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



File: EAC 02 036 50297 Office: VERMONT SERVICE CENTER

Date: **DEC 01 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:



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 Citizenship and Immigration Services (CIS) 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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a refrigeration systems firm. It seeks to employ the beneficiary permanently in the United States as a refrigeration mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's financial information.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The sole issue on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 23, 2001. The beneficiary's salary as stated on the approved labor certification is \$23.66 per hour or \$49,212.80 annually.

The petitioner initially submitted insufficient information to establish its continuing ability to pay the beneficiary's proposed salary.

On December 19, 2001, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's salary of \$49,212.80 from the visa priority date to the present. The director requested information about the nature of the petitioner's business including its net and gross annual income and a copy of its 2000 federal income tax return.

The petitioner responded by submitting a copy of a profit and loss statement presenting financial data for the period from January through December 2000. According to this statement, the petitioner showed a net income of \$53,100.68. As noted by the director in his denial, this internally generated statement was not audited or reviewed and as such, consists of the sole representations of the petitioner's management. The petitioner did not submit any other information relevant to its ability to pay the proffered salary.

On August 13, 2002, the director denied the petition, concluding that the evidence did not sufficiently establish the petitioner's continued financial ability to pay the beneficiary's salary of \$49,212.80 pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2). We concur.

On appeal, counsel argues that the petitioner needs additional employees and that the petitioner had gross revenues of \$271,829 in 2001. The petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for the tax year of 2001 was submitted with the appeal to support this assertion. This tax return indicates that it represents a period from August 1, 2001 to December 31, 2001. The petitioner did not submit any evidence representing the period from January 1, 2001 until July 31, 2001, which covers the priority date.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

It is noted that the petitioner's 2001 gross receipts of \$271,829 as reflected on its corporate tax return is only a partial picture of the information presented. Expenses incurred in order to generate such income must also be considered. After deductions and other expenses, this tax return indicates that the petitioner declared an ordinary income of \$14,205, an insufficient amount to cover the beneficiary's salary of \$49,212.80. Schedule L of this tax return shows that the petitioner had \$21,702 in current assets and \$1,299 in current liabilities. The difference between these figures represents the petitioner's net current assets of \$20,403, which is also not sufficient to cover the beneficiary's offered salary.

Counsel offers subsequent submissions on appeal. She submits the petitioner's owner's individual Form 1040 tax return for the calendar year ending December 31, 2000. She asserts that the petitioner's income was reported as part of the owner's Schedule C on his personal Form 1040 during this period. The sole proprietor declared an adjusted gross income of \$121,810 on this tax return, an amount exceeding the proffered salary. However, as noted above, the priority date of the visa petition is January 23, 2001. The petitioner subsequently reorganized as a corporation on August 1, 2001 as set forth on its 2001 tax return, although it is noted that the petitioner's name included an "Inc." on its application for labor certification. Based on the financial information submitted, it cannot be concluded that the petitioner has demonstrated a continuing ability to pay the offered salary.

Counsel also argues that the beneficiary will contribute to an increase in business for the petitioner. It is noted that the record contains no evidence of this projected increase in profits or any information from which this asserted increase in business might be estimated. The prospective increase in profits hypothesized by counsel is not supported by evidence in the record and cannot be considered in this case.

Finally counsel contends that because the immigrant petition of the beneficiary's cousin was approved for the same position at the same wage, then the instant petition also merits approval. This argument is not persuasive in this case. Multiple petitions are part of CIS consideration because the petitioner must demonstrate an ability to pay all beneficiaries' salaries. If another petition has been approved for the same salary, then this represents an additional \$49,212.80 expense and further affects the petitioner's ability to pay subsequent beneficiaries' salaries.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

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.