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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: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date:

DEC 13 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: [REDACTED]

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 operates gasoline stations. It seeks to employ the beneficiary permanently in the United States as a District Operations 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 brief.

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 wage offered beginning on the priority date, the day 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 request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$44.37 per hour, which equals \$92,289.60 per year.

With the petition counsel submitted the petitioner's 2001 Form 1065 U.S. Return of Partnership Income. That return shows that the petitioner declared a loss of \$574,529 as its ordinary income

from trade or business during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for the second, third, and fourth quarters of 2001 and the first quarter of 2002. Those documents show that the petitioner employed the beneficiary during all four of those quarters. The petitioner paid the beneficiary \$8,765.86, \$7,638.86, and \$9,641.17 during the last three quarters of 2001, respectively, and \$8,952.52 during the first quarter of 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, California Service Center, on January 8, 2003, issued a Notice of Intent to Deny in this matter. The director cited *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985) for the proposition that CIS may rely on the petitioner's income tax returns and *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986) for the proposition that the Service may determine the petitioner's ability to pay the proffered wage based on the petitioner's net income, rather than its gross receipts.

In response, counsel conceded that those New York cases are persuasive authority, but noted that they are not controlling. Counsel observed that the petitioner had gross receipts of \$9,827,390 during 2001. Counsel argued that, based on those gross receipts, the petitioner has the ability to pay the proffered wage. Counsel also cited the petitioner's Form DE-6 Wage Reports as showing that the petitioner is able to pay the proffered wage.

Counsel provided copies of the petitioner's bank statements for October, November, and December of 2002 and argued that the balances of those bank accounts show the ability to pay the proffered wage.

Counsel observed that the federal government incurred a deficit during nearly every year of its recent operation, but still paid its employees. Finally, counsel argued that the petitioner's tax returns are not necessarily a valid indicator of the petitioner's financial condition.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on February 19, 2003, denied the petition.

On appeal, counsel submits the petitioner's unaudited profit and loss statement for 2002. Pursuant to 8 C.F.R. § 204.5(g)(2), only financial statements produced pursuant to an audit are

competent evidence of a petitioner's ability to pay the proffered wage. The contents of those unaudited financial statements will not be considered.

Counsel observes that the petitioner has employed the beneficiary since 1998 and has paid his wages during that time. Counsel again cites the petitioner's gross receipts and bank balances as proof of its ability to pay the proffered wage.

This office is convinced by the reasoning of *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986). Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. 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 ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS 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 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*, at 1084, the court held the INS, now CIS, 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. 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.

Counsel's argument pertinent to the federal deficit is inapposite. The petitioner is a private employer applying to hire a foreign worker pursuant to a program that requires it to demonstrate its ability to pay the proffered wage using annual reports, federal tax returns, or audited financial statements. The federal government is not. This argument will be addressed no further.

Counsel's argument that the petitioner's bank balances show the ability to pay the proffered wage is unconvincing. 8 C.F.R. § 204.5(g)(2) makes clear that bank balances are not one of the three types of documentation that are competent evidence of a petitioner's ability to pay the proffered wage. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return.

Counsel correctly observed that the petitioner currently employs the beneficiary, and has been paying him wages. The record contains evidence of the amounts the petitioner paid the beneficiary during the last three quarters of 2001 and the first quarter of 2002. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only the balance.

The record shows that the petitioner paid the beneficiary \$8,765.86, \$7,638.86, and \$9,641.17 during the last three quarters of 2001 for a total of \$26,045.89. Counsel has stated that the petitioner employed the beneficiary previously, but the record contains no evidence of that assertion.

The proffered wage is \$92,289.60. The evidence demonstrates that the petitioner paid the beneficiary \$26,045.89 during 2001, leaving a balance of \$66,243.71, which the petitioner must show, using copies of annual reports, federal tax returns, or audited financial statements, that it had the ability to pay that balance during 2001.

The petitioner submitted no copies of annual reports and no audited financial statements, and has thereby elected to rely on its tax returns. The petitioner's 2001 tax return shows that during that year it suffered a loss and had negative net current assets. The petitioner has not shown the ability to pay the balance of the proffered wage during 2001 out of either its income or its assets.

Counsel argues that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

The petitioner failed to submit sufficient evidence that the petitioner had 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.