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U.S. Citizenship
and Immigration
Services

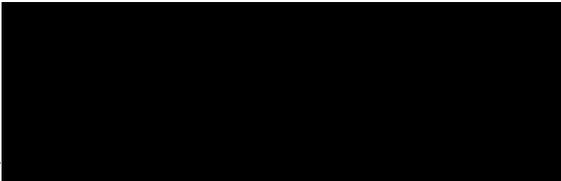


FILE: WAC 02 142 51113 Office: CALIFORNIA SERVICE CENTER Date: MAR 12 2004

IN RE: Petitioner: [Redacted]
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:

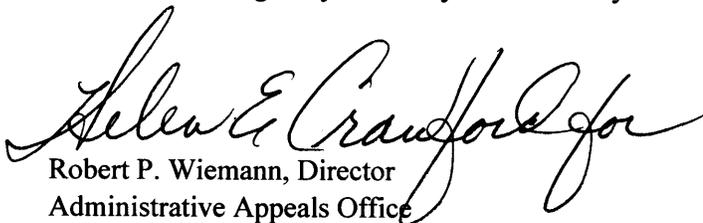


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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, 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 nursing home. It seeks to employ the beneficiary permanently in the United States as a cook. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 January 13, 1998. The beneficiary's salary as stated on the labor certification is \$13.87 per hour, which equals \$28,849.60 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, the California Service Center, on May 6, 2002, requested additional evidence. The Service Center requested, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner provide evidence of its continuing ability to pay the proffered wage either in the form of copies 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-A Corporation Short-Form Income Tax Return.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$513 during that year. The return also shows that the petitioner's current liabilities were greater than its current assets at the end of that year.

The 1999 tax return shows that the petitioner declared a loss of \$627 as its taxable income before net operating loss deduction and special deductions during that year. The return also shows that the petitioner's current liabilities were greater than its current assets at the end of that year.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$5,513 during that year. The return also shows that the petitioner's current liabilities were greater than its current assets at the end of that year.

Counsel also provided the 1998, 1999, 2000, and 2001 Form 1040 joint tax return of the petitioner's owner and the owner's spouse, monthly statements of the petitioner's bank accounts, and statements pertinent to a trust account held for the benefit of the petitioner's owner. Counsel argued that the various documents submitted show the ability of the petitioner to pay the proffered wage.

On August 5, 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. The director found that because the petitioner is a corporation, evidence pertinent to the owner's personal finances is not directly relevant. The director further found that the petitioner's bank accounts and tax returns do not show the ability to pay the proffered wage.

On appeal, counsel cites cases for the proposition that in appropriate cases courts will "pierce the corporate veil" and hold shareholders responsible for corporate debts and obligations. Counsel admits in his brief, however, that those are cases where the court seeks to prevent fraud or achieve equity. Counsel offers no indication that the owner of the petitioner in this case is legally or contractually obliged to pay the debts and obligations of the petitioning corporation. The precedent cited by counsel is irrelevant to this petition. Because the petitioner's owner is not obliged to pay the petitioner's debts and obligations out of her own personal funds, her personal funds shall not be considered in the calculation of the petitioner's ability to pay the proffered wage.

Counsel also cites two very disparate immigration law cases for the abstract proposition that CIS is bound in this case to consider the "totality of circumstances." In fact, in determining whether the petitioner is able to pay the proffered wage, CIS is obliged to consider only the competent, relevant evidence of record.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the petitioner must demonstrate its continuing ability to pay the proffered wage using copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no copies of annual reports and no audited financial statements. The petitioner's income tax returns are the only competent evidence of record pertinent to the petitioner's ability to pay the proffered wage.

The petitioner was permitted to demonstrate its ability to pay the proffered wage with copies of annual reports or audited financial statements, but chose not to do so. The petitioner was not obliged to demonstrate that ability with its tax returns, but chose to do so. The petitioner shall not now be heard to argue that its tax returns are a poor indicator of its ability to pay the proffered wage.

Those returns show that the petitioner was unable to pay the proffered wage during 1998, 1999, and 2000 out of its income or its net current assets. In addition, although the Service Center requested, on May 6, 2002,

that the petitioner provide evidence of its ability to pay the proffered wage from the priority date “to the present,” the petitioner submitted no competent evidence of its ability to pay the proffered wage during 2001.

The competent evidence in the record does not demonstrate that the petitioner was able to pay the proffered wage during 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered wage 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.