

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

B6

**PUBLIC COPY**

**Identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

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



File: WAC 02 135 50944 Office: CALIFORNIA SERVICE CENTER

Date: DEC 03 2003

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

**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 Citizenship and Immigration Services (CIS) 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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a manager. 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, the petitioner<sup>1</sup> submits additional information and asserts that the petitioner's financial information establishes its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The sole issue raised on appeal is whether the petitioner has established its ability to pay the offered wage to the beneficiary. Eligibility in this case rests upon 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 3, 1997.<sup>2</sup> The beneficiary's salary as stated on the labor certification is \$502.80 per week or \$26,145.60 annually. The petitioner is organized as a sole proprietorship.

---

<sup>1</sup> The petitioner's owner filed the appeal. As no withdrawal of representation appears in the record, counsel will be provided a copy of this decision.

<sup>2</sup> We believe that the director erred in stating that the priority date was January 13, 1998.

The petition initially included insufficient evidence to support the petitioner's ability to pay the beneficiary's offered wage. The director requested the petitioner to submit further evidence.

The petitioner subsequently supplemented the record with copies of the sole proprietors' Form 1040, U.S. Individual Income Tax Returns for 1997 through 2001. The sole proprietors' 1997 individual tax return indicated that they had \$47,384 in adjusted gross income including \$11,023 in business income as reflected on Schedule C.

The sole proprietors' 1998 individual tax return showed \$20,391 in adjusted gross income including business income of -\$1,352 as shown on Schedule C.

The 1999 tax return reflected business income of -\$11,415 as set forth on Schedule C and \$7,319 in adjusted gross income.

The 2000 tax return showed an adjusted gross income of -\$53,901 including -\$7,063 business income as indicated on Schedule C.

The 2001 tax return showed an adjusted gross income of \$24,845 including business income of \$8,711.

The record indicates that the petitioner's owners have employed the beneficiary since 1997. Copies of the beneficiary's W-2s submitted on appeal indicate that the beneficiary was paid \$11,547.89 in 1997, \$12,000 in 1998 and 1999, \$16,358 in 2000, and \$17,736 in 2001. The difference between the proffered wage and the wages actually paid to the beneficiary were \$14,597.71, \$14,145.60, \$14,145.60, \$9,787.60, and \$8,409.50, respectively. In 1997, 1998 and 2001, these sums could have been covered by the sole proprietors' adjusted gross income figures. In 1999 and 2000, the sole proprietors' adjusted gross income fell far short of the necessary amount to cover the difference.

As noted by the director's denial, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show that it has a continuing ability to pay the offered wage as of the visa priority date and continuing until the beneficiary receives permanent lawful resident status. Here, two out of the relevant five years indicate that the petitioner could not meet the difference between the wages paid and the beneficiary's proposed wage.

The petitioner asserts on appeal that the sole proprietors' bank statements and other holdings could be used to meet the proffered wage. While other income and expenses of a sole proprietorship are subject to review, it is also noted that 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns or audited financial statements. Additional evidence may be offered, but it cannot generally substitute for the regulatory requirements. It is further noted that the combined ending balance of the sole proprietors' savings accounts contained in the record as of the end of 2000 was approximately \$5000; an amount insufficient to cover the difference in the proposed wage and the beneficiary's paid wages for that year.

Accordingly, based on a review of the evidence submitted to the record, we cannot currently find that the petitioner has persuasively demonstrated that it has established its ability to pay the proffered wage as of the priority date of the petition and continuing until 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.