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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: WAC 01 280 51361 Office: California Service Center Date: JUN 05 2003

IN RE: Petitioner:
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 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 the Bureau of Citizenship and Immigration Services (Bureau) 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.

Helen E. Crawford 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 on appeal. The appeal will be dismissed.

The petitioner is a nursery school. It seeks to employ the beneficiary permanently in the United States as a nursery school teacher. 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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is November 29, 1999. The beneficiary's salary as stated on the labor certification is $851.00 per week or $44,252.00 per annum.

Counsel submitted copies of the petitioner's 1999 and 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit

and Loss from Business Statement. The petitioner's 1999 Form 1040 reflected an adjusted gross income of $29,996. Schedule C reflected approximate gross receipts of $97,698; approximate gross profit of $97,098; wages of $32,024; and a net profit of $17,331. The petitioner's 2000 Form 1040 reflected an adjusted gross income of $19,043. Schedule C reflected gross receipts of $76,440; gross profit of $76,440; wages of $34,806; and a net profit of-$19,572.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a letter from the petitioner's accountant and a copy of the petitioner's 2001 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss From Business Statement. The petitioner;s 2001 Form 1040 reflected an adjusted gross income of $39,272. Schedule C reflected gross receipts of $91,532; gross profit of $91,532; wages of $34,204; and a net profit of $4,040.

Counsel argues that the nursery school suffered depletion of its income in 1999, 2000, and 2001 due to construction and remodeling costs, but is now established and growing. Counsel asserts that the petitioner's spouse is now projecting a net profit from his business for 2002 of $47,000.00, which is sufficient to pay the wage offered.

The federal tax return for 1999 shows an adjusted gross income of $29,996. The petitioner could not pay a salary of $44,252 a year from this figure.

In addition, the tax returns for 2000 and 2001 continue to show an inability to pay the wage offered.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

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.