

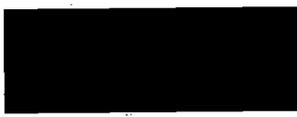
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**U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services**

*BE*

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



AUG 06 2003

File: EAC 01 230 56965 Office: VERMONT 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 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. With the petition, counsel submitted a copy of the Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor in this matter. 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. The director also determined that the petitioner had not shown that the beneficiary met the qualifications stated on the Form ETA 750.

On appeal, counsel submits a statement 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 nature, for which qualified workers are not available in the United States.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 C.F.R. § 204.5(1)(3)(ii)(B) states, in pertinent part:

*Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence

that the alien meets the educational, training or experience, and any other requirements of the individual labor certification. The minimum requirements for this classification are at least two years of training or experience.

8 C.F.R. § 204.5(g)(1) states that photocopies of documents are generally acceptable as evidence, except for (Form ETA 750) labor certifications from the Department of Labor.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Eligibility is also dependent on the petitioner demonstrating that, on the priority date, the beneficiary possessed all of the requirements of the position. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on May 26, 1989. The proffered wage as stated on the Form ETA 750 is \$9.26 per hour, which equals \$19,250.80 per year. The Form ETA 750 states that the proffered position requires one year of experience in the same position. Block 15 of the Form ETA 750 states, "License required."

With the petition, counsel submitted a copy of the petitioner's 1989 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$914.07 as its taxable income before net operating deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the petitioner's eligibility pursuant to the terms of the approved Form ETA 750, the Vermont Service Center, on November 19, 2001, requested additional evidence. Specifically, the Service Center requested a copy of the petitioner's 2001 tax return and evidence to establish that the beneficiary possessed the required license and experience on priority date.

The Service Center also observed that the petitioner had not provided the original Form ETA 750 and asked, consistent with 8 C.F.R. § 204.5(l)(3)(ii)(B), that it be provided.

In response, counsel submitted a letter, dated February 8, 2002, from the petitioner's president. The letter states that the beneficiary worked as a hair stylist in Jamaica from 1975 to 1990 and as a hair stylist in New York from 1998 to the date of the letter. The letter continues that, although the beneficiary has 14 years of qualifying experience, that experience is difficult

to document because the beneficiary was self-employed and disposed of all documentation when she closed her business. The president did not state how he obtained his knowledge of the asserted facts.

Counsel also submitted an additional copy of the petitioner's 1999 Form 1120 tax return, but not the requested 2001 tax return or evidence that the beneficiary possessed the requisite license on the priority date.

The 1999 return states that the petitioner declared taxable income before net operating loss deduction and special deductions of \$9,964 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director found that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director also found that the evidence did not establish that the beneficiary was qualified for the proffered position pursuant to the terms of the labor certification on the priority date. The director denied the petition on July 29, 2002.

On appeal, counsel noted that the petitioner's total assets increased between 1989 and 1999 and implied that this difference showed the ability to pay the proffered wage. Counsel also noted the amount of the petitioner's salaries, deductions, and gross receipts during 1989 and 1999 and stated that those amounts also show the ability to pay the proffered wage. Counsel also stated that, "It is a known fact that these deductions can be manipulated so that the business may have more or less taxable income."

Counsel's assertion is apparently meant to show that the petitioner's income tax returns are not necessarily indicative of its actual cash position. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue, through counsel, that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

Counsel also stated, "it is absurd to request the license if the beneficiary was residing in Jamaica in 1989 and is now being substituted on the labor certification application" and "It is unreasonable to request the license if the beneficiary was not in

the U.S. at the time." With the appeal, counsel submitted a copy of the beneficiary's New York cosmetology license, which was issued on June 21, 2001.

*Matter of Wing's Tea House, Supra.*, makes clear that the petitioner is obliged to show that the beneficiary was qualified, on the priority date, pursuant to the terms of the approved labor certification. No exception is made for substituted beneficiaries or people outside of the United States on the priority date. The labor petition makes clear that licensure is a prerequisite of the proffered position. The beneficiary did not have the requisite license on the priority date. Counsel's assessment of the law does not invalidate it and does not render the beneficiary eligible.

Counsel has cited various figures from the petitioner's tax returns and asserted that they show the ability to pay the proffered wage. Counsel presented no coherent argument, however, to advocate any way in which this office might view those figures to be related to the petitioner's ability to pay the wage.

Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses\*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income, shown on the petitioner's Form 1120 tax returns as taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage, the Service will first examine the net income figure reflected on the petitioner's federal income tax return, 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 Service 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.*

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\* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

*Food Co., Inc. v. Sava*, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The petitioner declared a loss of \$914.07 during 1989 and ended the year with negative net current assets. The petitioner has not shown that it was able to pay the proffered wage during that year either out of its income or out of its assets.

The petitioner declared a loss of \$9,964 during 1999 and ended the year with negative net current assets. The petitioner has not shown that it was able to pay the proffered wage during that year out of either its income or its assets.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1989 or 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that block E on the first page of the Form I-150 petition has been checked, indicating that the petition is for a skilled worker. As is stated above, 8 C.F.R. § 204.5(l)(3)(ii)(B) states that a position for a skilled worker is one which requires at least two years of training or experience.

The Form ETA 750 labor certification, however, indicates that the position requires only one year of experience and no additional training. This indicates that the proffered position is not a position for a skilled worker, and the petition should also have been denied for that reason.

Further, the petitioner should have been obliged to show the continuing ability to pay the proffered wage beginning on the priority date. The priority date in this matter is May 26, 1989. The petitioner should have been required to show the ability to pay the proffered wage from that date forward. The petitioner submitted only its 1989 and 1999 tax returns. The petitioner should have been obliged to produce evidence pertinent to its ability to pay the proffered wage during 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 2000, and 2001.

The Service Center did request that the petitioner provide a copy

of its 2001 tax return. The petitioner did not provide that tax return, nor did it provide any other evidence pertinent to its ability to pay the proffered wage during 2001. The petition should also have been denied for that reason.

Further still, the petitioner has never submitted the original Form ETA 750. That form should have accompanied the petition, but did not. On November 19, 2001 the Service Center requested that the petitioner provide the original Form ETA 750. The petitioner and counsel have still failed to submit that form. Pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(B), the petition should have been denied for this additional reason.

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.