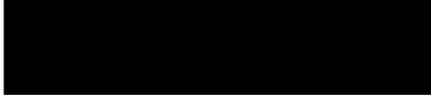


BC6

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: EAC 01 059 53623 Office: Vermont Service Center

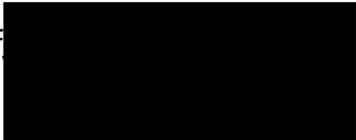
Date: **AUG 12 2003**

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:



PUBLIC COPY

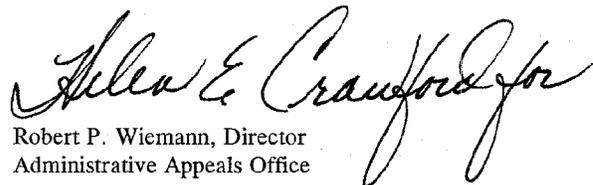
INSTRUCTIONS:

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 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a convenience store. 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 night manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel 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 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was filed on February 16, 1999. The beneficiary's salary as stated

on the labor certification is \$13.10 per hour which equals \$27,248 annually.

The petitioning entity is a sole proprietorship. With the petition, counsel submitted a letter, dated November 21, 2000, from the petitioner's owner. In the letter, the petitioner's owner stated that he owns two convenience stores with gross revenues of over \$2 million and that he pays wages of \$145,000. Counsel submitted no evidence of those assertions.

In addition, that letter states that the beneficiary would replace an existing employee whose wages would then be available to pay the proffered wage. Counsel also submitted a 1999 Form W-2 wage and tax statement showing that the petitioner paid the current employee \$25,605 during that year.

On July 25, 2001, the Vermont Service Center asked for additional evidence, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), to show that the petitioner has had the continuing ability to pay the proffered wage since the priority date. In addition, the Service Center specifically requested copies of the petitioner's 1999 and 2000 federal tax returns.

In response, counsel submitted a letter, dated October 19, 2001. In the letter, counsel emphasized the previously stated wage and labor expense and gross revenue figures. Counsel submitted copies of the petitioner's 1999 and 2000 Form 1040 individual tax returns, including Schedule C, Profit or Loss from Business (Sole Proprietorship). Counsel reiterated that the beneficiary would replace an existing employee.

The 1999 return shows that the petitioner's owner declared an adjusted gross income of \$10,880 for that year, including the net profit from both of his convenience stores.

The 2000 return shows that the petitioner's owner declared an adjusted gross income of \$3,119 for that year, including the net profit from both of his convenience stores.

Counsel also submitted copies of documents in which an institutional lender agreed to lend the petitioner's owner \$45,000 secured by a certificate of deposit account. Those documents were not executed and the proposition which counsel intended to support with them is unclear. They shall not be addressed further.

Finally, counsel submitted monthly statements of the petitioner's owner's investment account for December 1999 and March 2000. Those statements show total account values of \$20,515 and \$18,233.70,

respectively.

On December 5, 2001, the Director, Vermont Service Center, denied the petition, finding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel emphasized that the evidence submitted demonstrates that the petitioner grosses more than \$2 million per year, and that this shows the ability to pay the proffered wage. Counsel also stated again that the petitioner's owner has, at all relevant times, maintained that the beneficiary will replace an identified existing employee. Counsel urges that those assertions, plus the fact that the petitioner paid almost \$150,000 in wages during one year, indicate that the petitioner has the ability to pay the proffered wage.

On July 22, 2002, the AAO dismissed the appeal, noting that the petitioner's adjusted gross income was insufficient, during 1999 and 2000, to pay the proffered wage.

Counsel files the instant motion urging that the decision of the AAO was incorrect, in that it considered only the petitioner's net profit. Counsel urges that other factors should also have been considered. Counsel notes that many successful businesses show losses for income tax purposes. Finally, counsel asserted that reference to the petitioner's owner's adjusted gross income is irrelevant, as the beneficiary would be employed by the business.

