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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

MAR 11 2004

File: [redacted] Office: California Service Center Date:

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: N/A

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.

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.

At the outset, the AAO notes that the petitioner's purported representative is not on the most current list of accredited individuals or organizations. Thus, a copy of this decision will not be furnished to the purported representative. A copy of this decision will only be furnished to the petitioner.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a domestic caregiver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner asserts that the service center erred in basing its decision on adjusted gross income as that figure already reflects net income after salaries and wages.

Section 203(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 petitioner'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 and continuing until the alien is granted permanent residence. The petitioner's priority date in this instance is April 29, 1999. The beneficiary's salary as stated on the labor certification is $8.69 per hour or $18,075.20 per year.

With the petition, its representative submitted copies of the petitioner's 1999, 2000 and 2001 Form 1040, U.S. Individual Income Tax Return. The petitioner's federal tax return for 1999 reflected adjusted gross income of $25,058, more than the proffered wage. The 2000 tax return reflected adjusted gross income of $33,297, more than the proffered wage. The 2001 tax return reflected adjusted gross income of $36,898, more than the proffered wage.

In a request for evidence (RFE) dated October 10, 2002, the director requested evidence to establish the petitioner's ability to pay the proffered wage beginning at the time the priority date was established and continuing until the beneficiary obtains permanent residence. The director also requested a statement of the monthly expenses for the petitioner's family. In response, in addition to the tax returns previously submitted, the petitioner submitted copies of the California Employment Development Department (EDD) Form DE-6, Quarterly Wage Report, for the quarters ending September and December 2000, and March and June 2002. The petitioner also submitted a statement showing the family's monthly living expenses for September 2002 was $5,699.

The director determined that, based on the family's adjusted gross income and monthly living expenses, the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established and continuing until the beneficiary obtains lawful residency.

On appeal, the petitioner states that the adjusted gross income is net of the wages it had paid to the beneficiary. Additionally, the petitioner asserts that the wages reflected as paid to the beneficiary were net of the charges for board and lodging, since the beneficiary is a live-in caregiver. The petitioner asserts that, by law, it can withhold corresponding charges for the beneficiary's board and lodging expenses.

The petitioner's assertions are erroneous. If the beneficiary actually earned the wage, and expenses for board and lodging were withheld, then the amount reflected as wages on the tax returns should include the amount for board and lodging. On the other hand, if board and lodging are for the convenience of the employer, as it appears to be in this case, then those expenses

are not includable in the wages. If board and lodging are not for the convenience of the employer, they are reportable compensation that must be included in gross income. *See* 26 U.S.C. § 119.

The petitioner's statement of monthly family expenses reflects yearly living expenses of $68,388. This figure far exceeds the amount reported as gross income on the petitioner's federal income tax reports. The petitioner could not pay the beneficiary the proffered wage and retain enough to meet its own expenses.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.