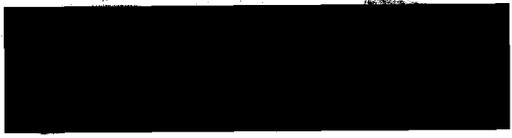


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



File: EAC 00 012 51681

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 § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN 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 (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.

Selen E. Crawford for
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) summarily dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen (motion). The motion will be granted, and the previous decisions of the director and the AAO will be affirmed. The petition will be denied.

The petitioner is a woodworking firm. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

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). Here, the petition's priority date is February 12, 1996. The beneficiary's salary as stated on the labor certification is \$20.22 per hour or \$42,057.60 per year.

The director denied the visa petition because the petitioner had not established that it had the ability to pay the offered wage at the priority date of the visa petition. The AAO summarily

dismissed the appeal, noting that the appeal had no specific allegation of error and, also, that the record contained no submissions from the petitioner after the director's decision.

Counsel filed this motion and stated, "The basis for the motion is that additional and sufficient evidence was submitted to demonstrate the petitioner's ability to pay the proffered wage."

Counsel insists that he made submissions on October 16, 2000 in response to the request for evidence in the Notice of Action (herein Form I-797). The record for this motion includes Form I-797 and attachments, and their receipt is recorded before the decisions of the director and the AAO.

An accountant's opinion dated April 18, 2001 (CPA opinion) appears with counsel's affirmation for the motion, received July 18, 2002. The CPA opinion constitutes new evidence.

The CPA opinion for the motion elaborates on the response to the Form I-797:

Although the tax returns of [the petitioner] reflect a loss, this loss is a result of two factors: 1) depreciation and amortization; and 2) interest expense on the company's refinancing of the property. It should be noted that the company's assets have appreciated significantly in value, which created the opportunity for a large refinancing. This creates large amounts of available cash and higher interest expense.

I have reviewed the tax returns for the years 1996 to 2000, and each year can support the payment of additional wages to the applicant.

The CPA opinion in support of this motion is not persuasive. The petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for 1997, 1998, and 1999 detail cash in the balance sheet, respectively, of \$40,854, \$24,012, and \$10,328, each less than the proffered wage. None shows any interest expense, said to be significant.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's transmittal with the response to the Form I-797 advised, in substance:

With over two millions [of dollars], surely the sponsor has no difficulties in meeting financial responsibilities concerning payment of salaries to employees and the business operational expenses. This is an indicative that the sponsor's business is financially healthy and stable, hence able to guarantee long term employment to the alien....

In short, the company has firmly established ability to meet financial obligations. Hence there are no financial hardships of any nature, which prevents meeting financial responsibilities.

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 motion objects that:

5. ...The [Bureau, formerly the Service or the INS] relied only on the 1996 taxes to conclude that the petitioner did not have sufficient income to pay the proffered wages....

6. However, the Bureau did not consider that the tax return showed that the petitioner had sufficient assets and cash flow to meet its obligations to the beneficiary. The 1996 return shows total assets of \$3,171,796. Such assets were available to the petitioner during that year and would have been used to pay the beneficiary's salary if it had become necessary. Additionally, the petitioner submitted several IRS Forms W-2 for the years 1996 through 2000 showing that the company had actually met all its obligations to all its employees without any problems, and without ever being in danger of faltering financially.

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 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. 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 (7th 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.

In response to the Form I-797, counsel offered the petitioner's federal tax returns, Forms 1120S for 1996 through 1999. Indeed, counsel admixed another corporation's Forms 1120, U.S. Corporation Income Tax Return, for 1997 through 1999. Counsel did not distinguish the interloper's federal tax returns or Forms W-2, though composed under a different employer identification number.

The petitioner's Forms 1120S relate through the employer identification number [REDACTED]. For 1996 to 1999, all show either no ordinary income or a (loss). The petitioner's several federal tax returns claimed no salaries and wages paid, and all referred to a statement, not readily found, about compensation of officers. The visa petition (Form I-140), in contradiction, claimed two (2) employees at the date of its filing, October 18, 1999. No tax return is signed, dated, or authenticated in any way.

Forms W-2 claimed that the petitioner paid wages, as follows: in 1999 of \$6,304.14 to the beneficiary and \$78,247.44 in total and in 1997 of \$330 to the beneficiary and \$58,030.32 in total. This showing contradicts the tax returns under the petitioner's employer identification number for those years. They claimed no salaries or wages paid.

Matter of Ho, 19 I&N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel submits, and the CPA opinion comments without distinction on, tax returns of different tax filers. The corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, assets of its shareholders or of

other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel particularly emphasizes that sufficient assets were available in 1996, at the priority date. The petitioner must show, however, 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 CFR § 204.5(g)(2). 8 CFR § 103.2(b)(1) and (12).

In passing, it must be noted that the decision of the AAO, sent to the petitioner at its address of record, was returned as undeliverable. Notice will be given to the petitioner and counsel at their respective addresses of record.

After a review of the tax returns, the response to the Form I-797, and the CPA opinion, 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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.