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U.S. Department of Homeland Security

Citizenship and Immigration Services

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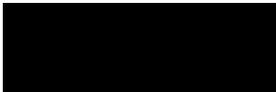
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 089 51020 Office: CALIFORNIA 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: SELF-REPRESENTED

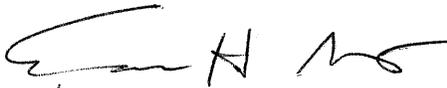
INSTRUCTIONS:

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a structural steel worker. 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, the petitioner 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 22, 1999. The proffered wage as stated on the Form ETA 750 is \$9.92 per hour, which equals \$20,633.60 per year.

With the petition the petitioner submitted no evidence in support of its ability to pay the proffered wage. Therefore, on July 3, 2002, the California Service Center requested, consistent with 8

C.F.R. § 204.5(g)(2), that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements showing that ability. The petitioner was informed that it must establish the continuing ability to pay the proffered wage beginning on the priority date. The petitioner was instructed to provide that evidence for 1999, 2000, and 2001.

The petitioner was also instructed to provide copies of its quarterly wage reports for the preceding four quarters.

In response, counsel submitted a 1997 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$16,373.48 during that year. This office notes that, as the priority date of the petition is April 22, 1999, the amount the petitioner paid to the beneficiary during 1997 is of no direct relevance to the petitioner's ability to pay the proffered wage after the priority date.

Counsel also provided quarterly wage reports for the second, third, and fourth quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner did not employ the beneficiary during those quarters.

The petitioner also submitted the 1999, 2000, and 2001 Form 1040 joint personal income tax returns of the petitioner's owner and the owner's spouse. Those returns show that the petitioner's owner and the owner's spouse had two dependents during each of those years. Those returns include the Schedule C, Profit or Loss from Business (Sole Proprietorship), for each of those years.

The 1999 Schedule C shows that the petitioner returned a net profit of \$6,081 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$16,310 during that year.

The 2000 Schedule C shows that the petitioner returned a net profit of \$5,224 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$17,286 during that year.

The 2001 Schedule C shows that the petitioner returned a net profit of \$20,545 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$34,406 during that year.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on August 31, 2002, denied the petition.

On appeal, the petitioner states that it has completed one contract, has another, and has additional proposals pending. In

support of those assertions, the petitioner provided copies of a purchase order and a contract. The purchase order, dated May 25, 2001, is for work on a golf course and is in the amount of \$381,000. The contract, ratified August 14, 2002, is for the petitioner to provide labor for casting manholes and installing curbstone. That contract is in the amount of \$443,500.

The amounts of those contracts exceed the petitioner's gross receipts during the three years for which income tax returns were provided. Whether the projected increase in gross receipts will be accompanied by an increase in net profits, however, cannot be determined by reference to that purchase order and contract. In any event, a petitioner is ordinarily required to demonstrate the ability to pay the proffered wage beginning on the priority date and during each ensuing year.

In determining the petitioner's ability to pay the proffered wage, the Service will first 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 Service 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 the Service 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is April 22, 1999. The proffered wage is \$20,633.60. During 1999, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due had the petitioner employed the beneficiary beginning on the priority date.

On the priority date, 111 days of that 365-day year had elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 254 days of 1999. The proffered wage multiplied by $254/365^{\text{th}}$ equals \$14,358.72, which is the amount the petitioner must show the ability to pay during

1999.

Because the petitioner is a sole proprietorship, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own income and assets. The income and assets of the petitioner's assets are, therefore, considered in the determination of the petitioner's ability to pay the proffered wage.

During 1999, the petitioner's owner and the owner's wife declared an adjusted gross income of \$16,310, including all of the petitioner's net profit. That amount is insufficient to pay the proffered wage. The petitioner provided no evidence of any other funds available to pay the proffered wage during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 2000, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$17,286, including all of the petitioner's net profit. That amount was also insufficient to pay the proffered wage. The petitioner provided no evidence of any other funds available to pay the proffered wage during 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner and the owner's spouse declared an adjusted gross income of \$34,406, including all of the petitioner's profit. Although that amount exceeds the proffered wage, the ability of the petitioner's owner and the owner's wife to support their family after paying the proffered wage to the beneficiary must also be considered.

If the petitioner's owner had paid the proffered wage out of his adjusted gross income, a difference of \$13,722.80 would have remained. The record contains no evidence pertinent to the fixed expenses of the petitioner's owner. That the petitioner could have supported his family of four on the remaining \$13,722.80 during 2001 seems unlikely. However, this office need not reach that question in view of the petitioner's failure to demonstrate the ability to pay the proffered wage during 1999 and 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

In providing evidence of recent contracts, the petitioner may have intended to imply that its low profits during 1999, 2000, and 2001 were uncharacteristic and unlikely to be repeated.

The petitioner is correct that, if the losses or very low profits are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Here, however, no evidence has been submitted to suggest that the petitioner has ever posted a large profit. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.