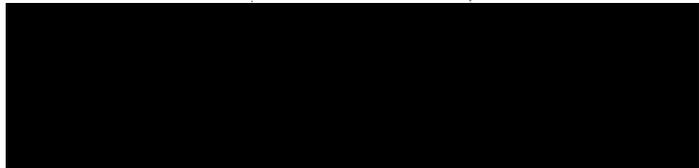


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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**identifying data deleted to  
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invasion of personal privacy**

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



File: WAC 02 147 50324 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 2003**

IN RE: Petitioner:   
Beneficiary:

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: SELF-REPRESENTED

**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, 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 horse training and breeding ranch. It seeks to employ the beneficiary permanently in the United States as a horse rancher. 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 hinges 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 14, 1998. The beneficiary's salary as stated on the labor certification is \$14.10 per hour or \$29,328 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director issued three (3) requests for evidence, RFE1 dated May 24, 2002, RFE2 dated August 30, 2002, and RFE3 dated November 26, 2002.

Each RFE sought additional evidence to establish, among other facts, the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. RFE1 required the petitioner's federal income tax returns, annual reports, or audited financial statements for 1998 to the present, as well as the beneficiary's Wage and Tax Statements (Forms W-2) and payroll summaries (Forms W-3). RFE2 was necessary to secure complete and signed Forms 1120S, U.S. Income Tax Returns. Again, it exacted them from 1998, 1999 and 2000 and Forms W-2 from 1998-2001. Finally, RFE3 elicited the clarification of the beneficiary's name, as submitted on his presumed Forms W-2.

The petitioner's federal tax returns reported ordinary losses from trade or business of (\$55,084) in 1999, (\$68,447) in 2000, and (\$71,582) in 2001, less than the proffered wage. Schedule L reflected current assets minus current liabilities and, thus, stated net current assets, namely, a deficit (\$4,733) in 1999, \$8,204 in 2000, and a deficit (\$16,931) in 2001, less than the proffered wage.

The director considered the beneficiary's Forms W-2 for 1999-2001, the petitioner's ordinary income and loss, and net current assets, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

On appeal, the petitioner submits a sole argument and states that:

When [CIS, formerly the Bureau, the Service or the INS] made its decision and denied the I-140, it failed to take into account that [the beneficiary], his wife, and his six children were living at [the petitioner's] place of business. [The beneficiary's] salary includes boarding. Thus, rent and all the utilities that are used by [the beneficiary] and his family are part of [the beneficiary's] compensation... If [CIS] had taken into account the cost of rent and all the utilities that are being used by [the beneficiary] and his seven family members in an area such as Temecula, California, [the beneficiary] earns another \$1,500.00 each month. In essence, [the beneficiary] earned \$34,600.00 in 1999, \$35,800.00 in 2000, and \$34,800 in 2001.

Form ETA 750, in block 12, stated the salary in dollars. The Department of Labor may act on a Form ETA 750 only if the employer clearly shows that it has enough funds available to pay the wage or salary offered the alien. 20 C.F.R. § 656.20(c)(1).

Further provisions of 20 C.F.R. § 656.20(c) require the petitioner clearly to show that:

- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis...

This regulation prevents the approval of a petition based on room, board, and utility incentives. The regulations require CIS both to find clear evidence of the petitioner's funds and to reject that of other incentives than the proffered weekly, bi-weekly, or monthly wage.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the Form ETA 750 to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner presented no federal tax return or other evidence of the ability to pay the proffered wage for 1998, the priority date. For this additional reason, the petition may not be approved.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

RFE1 and RFE2 expressly required the federal income tax return for the priority date. The petitioner, however, did not present the tax return or any other acceptable evidence for the ability to pay the proffered wage in 1998. For this further reason, the petition may not be approved.

A petitioner must establish the elements for the approval of the

petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Finally, the failure to produce the 1998 federal income tax return creates a presumption of ineligibility.

8 C.F.R. § 103.2 (b) states in part:

(2) *Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

As noted, RFE1 and RFE2 requested the 1998 federal tax return, annual report or audited financial statement in accord with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

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.