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U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 080 51874 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2002

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:
[Redacted]

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 immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a "...motion to reopen and [sic] reconsider" The motion will be denied.

The petitioner is an owner and licensee of nursing homes. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a "live in" residential manager. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed that decision, summarily dismissing petitioner's appeal of the director's decision. On appeal, petitioner's counsel failed to specifically assert that the director made an erroneous conclusion of law or a statement of fact as a basis in his decision.

In support of the motion, counsel submits the following documents: a letter from the petitioner dated January 29, 2004, stating that she now owns and operates another nursing home; a copy of petitioner's 2002 federal Form 1040 U.S. Individual Tax Return; a copy of a grant deed for property in the City of Murrieta, California; and, copies of one recent and three existing licenses to operate nursing homes in California. There was no brief with the documents submission. Petitioner's counsel states in a cover letter transmitting the above the above documents that the documents now submitted were "...not previously considered by the Service...."

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position. There was no brief in the matter. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of law or fact.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does not qualify as a motion to reopen. There are no new facts presented here by counsel that related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The decision of the director dated August 19, 2002, stated that the petitioner had not submitted any evidence at that time to demonstrate it had sufficient income to pay the beneficiary on the priority date of the labor

certification. Petitioner's present introduction of his 2002 federal Form 1040 U.S. Individual Tax Return cannot be used to demonstrate that ability since it reflects income received by petitioner one year after the priority date.

Also, the attempt by petitioner to introduce into evidence a deed to property she acquired also fails for several reasons. The real property is a capital asset and not an asset available to pay the proffered wage offered the beneficiary. In the current instance, since the realty was purchased after the priority date, this asset cannot under any circumstances be considered to determine the ability to pay the proffered wage on the priority date. Insofar as the additional nursing home and operating license will affect the petitioner future income, again, the burden of coming forward with evidence to show sufficient income on the priority date cannot be met with assets recently acquired after the priority date. The documentation submitted does not establish that the petitioner had the ability to pay the proffered wage on the priority date.

Petitioner has the burden in these proceedings of coming forward and presenting evidence responsive to the question of whether or not petitioner on the priority date of the alien labor application had the ability to pay the beneficiary the proffered wage. 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. The documentation now submitted by petitioner does not establish that petitioner had the ability to pay the proffered wage on the priority date. Accordingly, the motion will be denied, the decision of the director will be affirmed, and the petition will remain denied

ORDER: The motion to reopen or reconsider is denied.