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Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS  
CIS, AAO, 20 Mass, Rm 3042  
425 Eye Street, N.W.  
Washington, D.C. 20536

File: WAC 02 068 53852 Office: California Service Center

Date:

**DEC 13 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 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 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. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by 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 January 12, 1998. The beneficiary's salary as stated on the labor certification is \$11.55 per hour which equals \$24,024 annually.

With the petition, counsel submitted the petitioner's 2000 Form 1065 U.S. Return of Partnership Income showing a loss of \$135,730 and net current assets of -\$95,571. In an accompanying letter, counsel stated that the depreciation of \$67,648 should be added to ordinary income to compute the funds available to pay the proffered wage.

On March 6, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the director requested the petitioner's income tax returns for the years 1998, 1999, and 2000.

In response, counsel submitted the petitioner's federal tax returns for 1998 and 1999, having previously submitted the return for 2000.

The 1998 return is the Form 1040 U.S. Individual Income Tax Return of petitioner's owner, including Schedule C, Profit or Loss from Business. Schedule C shows that the petitioner was then a sole proprietorship and made a net profit of \$10,232 during that year. The owner's Form 1040 shows that he and his wife had an adjusted gross income of \$36,757 during that year.

The 1999 return is a Form 1065, U.S. Partnership Return of Income, indicating that the petitioner converted to a partnership. That return shows that the petitioner suffered a loss of \$147,496.

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

On appeal, counsel urges that the petitioner's depreciation deduction should be added to its income for those years to yield the total funds 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, this deduction represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated in fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings as necessary, and is not available to pay wages.

During 1998, the petitioner earned profit of just over \$10,000.

his own funds.

During 1999, the petitioner, which was then a partnership, suffered a loss of almost \$150,000. Counsel provided no evidence of the owners' ability to pay the proffered wage out of their own funds.

During 2000 the petitioner, still a partnership, suffered a loss of more than \$135,000. Again, counsel submitted no evidence of the ability of the petitioner's owners to pay the proffered wage.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has not established that it 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.