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U.S. Department of Justice
Immigration and Naturalization Service

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

[Redacted]

File: WAC 99 199 53195

Office: CALIFORNIA SERVICE CENTER

Date: JUL 30 2002

IN RE: Petitioner:
Beneficiary:

[Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[Redacted]

Public Copy

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 employment-based preference visa petition was denied by the Director, California Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is an upholstery firm. It seeks to employ the beneficiary permanently in the United States as an automobile upholsterer. 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 filing date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, the petitioner submits a brief and additional documentation.

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 May 27, 1997. The beneficiary's salary as stated on the labor certification is \$16.46 per hour or \$34,236.80 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, the petitioner submits a copy of her 2000 Form 1040 U.S. Individual Income Tax Return and copies of her W-2 Wage and Tax Statement for 1999 and 2000, and argues that:

You have made a determination on this case on you did not take into consideration, my statement that I have the funds available to pay the wage to [the beneficiary]. I am enclosing a copy of the I-290-B Notice of Appeal for this case you can see that I actually intended to not enclose any brief or additional written argument. Secondly, you keep on insisting on taxes, even though I have already given you taxes for 1999 and 2000. Also my signed statement that I had the ability to pay [the beneficiary] his wages since 1997 to the present. Again since this amount does not appear on my income taxes because this is the only proof that you have requested. But as you are well aware my statement submitted under oath that I have the funds available even though they do not show up on the income taxes is a valid since that is sufficient proof of the ability to pay the wages. My major income is from the Social Security which I have stated that I receive, you did not even take this into consideration. The best proof of the ability to pay the wages for my employee is that I have been paying him the wages all this time. My declaration and the evidence that I have submitted previously is sufficient to prove that I have the ability to pay him the wages that I have stated that I have been doing since I filed this case.

The petitioner's argument is not persuasive. While the petitioner has claimed to have been paying the beneficiary a salary since 1997, no evidence in support of this claim has been submitted. Furthermore, the petitioner has submitted no evidence of the ability to pay the proffered wage at the time of filing the petition, May 27, 1997.

A review of the record shows that the petitioner had an adjusted gross income of \$41,573 in 1998. This would be sufficient to pay the wage offered in 1998, however, the tax return for 2000 shows an adjusted gross income of \$30,249.00, a figure less than the proffered wage of \$34,236.80.

The petitioner must show that she has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 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). Therefore, the petition may not be approved.

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 sustained that burden.

ORDER: The Associate Commissioner's decision of August 21, 2001, is affirmed. The petition is denied.