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U.S. Citizenship  
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Services

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**MAY 19 2004**



FILE: WAC-02-173-52826 Office: CALIFORNIA SERVICE CENTER Date:

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:



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*

for 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 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 a hotel. It seeks to employ the beneficiary permanently in the United States as a laundry supervisor. 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 the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel submits additional evidence.

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. 8 C.F.R. § 205.5(d). The petition's priority date in this instance is December 3, 1998. The beneficiary's salary as stated on the labor certification is \$22.21 per hour or \$46,196 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated July 22, 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 specified the petitioner's 1998 through 2001 federal income tax return, audited financial records and evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted the petitioner's unaudited financial reports for the years 1998, 1999, and 2001 as well as a wage and tax report and W-2 Management Report for the period ending December 31, 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted that he had specified that the petitioner submit audited financial reports.

On appeal, counsel submits the petitioner's 1998 through 2001 financial reports audited by Ernst and Young. On review, the AAO agrees with the decision of the director. The record does not establish that the petitioner had the ability to pay the proffered wage as of the priority date continuing through the time of adjustment. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*,

19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence, which specifically requested audited financial statements. *See id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Even if we did consider the audited financial statements, they do not demonstrate the petitioner's ability to pay the proffered wage. The financial statements for 1998 reflected net income of -\$331,000, total current assets of \$1,275,000, total current liabilities of \$1,364,000, and net current assets of -\$89,000. The financial report for 1999 reflected net income of -\$323,000, total current assets of \$2,180,000, total current liabilities of \$4,965,000, and net current assets of -\$2,785,000. The financial report for 2000 reflected net income of -\$666,000, total current assets of \$2,846,000, total current liabilities of \$2,487,000, and net current assets of -\$1,000. The financial report for 2001 reflected net income of \$958,000, total current assets of \$3,310,000, total current liabilities of \$4,254,000, and net current assets of -\$944,000.

The petitioner had a net loss of \$331,000 with net current assets of -\$89,000 in 1998; a net loss of \$323,000 with net current assets of -\$2,785,000 in 1999; a net loss of \$666,000 with net current assets of -\$1,000 in 2000; and a net income of \$958,000 with net current assets of -\$944,000 in 2001. The record contains no evidence of the beneficiary's wages paid by the petitioner during this period other than payroll records for 2001 reflecting that the petitioner paid the beneficiary \$12,996 that year, \$33,200 less than the proffered wage. Based on the petitioner's net losses and negative net current assets, we conclude it could not pay the proffered wage of \$46,196 during 1998, 1999, or 2001.

Thus, after a review of the evidence 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.