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

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

[REDACTED]

File: WAC 02 070 53970 Office: California Service Center

Date:

MAY 28 2003

IN RE: Petitioner:
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.

Robert P. Wiemann
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 residential health care provider. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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 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 November 12, 1997. The proffered salary as stated on the labor certification is \$2059.98 per month which equals \$24,719.76 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Accordingly, the California Service Center, on March 12, 2002, requested evidence pertinent to the continuing ability of the petitioner to pay the proffered wage beginning on the priority date. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay be in the form of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. corporation income tax returns. The 1998 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of -\$365 during that year. The corresponding Schedule L shows that, at the end of that year, the petitioner's current liabilities were greater than its current assets.

The 1999 return shows that the petitioner's taxable income before net operating loss deduction and special deductions was -\$26,464. The accompanying Schedule L shows that the petitioner had \$36,955 in current assets and no current liabilities at the end of that year.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$5,220. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of \$28,611 and no current liabilities.

In addition, counsel submitted copies of statements of the monthly balances in the petitioner's bank accounts.

On July 15, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel urged that the director incorrectly focused on the petitioner's taxable income, which counsel stated is a poor indicator of the petitioner's ability to pay the proffered wage. Counsel also argued that the petitioner's bank statements show the ability to pay the proffered wage.

With the appeal, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. corporation tax return. That return shows that the petitioner declared a taxable income before net operating deduction and special deductions of \$43,194. Counsel also submitted the petitioner's Form DE-6 quarterly wage reports for all four quarters

of 2001 and the first quarter of 2002. Those quarterly reports show that the petitioner did not employ the beneficiary during those quarters.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both Bureau and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

Bank balances are among the types of supplementary evidence which 8 C.F.R. § 204.5(g)(2) contemplates being submitted. However, in a case where the primary evidence, annual reports, tax returns, or financial statements, indicate that the petitioner did not have the ability to pay the proffered wage, more would be necessary than showing that the petitioner had funds in a bank account. In such a case, for those funds to evince the ability to pay the proffered wage, the petitioner would be obliged to demonstrate that those funds were available to the petitioner and were not reflected on the annual reports, tax returns, or financial statements.

The evidence demonstrates that the petitioner was able to pay the proffered wage out of its net current assets during 1999 and 2000. The evidence demonstrates that the petitioner was able to pay the proffered wage out of its income during 2001. However, the evidence does not demonstrate that the petitioner was able to pay the proffered wage during 1998. Therefore, the petitioner has not established that it has had the continuing ability to pay the

proffered salary 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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