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

*[Handwritten initials]*

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

[Redacted]

**JUL 21 2003**

File: WAC 02 088 50333 Office: CALIFORNIA SERVICE CENTER Date:

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 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.

*[Handwritten signature]*  
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 child care/preschool. It seeks to employ the beneficiary permanently in the United States as a preschool teacher. 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 continuing ability to pay the beneficiary the proffered wage beginning on 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 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 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 day the 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 on April 24, 2001. The proffered salary as stated on the labor certification is \$28,149 per year.

With the petition counsel submitted a copy of Schedule C of the petitioner's owners' 2000 Form 1040 joint income tax return. The Schedule C shows that the petitioner produced a profit of \$8,712 during that year. Because the priority date of the petition is April 24, 2001, however, evidence pertinent to the petitioner's

finances during 2000 is not directly relevant.

Counsel stated in his cover letter, dated December 3, 2001, that, "There has never been a question of the (petitioner's) ability to pay (the beneficiary's) salary. Therefore, (the petitioner) has the ability to pay (the beneficiary's salary.)"

Because the evidence submitted did not sufficiently demonstrate the petitioner's ability to pay the proffered wage, the California Service Center requested additional evidence pertinent to that ability. The Service Center requested, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements sufficient to show the continuing ability to pay the proffered wage beginning in 2001. The Service Center also specifically directed the petitioner to provide complete copies of the petitioner's owners' Form 1040 tax return.

In response, counsel submitted a complete copy of the petitioner's 2000 Form 1040 tax return. In a cover letter dated July 2, 2002, counsel stated that the petitioner's 2001 tax return had not yet been prepared. The 2000 tax return shows that the petitioner's owners have two dependents and declared an adjusted gross income of \$6,645, including the petitioner's profit reduced by deductions.

Counsel also provided monthly statements for the petitioner's bank account for January 2002 through May 2002 and statements pertinent to a line of credit available to the petitioner.

Finally, counsel provided copies of 1999, 2000, and 2001 Form W-2 wage and tax statements showing that the petitioner paid the beneficiary \$9,134, \$5,384.50, and \$12,922.50 during those years, respectively.

The Director, California Service Center, determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 8, 2002, denied the petition.

On appeal, counsel argues that the petitioner's bank accounts demonstrate that the petitioner has sufficient funds to pay the proffered wage. Counsel adds that the petitioner has been in business for 22 years and had paid its teachers with the income it derives. Finally, counsel notes that evidence was submitted of wages actually paid to the beneficiary.

Counsel quoted 8 C.F.R. § 204.5(g)(2) for the proposition that the petitioner must establish its ability to pay the proffered wage using copies of annual reports, federal tax returns, or audited financial statements. Counsel also noted that bank accounts may be submitted as additional evidence of that ability.

Counsel is correct that the wages the petitioner actually paid to the beneficiary during any given year demonstrate, at least in part, the petitioner's ability to pay the proffered wage during that year. The proffered wage is \$28,149. During 2001, for instance, the petitioner paid the beneficiary \$12,922.50, and is obliged to demonstrate only the ability to pay the balance of \$15,226.50.

The priority date of the petition is April 24, 2001. As per 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate its ability to pay the proffered wage beginning on that date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner, however, has submitted no annual reports and no audited financial statements, and has submitted no federal tax returns for 2001 or any subsequent year.

In a cover letter dated July 2, 2002, counsel stated that the petitioner's 2001 tax return had not yet been prepared. Although counsel provided no evidence in support of that statement, this office notes that many businesses file late returns.

The petition was denied on August 8, 2002. This decision accorded the petitioner notice that the proof submitted had been found insufficient. Counsel's appeal brief, submitted September 5, 2002, did not contain the petitioner's owners' 2001 tax return or any reason for its absence. This office has no reason to believe that the petitioner's owners' 2001 tax return remained unavailable at that late date and the failure to provide it is unexcused.

As per 8 C.F.R. § 204.5(g)(2), the petitioner may provide bank account statements in addition to copies of annual reports, federal tax returns, or audited financial statements, but not in lieu of them. In any event, the petitioner provided no evidence of its bank balances during 2001. The petitioner has provided no competent evidence to demonstrate its ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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