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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 00 202 50525 Office: California Service Center Date: JUN 19 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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, 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 home for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States 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 beneficiary the proffered wage as of the filing 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 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 February 10, 1997. The beneficiary's salary as stated on the labor certification is $1,789.20 per month or $21,470.40 per annum.

Counsel submitted copies of the petitioner's 1997, 1998 and 1999 Form 1120 U.S. Corporation Income Tax Return. The 1997 tax return reflected gross receipts of $863,873; gross profit of $863,873; compensation of officers of $0; salaries and wages paid of $260,600; and a taxable income before net operating loss deduction and special deductions of $2,132. The 1998 tax return reflected gross receipts of $905,226; gross profit of $905,226; compensation of officers of $0; salaries and wages paid of $311,715; and a taxable income before net operating loss deduction and special deductions of $8,401.

The 1999 tax return reflected gross receipts of $1,166,654; gross profit of $1,166,654; compensation of officers of $110,000; salaries and wages paid of $391,799; and a taxable income before net operating loss deduction and special deductions of $11,076.

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 argues that:

> Petitioner's tax returns demonstrate substantial and increasing income, greatly exceeding beneficiary's salary. Petitioner's Quarterly Wage and Withholding Reports for the year 2000, attached as Exhibit A, show the company paying much higher salaries than previous years. Petitioner paid a total of $452,701.37 in salaries in 2000. See Exhibit A. In effect, Petitioner's tax returns and Quarterly Wage and Withholding Reports clearly negate the Service's assertions that the Petitioner is unable to pay Beneficiary's yearly salary of $21,470.40, since they show a yearly increase in overall salaries in excess of that amount.

Counsel further argues that the depreciation figure in the tax return should be factored against the funds available for salaries and other expenses. Counsel's argument is not persuasive. Even if one were to include the deprecation of $5,475 in 1997, the result would be $7,607, still less than the proffered wage.

The petitioner's Form 1120 for calendar year 1997 shows a taxable income of $2,132. Form 1120 for calendar year 1998 shows a taxable income of $8,401. Form 1120 for calendar year 1999 shows a taxable income of $11,076. The petitioner could not pay a proffered wage of $21,470.40 a year out of these incomes.

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing 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.