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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

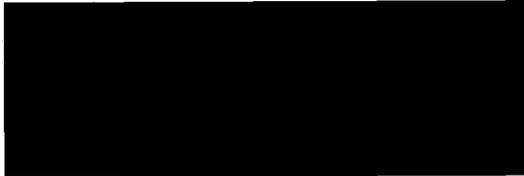
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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536



AUG 12 2003

File: EAC 02 085 51233 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:



Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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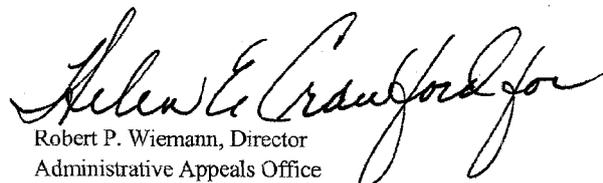
**INSTRUCTIONS:**

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an asbestos abatement construction firm. It seeks to employ the beneficiary permanently in the United States as a supervisor in asbestos removal. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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). The petition's priority date in this instance is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$26.82 per hour or \$55,785.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. Requests for evidence (RFE), dated March 12, 2002 (RFE 1) and July 3, 2002 (RFE 2), required additional evidence to establish the petitioner's

ability to pay the proffered wage as of the priority date. RFE 2 suggested wage and salary statements (Form W-2) or any other evidence of payments or wages. Also, RFE 2 listed five (5) Immigrant Petitions for Alien Worker (I-140) from the petitioner, virtually identical and affecting the priority date. Reference to them is by the final digits of the receipt numbers in RFE 2, viz., 091, 217, 233 (the beneficiary), 865, and 891.

The petitioner's Form 1120, U.S. Corporation Income Tax Return, reported taxable income before net operating loss deduction and special deductions, in 2001, of \$117,747, less than the proffered wage for the five (5) I-140s. Schedule L of the federal tax return reflected a deficit (\$57,833) of net current assets, the difference of current assets minus current liabilities. RFE 2 suggested that the petitioner designate which two (2) of the subject I-140s it preferred for approval.

Counsel contended in response to RFE 1 on May 14, 2002 (May 14 response) that the petitioner intended to pay the beneficiary (233) after he obtained lawful permanent residence. Counsel reasoned that the process officially culminated then and that, before such time, the regulations did not require Forms W-2 or other evidence of the intent or ability to pay the proffered wage.

Counsel offered, in response to RFE 2, unaudited financial statements of the petitioner as of December 31, 2002 and requested the approval of the petitions. The director observed that unaudited financial statements were of limited evidentiary value and did not relate to the priority date.

The director considered the federal tax returns, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, counsel submits a brief, discusses financial data for 2002 and the future, and states:

If, at a minimum, three (3) petitions are not approved, the [petitioner] will not be able to meet their current contracts and the business will suffer... and begin to decline...

Contrary to counsel's assertions, here and in the May 14 response, the petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142,

145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel's statement infers that business necessity, independently of the ability to pay the proffered wage, warrants the approval of a minimum of three (3) petitions. No authority supports this proposition.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's brief on appeal, further, avers the approval of the I-140 for 891, and the director's decision, dated February 20, 2003, acknowledges an approval for 217. No more funds are available, from the taxable income of \$117,747 or from the deficit of net current assets (\$57,833), to pay the proffered wage for 233, this beneficiary, at the priority date.

Counsel's brief asserts the obligation of the Bureau [formerly the Service or INS] to consider the petitioner's gross profit, total current assets, and future, anticipated business.

To the contrary, in determining the petitioner's ability to pay the proffered wage, the Bureau will 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 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The petitioner did not respond to RFE 2, either to request the reopening of 891 or 217, or to designate, instead, another I-140 to which to apply taxable income for the payment of the proffered wage for two (2) positions. The belated proposal to designate three (3), on appeal, will not be considered.

The director, in RFE 2, requested the petitioner's designation of preferred petitions in accord with the evidence and 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The reopening of 891 or 217, therefore, is moot and beyond the scope of this decision. Moreover, the reopening of these approved petitions, and the consequent substitution of another beneficiary, is constrained by provisions of 8 C.F.R. § 204.5(n):

(3) *Validity of approved petitions.* Unless revoked under section 203(e) [8 U.S.C. 1153(e)] or 205 of the Act [8 U.S.C.1155], an employment-based petition is valid indefinitely.

After a review of the federal tax returns, unaudited financial statements, and the briefs, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.