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U.S. Department of Justice

Immigration and Naturalization Service

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invas

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

File: WAC 01 230 53666

Office: California Service Center

Date: OCT 10 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 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

Melen E Crawford
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 provides physical therapy services. It seeks to employ the beneficiary permanently in the United States as a physical therapist. 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 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 April 27, 2001. The beneficiary's salary as stated on the labor certification is \$20.00 per hour or \$41,600.00 per annum.

Counsel submitted copies of the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2000 reflected gross receipts of \$655,865; gross profit of \$655,865;

compensation of officers of \$131,500; salaries and wages paid of \$244,106; and a taxable income before net operating loss deduction and special deductions of -\$39,470.

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 submits a letter from the petitioner's accountant and copies of the petitioner's unaudited financial statements for the period ended December 21, 2001.

On appeal, counsel argues that:

The Services reliance on net negative income to exclusion of all other evidence is unwarranted. In recent decisions the AAO has held that focusing on net income to the exclusion of the other factors is an incorrect application of the law. What they base this on is 8 CFR 204.5, which specifically allows the Service to demand an audited financial statement, tax return or annual report but permits the Service to consider other applicable documents. The rationale is that since the Service is allowed to consider these other sources that it would be inappropriate not to allow the employer to provide other documents for consideration.

The unaudited income statement 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.

This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

The petitioner's Form 1120 for calendar year 2000 shows a taxable income of -\$39,470. The petitioner could not pay a proffered wage of \$41,600.00 a year out of this income.

Accordingly, after a review of the evidence submitted, 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.

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.