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

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



File: EAC 02 070 50339 Office: VERMONT SERVICE CENTER

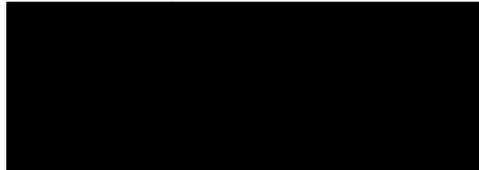
Date: **DEC 08 2003**

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:



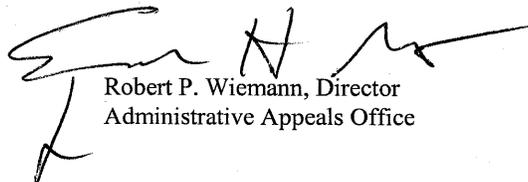
INSTRUCTIONS:

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 preference 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 is a manicurist shop. It seeks to employ the beneficiary permanently in the United States as a 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, counsel submits a statement and additional evidence.

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 April 11, 2001. The proffered wage as stated on the Form ETA 750 is \$29 per hour for 40 hours per week, which equals \$60,320 per year.

With the petition counsel submitted a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the second quarter of 2001. That return shows that the petitioner paid \$33,850 in wages during that quarter. Counsel submitted no

additional evidence of the petitioner's ability to pay the proffered wage with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 19, 2002, requested additional evidence pertinent to that ability. In addition to evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Service Center specifically requested the petitioner's 2000 tax return. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2000, it provide a copy of the Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary during that year.

In response, counsel submitted the petitioner's 2000 and 2001 Form W-3 transmittal of wage and tax statements. Those W-3 forms show that the petitioner paid \$63,112 and \$107,780 in wages during those years, respectively. On the request for evidence, which counsel returned with his response, an unidentified person typed: "White Star Nail, Inc. did not issue a Form W-2 Wage and Tax Statement for the Year 2000."

Counsel also submitted copies of the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 2000 return pertains to the petitioner's fiscal year from April 1, 2000 to March 31, 2001. The return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$13,735 during that year. The corresponding Schedule L shows that at the end of the year the petitioner's current liabilities exceeded its current assets.

The 2001 return, covering the fiscal year from April 1, 2001 to March 31, 2002, shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$31,012 during that year. The corresponding Schedule L shows that at the end of the year the petitioner's current liabilities exceeded its current assets.

Because the priority date of the petition is April 11, 2001, the petitioner's 2000 tax return has no direct relevance to the petitioner's ability to pay the proffered wage. The return has some peripheral relevance, however, which will be described below.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on September 5, 2002, denied the petition.

On appeal, counsel argued that the growth from 2000 to 2001 in the amount of wages the petitioner paid clearly demonstrates that

the petitioner is expanding and has, therefore, the ability to pay the proffered wage.

Counsel notes that the petitioner is located in Newark, New Jersey, near Penn Station, a stop on a commuter rail station which serves Manhattan, the terminal point of which was under the World Trade Center. Counsel states that had the September 11, 2001 terrorist attacks not occurred, the petitioner's business would have been better.

Counsel also states that the annual amount of the proffered wage was miscalculated, as the proffered wage contemplates a 7-hour day.

Subsequently, counsel submits a letter, dated October 7, 2002, from the petitioner's accountant. The accountant states that, based on the petitioner's 2001 tax return, he believes the petitioner had the ability, during that year, to pay the proffered wage. The accountant bases his opinion on the 35-hour workweek postulated by counsel on appeal. The accountant also stated that the petitioner's business declined after the September 11, 2001 terrorist attacks. Finally, the accountant stated that, although the petitioner had taken a deduction for depreciation of capital assets during 2001, the amount deducted was actually available to pay the proffered wage. Counsel notes that the petitioner's assets at the end of 2001, as stated on the petitioner's Schedule L, included cash of \$16,458, and that this amount, too, was available to pay the proffered wage.

Counsel's argument that the petitioner has demonstrated its ability to pay the proffered wage by paying more wages during 2001 than during 2000 is unconvincing. Showing that the petitioner's wage expense is growing is insufficient to demonstrate the ability to pay the proffered wage. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

Counsel and the accountant both baldly state that the petitioner's business would have been better but for the events of September 11, 2001. Both counsel and the accountant cite the petitioner's proximity to Newark's Penn Station and the

* The petitioner might demonstrate this, for instance, by showing that the beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

petitioner's asserted dependence on commuter traffic, which declined after the attacks.

Reference to a map shows that the petitioner's business is approximately six blocks from Penn Station. Given that distance, that the petitioner's business relies heavily on commuters stopping by for a manicure either before or after their commute to the city by rail seems unlikely. In any event, counsel was obliged to provide evidence of that dependence, rather than merely allege it.

The assertion of counsel and the assertion of the accountant are not evidence. The record contains no evidence to support the assertion that the petitioner's business relies on commuter traffic and no evidence that the petitioner's business was adversely affected by the September 11, 2001 terrorist attacks.

In fact, the petitioner's Fiscal 2000 tax return, while not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date, seems to suggest that the petitioner would have been unable to pay the proffered wage even before the September 11, 2001 terrorist attacks. The petitioner ended fiscal 2000 with negative net current assets. The petitioner's taxable income before net operating loss deduction and special deductions of \$13,735 during that year were less than the proffered wage and less, in fact, than the same line item for fiscal 2001.

The assertion of counsel, echoed by the accountant, that the proffered wage is based on a 35-hour week is directly contradicted by the Form ETA 750 labor certification in this case. Section 10A of the form states that the beneficiary will work 40 hours per week. Section 12A states that the beneficiary will be paid \$29 per hour. Neither the petitioner, nor counsel, nor the accountant, nor this office is able to vary the terms of an approved labor certification in order to render the petition approvable. The proffered wage is \$60,320 per year.

The accountant is correct that the petitioner's assets at the end of 2001 include cash of \$16,458. In fact, that amount was the total of the petitioner's current assets. Those current assets were dwarfed, however, by current liabilities of \$25,788. The petitioner, therefore, had negative net current assets at the end of 2001. The petitioner's assets contribute nothing to the ability to pay the proffered wage.

Finally, the accountant argues that the amount the petitioner claimed as depreciation of capital assets was available to pay the proffered wage. A depreciation deduction, of course, does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value

of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, it is not available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054. The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to his present purpose, nor treat it as a fund available to pay the proffered wage.

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 CIS 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 INS, now CIS, 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 INS should have considered income before expenses were paid rather than net income.

During 2001, the petitioner had taxable income before net operating loss deduction and special deductions of \$31,012, and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2001. 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.