The petitioner's owner also stated, and counsel has repeated, that the beneficiary will replace a specified employee. Counsel argues that this specified employee's wages would be available to pay the proffered wage if the petitioner were permitted to hire the beneficiary. The petitioner's assertion is not persuasive. First, other than the petitioner's assertion, the record contains no evidence that the named employee holds the position of Night Manager, the position proffered to the beneficiary. Further, other than the petitioner's assertion, the record contains no evidence that the beneficiary would replace the current employee. Finally, the amount paid to that current employee during 1999, the only year for which evidence was submitted that the petitioner employed him, was \$25,605, which is less than the proffered wage. Even if the petitioner's assertion were to be taken as fact, the petitioner would have to show the ability to pay the difference.

Counsel asserts that the petitioner's gross receipts should be considered as showing the ability to pay the proffered wage. Counsel also asserts, possibly in the alternative, that the amount

which the petitioner has paid in wages should be accepted as proof of that ability.

The bulk of the petitioner's gross receipts, however, were consumed by various expenses. This office is concerned with whether the petitioner was able to pay the proffered wage **in addition to** those expenses. The answer to that inquiry is found at Line 31 of the petitioner's Schedule C, Net Profit.

The petitioner paid \$145,181 in wages and cost of labor during 1999 and \$110,796 for the same expenses during 2000. Another convenience store which the petitioner's owner also owns paid \$74,917 and \$76,616 for the same expenses during those same years.

Contrary to counsel's position, this fact fails to dispose of the issue of the petitioner's ability to pay the proffered wage. Absent sufficient evidence that the beneficiary would replace an employee whose wages would be sufficient to pay the proffered wage, the question before this office is whether the petitioner was able to pay the proffered wage **in addition to** the wages it actually paid. The answer to that inquiry, again, is found at Line 31 of the petitioner's Schedule C, net profit. The petitioner's net profit is the amount left after payment of various expenses, including wage and labor costs, and is the amount on the Schedule C which indicates additional funds which were available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the net profit figure reported on the petitioner's Schedule C. 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 Bureau 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 that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. The net profit figure of a sole proprietorship is analogous to the net income figure of a corporation.

Counsel argues that the net profit is not, in itself, an appropriate indication of the petitioner's ability to pay the proffered wage. No other figure on the petitioner's tax return is indicative of the petitioner's ability to pay the proffered wage **in addition to** the other expenses it actually paid during a given year. 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. The petitioner might, in the alternative, have produced annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

The petitioner's net profit during 1999 was \$5,955. During 2000 the petitioner suffered a loss of \$8,466. The petitioner's net profit does not show that the petitioner was able to pay an additional \$27,248, the amount of the proffered wage, during either of those years.

Because the petitioner is a sole proprietorship, the petitioner's owner is obliged to pay its debts and obligations with his own funds. Therefore, the petitioner's owner's funds may be considered in the calculation of the petitioner's ability to pay the proffered wage.

During 1999, the petitioner's owner's adjusted gross income, including the profit from both of his businesses, was \$10,880. During 2000, the petitioner's owner's adjusted gross income was \$3,119. Either of those figures is an uncommonly small income upon which to sustain oneself. The petitioner's owner may have demonstrated that he was able to sustain himself on those amounts, but not that he was able to sustain himself on any lesser amount and contribute the balance of his adjusted gross income toward paying the proffered wage.

Because the petitioner's owner's adjusted gross income includes all of the profit from his business, and because no evidence exists that the petitioner's owner could have sustained himself on a lesser adjusted gross income, no portion of the petitioner's profits or the petitioner's owner's adjusted gross income may be included in the calculation of the ability to pay the proffered wage.

Counsel submitted evidence of the amount the petitioner's owner had

in an investment account at the end of two selected months. This amount, too, might be available to pay the proffered wage. Counsel's evidence shows that at the end of December 1999 the petitioner's owner's investment account was valued at \$20,515 and that at the end of March 2000 it was valued at \$18,233.70. Those amounts, if liquid, might be available to the petitioner to pay the proffered wage, though they are insufficient in themselves.

The amounts of those two investment accounts are the only funds which counsel has demonstrated may have been available to pay the proffered wage. As was stated above, those funds were insufficient to pay the proffered wage.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1999 or 2000. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of July 22, 2002 is affirmed. The petition is denied.