.

On appeal, counsel reiterates his argument that the Service "failed to include guaranteed payments to partners as income which could be used to pay alien worker."

Counsel's assertion that the guaranteed payment to partners could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the partners, and therefore, not readily available for payment of the beneficiary's salary in 1996. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the

application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

A review of the federal tax returns show that the petitioner has established that it had sufficient available funds to pay the salary offered from 1997 to 1999, however, a review of the 1996 federal tax return shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$1,580, less than the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2). The petitioner's filing date is January 26, 1996.

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.