



B/p

U.S. Department of Justice

Immigration and Naturalization Service

**PUBLIC COPY**

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



26 SEP 2002

File: WAC 00 238 53398 Office: California Service Center

Date:

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:



**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 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

*Helen E. Crawford for*  
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 health agency. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 July 11, 1995. The beneficiary's salary as stated on the labor certification is \$2,432.00 per month or \$29,184.00 per annum.

Counsel submitted copies of the petitioner's 1995 through 1999 Form 1120 U.S. Corporation Income Tax Return. The 1995 tax return

reflected gross receipts of \$2,162,034; gross profit of \$2,162,034; compensation of officers of \$65,479; salaries and wages paid of \$752,637; and a taxable income before net operating loss deduction and special deductions of -\$26,747. The 1996 federal tax return reflected gross receipts of \$979,779; gross profit of \$979,779; compensation of officers of \$34,667; salaries and wages paid of \$429,552; and a taxable income before net operating loss deduction and special deductions of -\$63,415. The 1997 federal tax return reflected gross receipts of \$1,418,895; gross profit of \$1,418,895; compensation of officers of \$56,250; salaries and wages paid of \$839,497; and a taxable income before net operating loss deduction and special deductions of \$5,064.

The 1998 federal tax return reflected gross receipts of \$796,592; gross profit of \$796,592; compensation of officers of \$37,500; salaries and wages paid of \$493,054; and a taxable income before net operating loss deduction and special deductions of \$2,842. The 1999 federal tax return reflected gross receipts of \$1,582,734; gross profit of \$1,582,734; compensation of officers of \$86,400; salaries and wages paid of \$842,765; and an ordinary income (loss) from trade or business activities of \$39,467.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel re-submits copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1995 through 1999 and argues that:

Furthermore, because the company's Executive Director is entwined in the day-to-day accounting activities, the business is lacking an integral part, specifically, the marketing of the service. The Executive Director has many demands, without the additional burden of general accounting tasks. With accounting tasks being delegated to the Beneficiary, the Petitioner will have more time to generate even more business and revenues. An in-house accountant would free up a significant amount of the Executive Director's time, thus, allowing him to focus on the marketing of the company's services, while still being fully informed of the company's day-to-day/week-to-week/month-to-month financial stability and growth.

Counsel further argues that the employment of the beneficiary "will increase sales, revenue, and result in the growth of the company." Counsel does not explain, however, the basis for such a conclusion. For example, the petitioner has not demonstrated that the

beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

Counsel's argument is not persuasive. The petitioner's Form 1120 for the calendar year 1995 shows a taxable income of -\$26,747. The petitioner could not pay a proffered salary of \$29,184.00 out of this income.

In addition, the petitioner's 1996, 1997, and 1998 federal tax returns continue to show an inability to pay the wage offered. While the 1999 tax return shows the ability to pay the wage offered, 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).

Accordingly, after a review of the federal tax returns, 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 and continuing to present.

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.