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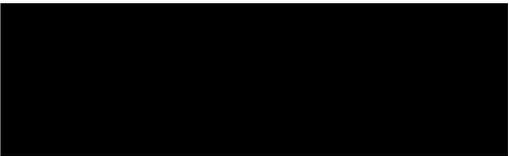
U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
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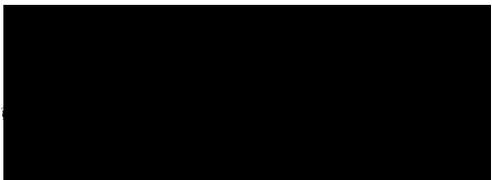
IN RE: Petitioner:
Beneficiary:



MAR 02 2004

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 of the Administrative Appeals Office 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.

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 care facility for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. 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.

On appeal, counsel submits a statement and indicates that a separate brief and/or evidence are being submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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. Here, the petition's priority date is July 15, 1996. The beneficiary's salary as stated on the labor certification is \$7.58 per hour or \$15,766.40 per annum.

Counsel submitted copies of the petitioner's 1996 through 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax return for 1996 reflected gross receipts of \$166,685; gross profit of \$166,685; compensation of officers of \$0; salaries and wages paid of \$27,900; and an ordinary income (loss) from trade or business activities of -\$40,975. The tax return for 1997 reflected gross receipts of \$194,686; gross profit of \$194,686; compensation of officers of \$0; salaries and wages paid of \$29,250; and an ordinary income (loss) from trade or business activities of -\$18,538.

The tax return for 1998 reflected gross receipts of \$211,288; gross profit of \$211,288; compensation of officers of \$0; salaries and wages paid of \$31,200; and an ordinary income (loss) from trade or business activities of -\$7,780. The tax return for 1999 reflected gross receipts of \$303,368; gross profit of \$303,368; compensation of officers of \$0; salaries and wages paid of \$50,500; and an ordinary income (loss) from trade or business activities of -\$2,792. The tax return for 2000 reflected gross receipts of \$318,698; gross profit of \$318,698; compensation of officers of \$13,165; salaries and wages paid of \$51,050; and an ordinary income (loss) from trade or business activities of

-\$14,261. Schedule L for all of the tax returns provided no information; therefore, net current assets could not be determined.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the decision is arbitrary and capricious and the analysis of the tax returns "was flawed and misinterprets the ability to pay the proffered wage as required by 8 C.F.R. § 204.5 (g)(2)."

The petitioner's Form 1120S for calendar year 1996 shows an ordinary income of -\$40,975. The petitioner could not pay a proffered salary of \$15,766.40 out of this income.

In addition, the petitioner's 1998 through 2000 federal tax returns continue to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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.