

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

BCG

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



AUG 12 2003

File: LIN 02 040 52089

Office: Nebraska Service Center

Date:

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

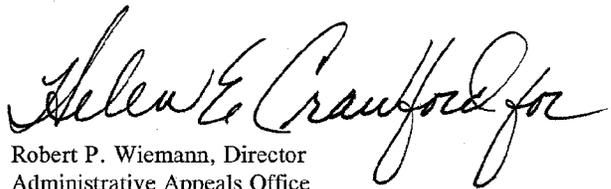
INSTRUCTIONS:

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 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 that 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a home health care facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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 statement and indicates that a separate brief and/or evidence is being submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 November 14, 2001. The beneficiary's salary as stated on the labor

certification is \$15.47 per hour or \$32,177.60 per annum.

Counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$1,290,552; gross profit of \$1,290,552; compensation of officers of \$80,500; salaries and wages paid of \$675,077; and an ordinary income (loss) from trade or business activities of \$93,906.

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. The director noted that:

The Service requested evidence of the total number of petitions filed by the petitioner in 2001, and the proffered wage for each of those petitions. The petitioner was also asked to provide evidence of its ability to pay the wages for all of those for whom it had petitioned. The petitioner submitted a list of 25 petitions filed and indicates that 13 have been approved. The proffered wage for all beneficiaries is the same, \$16.00 per hour or \$34,944 per year.

The petitioner's income tax return for the year 2000 shows a net taxable income of \$93,906 with \$3,989 for depreciation. That shows an amount of \$97,895 potentially available for payment of salaries for new hires. That amount divided by the proffered wage of \$34,944 would appear to be sufficient to off set the salaries of three potential employees. In view of the fact that 13 petitions have already been approved, it is evident that the petitioner has failed to prove that it has generated sufficient funds to pay the wages of another employee at the rate stated above. Using the figures shown on the Profit/Loss statement for 2001, showing net income of \$556,209, and adding that to the net income for 2000 provides a sum of \$650,115 potentially available for new hires. That amount divided by 25 still shows an insufficient amount per beneficiary of only \$26,004.

On appeal, counsel argues that the overtime currently being paid employees by the petitioner will be used to pay the newly hired nurses. Counsel further argues that the potential employees employment will result in more income for the business. The petitioner 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 her 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 potential employees into consideration.

Furthermore, it is noted that the petitioner has filed 24 additional Forms I-140 for 24 more workers at the same wage, using the same filing date for the petition. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the time of filing of the petitions.

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 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.