

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



File: WAC 02 285 51057 Office: CALIFORNIA SERVICE CENTER

Date:

AUG 07 2003

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: SELF-REPRESENTED

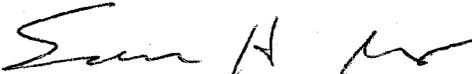
INSTRUCTIONS:

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an income tax and immigration services office. It seeks to employ the beneficiary permanently in the United States as an office manager. 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 submits a brief.

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.

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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 28, 1999. The proffered wage as stated on the Form ETA 750 is \$17.32 per hour, which equals \$36,025.60 per year.

With the petition the petitioner submitted a copy of the Schedule C from the petitioner's owner's 2001 Form 1040 tax return.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on January 7, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested evidence of the petitioner's continuing ability, beginning on the priority date, to pay the proffered wage, and that the evidence of that ability should be copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted copies of the 1999, 2000, 2001, and 2002 Form 1040 joint income tax returns of the petitioner's owner and the owner's spouse. Each of those returns was accompanied by the corresponding Schedule C, Profit or Loss from Business (Sole Proprietorship).

The 1999 return indicated that the petitioner made a net profit of \$4,627 during that year. The adjusted gross income of the petitioner's owner and the owner's spouse during that year, including the petitioner's profit, was \$21,184. During that year the petitioner's owner and the owner's spouse claimed one additional dependent.

The 2000 return indicated that the petitioner made a net profit of \$7,214 during that year. The adjusted gross income of the petitioner's owner and the owner's spouse during that year, including the petitioner's profit, was \$28,179.

The 2001 return indicated that the petitioner made a net profit of \$15,234 during that year. The adjusted gross income of the petitioner's owner and the owner's spouse during that year, including the petitioner's profit, was \$89,358. During that year the petitioner's owner and the owner's spouse claimed one additional dependent.

The 2002 return indicated that the petitioner made a net profit of \$10,936 during that year. The adjusted gross income of the petitioner's owner and the owner's spouse during that year, including the petitioner's profit, was \$26,984.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on April 1, 2003, denied the petition.

On appeal, the petitioner's owner asserted that she has social security income but provided no evidence of the existence or the amount of that income. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner's owner's alleged social security income cannot be included in the computation of the petitioner's ability to pay the proffered wage.

Further, this office notes that lines 20(a) and 20(b) of the petitioner's owner's Form 1040 tax returns reflect no social security benefits received during 1999, 2000, 2001, or 2002. The petitioner must show the ability to pay the proffered wage during all of those years. Even if the petitioner's owner could show that she received social security benefits during some other years, that would not contribute to her ability to have paid the proffered wage during 1999, 2000, 2001, or 2002.

The petitioner also alleged that it paid wages to the beneficiary during each of the salient years. The petitioner alleges that it paid the beneficiary \$7,795 during 1999, as shown at line 11 of that year's Schedule C; \$15,201 during 2000, as shown at line 37, Schedule C; \$16,959 during 2001, as shown at line 37 of Schedule C; and \$34,000 during 2002, as shown at Line 37, Schedule C. The corresponding schedules do show that amount expended, but provide no evidence that the beneficiary was the recipient. The petitioner has asserted that it paid wages to the beneficiary, but provided no evidence in support of that assertion. As was stated above, an unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *Supra*. The amounts the petitioner allegedly paid to the beneficiary will not be included in the computation of the petitioner's ability to pay the proffered wage.

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. 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.

The priority date is June 28, 1999. The proffered wage is \$36,025.60 per year. During 1999, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only to have paid it beginning on the priority date. On June 28, 1999, 178 days, approximately 49% of that 365-day year had already

elapsed. The petitioner is only obliged to show that it was able to pay the 51% of the proffered wage, or \$18,373.06.

During 1999, the petitioner's owner and the owner's spouse declared an adjusted gross income, including the petitioner's profit, of \$21,184. That amount is somewhat larger than that portion of the proffered wage that the petitioner must show the ability to have paid during that year. The record contains no evidence, however, that the petitioner's owner could support her family, which consisted of three people, on the \$2,810.94 difference which would have remained after paying the appropriate portion of the proffered wage to the beneficiary. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The petitioner is obliged to demonstrate the ability to pay the entire \$36,025.60 proffered wage during 2000. During that year, the petitioner declared an adjusted gross income, including the petitioner's profits, of \$28,179, which was insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner and the owner's spouse declared an adjusted gross of \$89,358, which was sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$26,984, which was not sufficient to pay the proffered wage. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2002.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999, 2000, or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.