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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536



File: WAC 02 068 52281 Office: California Service Center

Date:

AUG 07 2003

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a nursing home held as a sole proprietorship. It seeks to employ the beneficiary permanently in the United States as a live-in nursing assistant with some cleaning duties. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment 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.

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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on October 30, 1996. The beneficiary's salary as stated on the labor certification is \$1,254.93 per month which equals \$15,059.16 annually.

With the petition, counsel submitted copies of the petitioner's owner's 1996, 1997, 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns. The 1996 return shows a taxable income of \$0. The 1997 return shows a taxable income of \$0. The 1998 return shows a taxable income of \$5,765. The 1999 return shows a taxable income of \$17,592. The 2000 return shows a taxable income of \$0. Counsel also submitted the petitioner's bank statements and documents pertinent to real estate.

On February 26, 2002, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the petitioner was requested to provide quarterly wage reports for the most recent four quarters.

In response, counsel submitted the petitioner's Federal Form 941 Employer's Quarterly Tax Returns for all four quarters of 2001, \$2,550 per quarter.

On June 19, 2002, the Director, California Service Center, noted that the petitioner's owner's income tax returns demonstrate that the petitioner did not have the ability to pay the proffered wage except during 1999. The director denied the petition.

On appeal, counsel submitted a letter from the petitioner. In it, the petitioner states that, had she employed the beneficiary since 1996, she would have claimed smaller depreciation deductions, and her income tax returns would then have reflected the ability to pay the proffered wage.

Counsel listed the depreciation deductions taken by the petitioner on each year's return, each of which exceeds \$50,000. Counsel argues that the petitioner was, therefore, able to pay the proffered wage during each of the salient years. Counsel further argues that 8 C.F.R. § 103.2(b)(8) mandates that the petitioner should have been informed of the deficiency in her proof and offered an opportunity to correct that deficiency.

The portion of 8 C.F.R. § 103.2(b)(8) which counsel paraphrased, however, applies only when the record does not contain evidence of ineligibility. 8 C.F.R. § 103.2(b)(8) also states that, "If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis"

As noted above, counsel implied that the depreciation deductions taken by the petitioner should be added to taxable income to compute the funds the petitioner had available to pay the proffered wage.

A depreciation deduction, while not a cash expenditure in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, the deduction represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is not a mere paper deduction, but an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages.

The petitioner's tax returns, submitted by counsel, demonstrate that the petitioner was unable, during 1996, 1997, 1998, and 2000, to pay the proffered wage. Therefore, the petitioner has not established that she had sufficient available funds to pay the salary offered as of the priority date and continuing to the 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.