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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: [redacted] WAC 03 030 51083 Office: CALIFORNIA SERVICE CENTER Date: DEC 17 2003

IN RE: Petitioner:
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)

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.

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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a firm providing residential care for the mentally disabled. It seeks to employ the beneficiary permanently in the United States as a Residence Supervisor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 turns 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). The petition's priority date in this instance is January 25, 2001. The beneficiary's salary as stated on the labor certification is $11.93 per hour or $24,814 per year. The director's decision states that "the beneficiary's proffered wage is $22,800 per year," but it is not clear from the record how this figure was calculated. Counsel's brief uses the figure of $24,814 as the total annual wages, which appears to be the accurate figure.

The director found that the petitioner's initial submissions of evidence were insufficient with regard to the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also found the evidence insufficient with regard to the substituted beneficiary's qualifications for the position. In a request for evidence (RFE) dated June 11, 2002, the director requested additional evidence on each of those issues.

On the ability to pay issue, the RFE requested signed and certified copies of the petitioner's federal income tax returns for 2001 and 2002, or in the alternative, Internal Revenue Service (IRS) computer tax records in the original for those years.

Counsel submitted original IRS printouts of the petitioner's 2000 and 2001 tax returns and signed taxpayer's copies of the petitioner's form 1120 for each of those years, with supplemental documentation. Counsel also submitted a photocopy of a request by the petitioner dated March 13, 2003 for an automatic extension of time until September 15, 2003 to pay the 2002 income taxes. The federal tax returns for 2000 and for 2001 reflected taxable income of $0 each year. For the year 2000 the taxable income before net operating loss deduction and special deductions was ($2,289). For the year 2001 the taxable income before net operating loss deduction and special deductions was $0.

On the issue of the substituted beneficiary's qualifications, counsel submitted a letter from the former employer of the substituted beneficiary and also a photocopy of a California Registered Nurse's license for the substituted beneficiary.

With regard to the ability to pay issue, the director's decision noted that the petitioner's tax return for 2001 indicated a taxable income of $0 (zero) "and a cash assets of $686.00." The decision did not specify the source of the "cash assets" figure, nor whether that figure reflected such assets at the beginning of the tax year or at the end.

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

With regard to the issue of the qualifications of the substituted beneficiary, the director's decision mentioned the letter from the former employer of the substituted beneficiary, but made no further comment, apparently accepting the sufficiency of the petitioner's submissions on that issue.

On appeal, counsel submits a letter describing the operations of the petitioner and certain financial matters, including income projections. Several of the factual assertions in counsel's letter are unsupported by other documentary evidence, and such factual assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Nonetheless, portions of counsel's letter do refer to documents in evidence, including "Employer's Quarterly State Report of Wages Paid to Each Employee," a document submitted for the first time on appeal. That document shows payments to [redacted] for the quarter ending December 31, 2002 in the amount of $4,553.50. Counsel argues that Ms. [redacted] was the original beneficiary in the instant petition, and that wages paid to her should be included in the evaluation of the petitioner's ability to pay the proffered wage to the present petitioner, which on an annualized basis,

according to counsel, would be only $6,600.40 higher than the annual wage total paid to Ms.

After a review of the federal tax returns and other documentary evidence 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 until the beneficiary obtains lawful permanent residence. The documentary evidence submitted by the petitioner shows zero taxable income for 2000 and 2001, and shows a request for extension of time until September 2003 for filing of the petitioner's tax returns for 2002. For 2000 the taxable income before net operating loss deduction and special deductions was negative and for 2001 that figure was zero. With regard to net current assets, at the close of the 2000 tax year on December 31, 2000 the current assets were $31,420 and current liabilities were $4,460, for net current assets of $26,960. At the close of the 2001 tax year on December 31, 2001 the current assets were $20,358 and current liabilities were $8,551, for net current assets of $11,807.

Although the net current assets at the close of the 2000 tax year were sufficient to pay the beneficiary's proffered annual wages of $24,814, the net current assets at the close of the 2001 tax year were not sufficient to pay the beneficiary's proffered annual wages.

Counsel argues that the wage payments made to the original beneficiary should be considered in evaluating the ability of the petitioner to pay the proffered wages of the substituted beneficiary. However, the evidence submitted on this issue is insufficient to sustain this argument. Counsel submitted only one quarterly statement of wages of the petitioner, for the quarter ending on December 31, 2002. That statement shows wage payments to 22 employees, including to Ms. But no tax returns or other financial statements with regard to the petitioner's general financial condition were submitted for any period after December 31, 2001, nor was any documentary evidence submitted to show the period of employment of Ms or to establish that payments made to Ms were for the same duties for which the substituted beneficiary is to be hired. An undated organization chart submitted in evidence shows five Residence Supervisor positions, four of which are shown as vacant. Although counsel's explanations of the business plans of the petitioner and the financial projections in counsel's letter are intended to show the ongoing ability of the petitioner to pay the proffered wages, those explanations and projections may not be considered as evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra*. The petitioner has therefore failed to establish its ability to pay the proffered wages of the substituted beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

With regard to the qualifications of the substituted beneficiary, the director's decision appears to implicitly accept the petitioner's submission as sufficient, and a review of those submissions on appeal indicates no reason to question this conclusion by the director.

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.