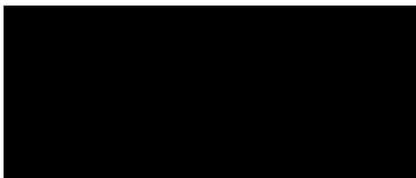


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



**B6**

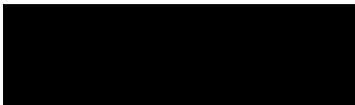
ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 MASS, 3/F  
425 L Street, N.W.  
Washington, D.C. 20536

**MAR 17 2004**

File: WAC-01-277-50096 Office: California Service Center

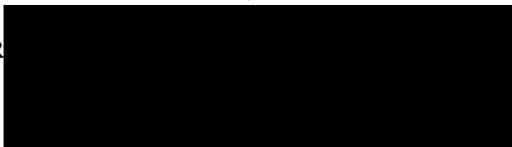
Date:

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.

A handwritten signature in black ink, appearing to read "R. 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 (AAO) 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 licensed practical nurse. 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.

The director denied the petition because he determined that the petitioner had failed to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage.

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.

The regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is August 18, 1997. The beneficiary's salary as stated on the labor certification is \$13.00 per hour or \$36,400 per year.

With its initial petition, counsel submitted copies of the petitioner's 2000 Form 1065 U.S. Return of Partnership Income. The tax return for 2000 reflected gross receipts of \$324,177; gross profit of \$324,177; salaries and wages paid of \$102,581; and an ordinary income of \$11,903.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence (RFE) dated June 4, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1997 through 2002, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary, if any, for 1997 through 2002.

In response to the Director's RFE, counsel submitted copies of the petitioner's 1997 Form 1040 U.S. Individual Income Tax return as well as its 1998 through 2001 Form 1065 U.S. Return of Partnership Income. The Form 1040 reflected gross income of \$105,535, total expenses of \$117,264 with total net loss of - \$11,729. The tax return Form 1065 for 1998 reflected gross receipts of \$265,783; gross profit of \$265,783; salaries and wages paid of \$68,564; and an ordinary income of \$23,620. Schedule L for 1998 reflects that the petitioner's current liabilities outweigh its current assets. The tax return for 1999 reflected gross receipts of \$317,226; gross profit of \$317,226; salaries and wages paid of \$56,710; and ordinary income of \$25,724. Schedule L for 1999 reflects that the petitioner's net current assets were \$20,054. The tax return for 2000 was previously submitted and will not be restated. In addition, the petitioner submitted California Quarterly wage and withholding reports for the period July 1, 2000 through January 1, 2001.

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

On appeal, counsel states that the petitioner has experienced significant growth during the four year period 1997 through 2000 and in each of those years has had growth revenue which is more than sufficient to pay the proffered wage. Counsel states that to conclude that the petitioner cannot pay the proffered wage simply because the petitioner's taxable income is low is "totally irrational and demonstrates a complete lack of understanding of principles of accounting and finance."

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and 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. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that CIS should have

considered income before expenses were paid rather than net income.

The petitioner's 1997 Form 1040 reflected a net loss of \$11,729. The petitioner's Form 1065 for the calendar years 1998 through 2000 shows ordinary incomes of \$23,620, \$25,724, and \$11,903, respectively. The petitioner could not pay a proffered salary of \$36,400 out of any of those figures. The petitioner's net current assets also show an inability to pay the proffered wage.

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 until the beneficiary obtains lawful permanent residence.

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.