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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
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Washington, DC 20536



File: WAC 01 286 55316 Office: CALIFORNIA SERVICE CENTER

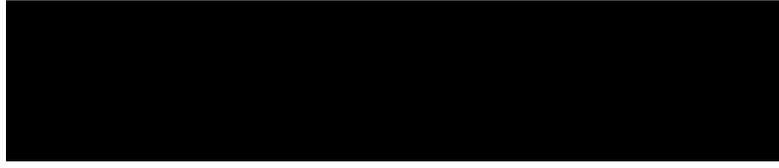
Date: OCT 21 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), as a worker requiring less than 2 years of training or experience. The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a night auditor/front desk manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The priority date of the visa petition, established by the approved labor certification, is November 17, 1997. The beneficiary's proposed wage is \$31,595.20 per year. On January 24, 2002, the director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. Based on the tax return figures set forth in Form 1040, Schedule C (Profit or Loss from Business) that the petitioner submitted in support of its ability to pay the proffered wage, the director concluded that the petitioner showed a net loss of (\$10,510) for 1997, (\$13,296) in 1998, and (\$178,335) in 1999.

The AAO dismissed the petitioner's appeal on September 19, 2002. The AAO confirmed the financial information contained in the record as noted by the director and additionally found that the petitioner's Schedule C for 2000 reflected a net profit of \$17,716. This figure is not sufficient to meet the proffered wage of \$31,595.20. The AAO also concluded that the evidence failed to show that the petitioner had sufficient available funds to pay the proposed salary as of the priority date and continuing until the present.

On motion, counsel submits a copy of the petitioner's 2000 and 2001 Form 1041, U.S. Income Tax Return for Estates and Trusts including Form 1040, Schedule C (Profit and Loss from Business). As noted above, the petitioner's 2000 Schedule C shows a net profit of \$17,716, while its net taxable income is shown as -\$141,562. Schedule C for the year 2001 shows a net profit of \$20,104. The petitioner's taxable income is shown as -\$119,608.

Counsel also submits an accountant's letter and a letter from the hotel controller. The accountant's letter states that the negative taxable income shown in 2000 and 2001 includes loss carryovers from previous years of \$141,562 and \$166,906, respectively, and do not reflect current operations. The accountant's letter, as well as the controller's letter, also notes that depreciation, as a non-cash expense, should be added back to the income in determining the petitioner's ability to pay. Counsel presents no authority for this proposition.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the

petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Even if the loss carryover figures for 2000 and 2001 were ignored, the remaining net figures for both years are still insufficient to cover the proffered wage. As noted above, as well as in the prior AAO decision, the evidence submitted does not support that the petitioner has established its ability to pay in any of the years from 1997 through 2001. It showed a net loss for 1997 through 1999 and a small Schedule C net profit in 2000 and 2001. None of these figures meet the beneficiary's proffered wage of \$31,595.20. The regulatory requirement at 8 C.F.R. § 204.5(g)(2) mandates that this continuing ability must be shown as of the priority date. The fact that the petitioner has been able to pay a significant amount of money in wages does not relieve it of the burden to show that its income is sufficient to cover the proposed salary of the beneficiary.

The trial balance sheets, also submitted on appeal, showing figures as of the end of 2000 and 2001 do not change this conclusion. We note that the primary evidence required to establish a petitioner's ability to pay is set forth in 8 C.F.R. § 204.5(g)(2) and consists of annual reports, federal tax returns, or audited financial statements. While additional material may be submitted, it may not be substituted for the primary evidentiary requirements.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition, November 17, 1997.

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 motion to reopen is granted. The previous decisions of the director and the AAO are affirmed. The petition remains denied.