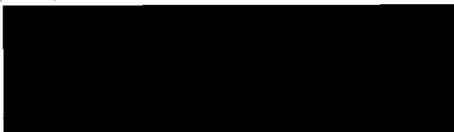


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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**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



SEP 29 2003

File: WAC 02 205 51231 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:   
Beneficiary:

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:



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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an auto repair shop. It seeks to employ the beneficiary permanently in the United States as a foreign car mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and continuing until the present.

On appeal, counsel submits additional information and asserts that the petitioner's financial information establishes its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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). Here, the petition's priority date is May 17, 1999. The beneficiary's salary as stated on the labor certification is \$18.36 per hour or \$38,188.80 annually. The evidence contained in the record indicates that the petitioning business was purchased in March 2000.

The petitioner initially did not provide sufficient evidence of its ability to pay the offered salary to the beneficiary as of the visa priority date and continuing until the beneficiary's receipt of lawful permanent residence. The director requested further evidence on July 25, 2002, specifically instructing the

petitioner to provide signed copies of its tax returns for the tax years 1999 through 2001.

In response, the petitioner supplied a copy of the 1999 Form 1120 U.S. Corporation Income Tax Return filed by the previous owner of the business and copies of its own Form 1120S U.S. Income Tax Return for an S Corporation for 2000 and 2001. The 1999 corporate tax return reflects that the petitioner had \$3,549,900 in gross receipts or sales, no officers' compensation, \$201,379 in salaries and wages, and -\$10,601 in taxable income before net operating loss deduction and special deductions. The 1999 Schedule L indicates that the petitioner had -\$4080 in net current assets.

The 2000 corporate tax return indicates that the petitioner had \$3,180,482 in gross receipts or sales, \$10,800 in officers' compensation, \$99,778 as salaries and wages, and -\$20,196 in ordinary income. Schedule L reflects that the petitioner's net current assets were \$44,673.

The petitioner's 2001 corporate tax return showed \$3,661,208 in gross receipts or sales, \$4,847 as officers' compensation, \$130,244 in salaries and wages, and -\$44,814 in ordinary income. Schedule L reflects that the petitioner's net current assets were \$21,436.

The petitioner also submitted a letter from an accountant that stated that the corporation income tax returns show a loss because of non-cash deductions like depreciation and amortization of goodwill. The director denied the petition, concluding that while the petitioner's net current assets were sufficient to cover the offered wage for the year 2000, the petitioner's negative ordinary income and net current assets figures were insufficient to meet the beneficiary's wages for 1999 and 2001. We concur.

On appeal, counsel submits copies of another letter from its accountant and a letter from the accountant of the former owner. Counsel asserts that if the non-cash deductions were considered, then it would support the petitioner's ability to pay the proffered wage. It is noted that CIS can properly rely upon the net income figure reflected on a petitioner's federal income tax return, without consideration of depreciation or other expenses. *See, e.g., Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). It is also noted that the petitioner's accountant's figures for projected 2001 net income when adding back the depreciation and amortization expenses is still well short of the beneficiary's offered wage. The former owner's accountant makes the same argument and includes insurance costs and unspecified outside services expenses as costs that should be considered. Again, even if that were a reasonable assertion, the projected net profit figure this accountant presents is still \$10,000 less than the beneficiary's offered wage.

Based on the evidence contained in the record and the foregoing discussion, the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.