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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



File: [Redacted] Office: NEBRASKA SERVICE CENTER Date:

NOV - 7 2002

IN RE: Petitioner: [Redacted]
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 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 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 that 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, Nebraska Service Center. In response to a subsequent motion to reconsider, the director affirmed his decision to deny the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner repairs trailers. It seeks to employ the beneficiary permanently in the United States as a trailer mechanic. 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 January 13, 1998. The beneficiary's salary as stated on the labor certification is \$17.75 per hour or \$36,920.00 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On May 1, 2001, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's Interim Balance Sheet of Transport Equipment & Service, Inc., for the period ended September 30, 1998 and a Statement of Income & Retained Earnings for the period ended December 31, 2000.

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 1999 and 2000 Form 1065 U.S. Partnership Return of Income. The 1999 tax return reflects gross receipts of \$1,077,589; gross profit of \$973,929; salaries and wages paid of \$423,615; guaranteed payment to partners of \$2,550; and an ordinary income (loss) from trade or business activities of \$180,444. The 2000 tax return reflects gross receipts of \$1,865,963; gross profit of \$785,416; salaries and wages paid of \$175,900; guaranteed payments to partners of \$2,502; and an ordinary income (loss) from trade or business activities of \$274,614.

On appeal, counsel argues that the submitted tax return shows that the petitioner has the ability to pay the wage offered.

The petitioner's 1999 tax return shows an ordinary income of \$180,444 and the 2000 tax return shows an ordinary income of \$274,614. The petitioner could pay a salary of \$51,021.00 a year out of these figures. The petitioner, however, must show that it has the ability to pay the proffered wage at the time the priority date is established, January 13, 1998, and continuing until the beneficiary obtains lawful permanent residence.

The compiled information which was submitted as proof of the petitioner's ability to pay the proffered wage is in the record. However, it has little evidentiary value as it is based solely on the representations of management. 8 C.F.R. 204.5(g)(2), already quoted above in part, states that:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

Based on the evidence submitted, it cannot be found that the

petitioner has established that it had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

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.