

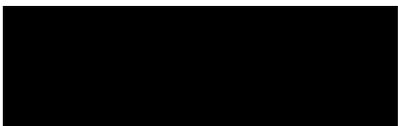
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U.S. Department of Homeland Security
Citizenship and Immigration Services

B6

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



File: WAC 02 105 53329 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:



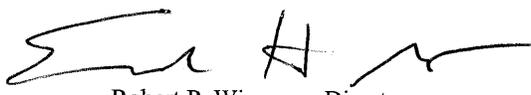
INSTRUCTIONS:

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 knitwear manufacturer. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 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 January 9, 1998. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour, which equals \$30,160 per year.

With the petition counsel submitted the first page of the petitioner's nominal 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports income based on a fiscal year beginning on

February 1.

The nominal 1998 tax return covers the fiscal year from February 1, 1998 to January 31, 1999. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$19,864 during that fiscal year.

The 1999 return covers from February 1, 1999 to January 31, 2000 and shows that the petitioner declared a loss of \$25,917 as its taxable income before net operating loss deduction and special deductions during that fiscal year.

The 2000 return, covering from February 1, 2000 to January 31, 2001, shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$12,652 during that fiscal year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 16, 2002, requested additional evidence pertinent to that ability.

The Service Center's request reminded the petitioner that, pursuant to 8 C.F.R. § 204.5(g)(2), it is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that evidence of that ability should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center specifically requested the petitioner's 2001 tax return and requested that any tax returns submitted be complete with all accompanying schedules and tables. In addition, the Service Center requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters. Finally, the Service Center requested a payroll summary, Form W-2 Wage and Tax Statements, and Form W-3 Transmittals for 1998, 1999, 2000, and 2001.

In response, counsel submitted a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return showing that the petitioner applied for an extension of time within which to file its fiscal year 2001 tax return.

Counsel submitted additional copies of the first pages of its 1998, 1999, and 2000 tax returns, rather than the complete copies requested. Counsel submitted California Form DE-6 Quarterly Wage Reports for all four quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner paid the beneficiary \$6,945.75 during the second quarter of 2001, \$6,632.50 during the third quarter of 2001, \$7,267.50 during the

fourth quarter of 2001, and \$6,310.50 during the first quarter of 2002.

In a letter dated July 8, 2002, counsel stated that he was providing copies of the petitioner's 1998, 1999, and 2000 federal tax returns, notwithstanding that he provided only the first pages of those returns. Counsel also stated that he was providing the petitioner's payroll summary, but did not provide it. Counsel did not provide the requested W-2 forms, or W-3 forms and did not explain their absence.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 2, 2002, denied the petition. This office notes that the director misstated the amount of the proffered wage in that decision.

On appeal, counsel stresses the petitioner's gross receipts. Counsel stated, incorrectly, that the petitioner generates in excess of \$600,000 in net income annually. Counsel argued that the determination of the ability to pay the proffered wage in the decision of denial was defective, in that it considered the petitioner's income net of wages paid to the beneficiary and other employees.

With the appeal, counsel submitted a letter, dated August 20, 2002, from the petitioner's accountant. The letter recites figures from the petitioner's tax returns, stressing the amount of the petitioner's gross receipts, gross profit, and salary and wage expense. The accountant also observes that the petitioner's taxable income before net operating loss deduction and special deductions is net of wages.

Counsel again provided copies of the first pages of the petitioner's 1998, 1999, and 2000 tax returns. Counsel did not provide the complete returns or explain his failure to do so.

Counsel provided photocopies of 2000 and 2001 W-2 forms showing that the petitioner paid the beneficiary \$27,586.75 and \$26,435.75 during those years, respectively. Counsel also provided a pay statement for the pay period from July 16, 2002 to July 31, 2002. That statement shows that the petitioner paid the beneficiary \$1,066.89 for work during that period. That statement further demonstrates that the petitioner was paying the beneficiary at the rate of \$14 per hour. The year-to-date gross pay shown on that statement indicates that as of July 31, 2002 the beneficiary had earned \$16,103.50 from the petitioner.

