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

B6

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



File: WAC 02 073 52113 Office: California Service Center

Date:

DEC 13 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a building maintenance and repair company. It seeks to employ the beneficiary permanently in the United States as a construction handyman. 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 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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on January 13, 1998. The proffered wage as stated on the labor certification is \$17.18 per hour which equals \$35,734.40 annually.

With the petition, counsel submitted a copy of page one of the petitioner's 2000 Form 1120 U.S. corporation income tax returns. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage. Because the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage, the California Service Center, on March 12, 2002, requested additional evidence pertinent to that ability.

The Service Center requested that the petitioner submit evidence of its continuing ability to pay the proffered wage beginning on the priority date and stipulated, consistent with 8 C.F.R. § 204.5(g)(2), that the evidence should be in the form of copies of annual reports, complete federal income tax returns, or audited financial statements.

The Service Center also requested that the petitioner provide copies of its Form DE-6 quarterly wage report for the previous four quarters.

In response, counsel submitted copies of 1998, 1999, 2000, and 2001 Form W-2 wage and tax statements showing amounts the petitioner paid to the beneficiary. Those statements show that the petitioner paid the beneficiary \$26,433.08, \$24,549.49, \$26,411.40, and \$16,152.57 during those years, respectively.

Counsel did not provide the requested copies of its California Form DE-6 wage reports, but provided copies of the petitioner's Federal Form 941 quarterly Federal tax returns for all four quarters of 2001 and copies of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. corporation income tax return.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$0. At the end of that year, the petitioner's current liabilities were greater than its current assets.

The 1999 tax return shows that the petitioner declared a loss of \$6,072 as its taxable income before net operating loss deduction and special deductions. At the end of that year, the petitioner's current liabilities were greater than its current assets.

The 2000 tax return shows that the petitioner declared a loss of \$1,401 as its taxable income before net operating loss deduction and special deductions. At the end of that year, the petitioner's current liabilities were greater than its current assets.

Counsel also submitted a letter, dated May 22, 2002. In that letter, the petitioner's owner noted the gross receipts during

1998, 1999, and 2000, and stated that although the return had not been filed, the petitioner's gross receipts for 2001 were comparable. The petitioner argued that those gross receipts indicate the petitioner's ability to pay the proffered wage. The petitioner's owner further noted that the petitioner had reported losses, but stated that those reported losses were the result of advantageous tax laws and had no effect on the petitioner's ability to pay the proffered wage.

On August 1, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's taxable income during 1998, 1999, and 2000 was insufficient to pay the proffered wage.

On appeal, counsel argued that the petitioner might have reduced its compensation of officers as necessary to pay the proffered wage. Counsel also noted that the petitioner employed the beneficiary during 1998, 1999, and 2000, and that the wages actually paid to the beneficiary during those years, though less than the proffered wage, evince the ability to pay the proffered wage in part. Counsel noted that the petitioner employed contract labor during 1998, 1999, and 2000, and argued that the cost of that contract labor should also be included in the calculation of the petitioner's ability to pay the proffered wage. Finally, counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F2d 898 (C.A.D.C. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Counsel's reliance on *Masonry Masters, Inc. v. Thornburgh*, *Supra.*, is misplaced. A portion of the decision urges that the ability of the beneficiary in that case to generate income for the petitioner. That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during 1998, 1999, and 2000, the petitioner would have enjoyed greater profits. In fact, the petitioner employed the beneficiary during all three of those years. In light of that fact, counsel's argument falls flat.

Counsel's argument that the cost of contract labor should be considered in the calculation of the petitioner's ability to pay

the proffered wage is similarly misguided. For that argument to succeed, the petitioner must show that, had it been able to hire the beneficiary, the beneficiary would have replaced some of the contract laborers, and the amount paid to the workers who would have been replaced would then have been available to pay the proffered wage. Counsel is unable to argue that those savings would have occurred if the petitioner had been able to hire the beneficiary during 1998, 1999, and 2000 because, as was noted above, the petitioner actually employed the beneficiary during all three of those years.

Counsel correctly notes that the wages actually paid to the beneficiary during 1998, 1999, and 2000 should be taken as an index of the petitioner's ability to pay, in part, the proffered wage. The amounts paid to the beneficiary during those years will be included in the calculation of the ability of the petitioner to pay the proffered wage.

The amount the petitioner paid as compensation of officers, however, is not available to pay the proffered wage. To include it in the calculation presuppose that the petitioner's officers were willing and able to forego their compensation, or some specified part of it, and that the petitioner was not contractually obliged to compensate them. None of those facts have been satisfactorily demonstrated.

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, compensation of officers, 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 CIS, then the Immigration and Naturalization Service, 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 CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng*

Chang v. Thornburgh, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

Counsel argues that the petitioner's taxable income does not accurately reflect it's ability to pay the proffered wage. The petitioner was obliged to demonstrate the petitioner's ability to pay the proffered wage using copies of annual reports, audited financial statements, or federal tax returns. The petitioner was not obliged to rely on its tax returns, but chose to do so. The petitioner might, instead, have submitted copies of annual reports or audited financial statements, but chose not to do so. Having made this election, the petitioner shall not now be heard to argue that its tax returns are a poor indicator of the petitioner's ability to pay the proffered wage.

During 1998, 1999, and 2000, the petitioner had no taxable income and no net current assets. The petitioner paid the beneficiary \$26,433.08, \$24,549.49, and \$26,411.40 during those years, which demonstrates that it was able to pay those amounts, but not that it was able to pay the balance of the \$35,734.40 proffered wage.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1998, 1999, or 2000. Therefore, the petitioner has not established that it has 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.