On appeal, counsel implies that the petitioner's gross receipts are an appropriate indicator of the petitioner's ability to pay the proffered wage. He also urges, possibly in the alternative, that the petitioner's salary and wage expense shows its ability

to pay the proffered wage. Those arguments are unconvincing.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of 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 taxable income before net operating loss deduction and special deductions.

Counsel is correct that the wages paid to the beneficiary are an appropriate consideration. If the petitioner is shown to have paid an amount equal to the proffered wage during a given year, it need not show the ability to pay the proffered wage a second time. That the petitioner paid the beneficiary an amount equal to the proffered wage during a given year indisputably shows the petitioner's ability to pay the proffered wage during that year. Similarly, if the petitioner paid the beneficiary an amount equal to half of the proffered wage during a given year, the petitioner is only obliged to show the ability to pay the other half during that year.

Generally, 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.

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

The priority date is January 9, 1998. The proffered wage is \$30,160 per year. During 1998, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, eight days of that 365-day year had elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 357 days. The proffered wage multiplied by $357/365^{\text{th}}$ equals \$29,498.96, which is the amount the petitioner must show the ability to pay during 1998.

The petitioner's reporting taxes based on a fiscal year rather than based on a calendar year further complicates the determination of the petitioner's ability to pay the proffered wage. The petitioner's 1998 fiscal year, for instance, runs from February 1, 1998 to January 31, 1999. Of the income reported for each year, roughly 1/12 was presumably earned during the following calendar year. Losses in a given year were presumably similarly apportioned.

The petitioner's fiscal year 1998 tax return states that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$19,864 during that year. Approximately 11/12th of that amount, or 18,208.67, will be attributed to the 1998 calendar year, and the remaining \$1,655.33 will be attributed to the 1999 calendar year.

Counsel provided no evidence that it paid any wages to the beneficiary during 1998, although, on April 16, 2002, the director requested a payroll summary, W-2 forms and W-3 forms for that year. As such, no wages paid to the beneficiary can be included in the determination of the petitioner's ability to pay the proffered wage.

Although the Service Center requested complete copies of tax returns including all schedules and tables, counsel did not provide the petitioner's Schedule L for 1998 or for any other year. Therefore, the petitioner's net current assets during various years cannot be calculated and cannot be included in the determination of the petitioner's ability to pay the proffered wage.

The petitioner has demonstrated that it had \$18,208.67 with which to pay the proffered wage during 1998. That amount is less than the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During fiscal year 1999 and each ensuing year, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 1999, the petitioner declared a loss of \$25,917 as its taxable income before net operating loss deduction and special deductions. Of that amount, approximately (\$23,757.25)

is attributable to the 1999 calendar year and (\$2,159.75) to the 2000 calendar year. The 1999 amount, (\$23,757.25), added to the amount carried forward from FY 1998, \$1,655.33, equals (\$22,101.92), which is the amount the petitioner has demonstrated it had available to pay the proffered wage during the 1999 calendar year. The petitioner would not have been able to contribute anything toward paying the proffered wage out of that negative income. The petitioner submitted no evidence that it paid the beneficiary any wages during 1999, although, on April 16, 2002, the director requested a payroll summary, Form W-2's and Form W-3's for that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During fiscal year 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$12,652. Of that amount, \$11,597.67 is attributed to calendar year 2000 and the remaining \$1,054.33 to 2001. The 2000 amount, added to the amount carried over from fiscal year 1999, (\$2,159.75), equals \$9,437.92.

The petitioner submitted a W-2 form showing that it paid the beneficiary \$27,586.75 during 2000. That amount, added to the \$9,437.92 from the computation above, indicates that the petitioner has shown the ability to pay a total of \$37,024.67 during that year. That amount is greater than the proffered wage. The petitioner has demonstrated that it was able to pay the proffered wage during 2000.

The petitioner did not provide any part of its 2001 tax return. In response to a request for that return on April 16, 2002, the petitioner provided a copy of a request for an extension of time during which to file that return. The petitioner's deadline for filing was extended until October 15, 2002. The petitioner's appeal was filed on August 28, 2002, prior to that deadline. This decision will not be based, even in part, on the failure to provide that return or to demonstrate the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998 and 1999. 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.