

**PUBLIC COPY**

**Identifying data deleted to  
prevent clearly unwarranted  
disclosure of personal privacy**

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

[REDACTED]

File: WAC 02 059 56619 Office: CALIFORNIA SERVICE CENTER

Date:

DEC 13 2003

IN RE: Petitioner:  
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 is an art gallery and interior designer. It seeks to employ the beneficiary permanently in the United States as a mural artist. 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 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 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 November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$21.99 per hour, which equals \$45,739.20 per year.

With the petition counsel submitted unsigned copies of the petitioner's 1997, 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns including Schedule C, Profit or Loss from Business (Sole Proprietorship).

The 1997 Schedule C shows that the petitioner returned a net profit of \$65,305 during that year. The petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$55,481.

The 1998 Schedule C shows that the petitioner returned a net profit of \$20,823 during that year. The petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$18,958.

The 1999 Schedule C shows that the petitioner returned a net profit of \$24,981 during that year. The petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$43,047.

The 2000 Schedule C shows that the petitioner returned a net profit of \$28,662 during that year. The petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$26,985.

On May 15, 2002, the California Service Center requested additional evidence. The Service Center noted that the tax returns submitted were unsigned and incomplete and requested complete, signed copies. The Service Center noted that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and requested additional evidence pertinent to that ability. The Service Center noted that, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate that ability with copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also requested that the petitioner's owner submit his personal budget and evidence of any additional personal assets that might be used to pay the proffered wage.

In response, counsel submitted the requested budget and the requested signed, complete copies of the petitioner's owner's income tax returns. With those returns, counsel also submitted a copy of two pages of the petitioner's owner's 2001 tax return. Those pages show that the petitioner suffered a loss of \$15,351 during that year, and that the petitioner's owner declared a loss of \$16,292, including the petitioner's losses, as his adjusted gross income during that year.

In addition, counsel submitted a settlement sheet showing that the petitioner's owner and the Mark Garrett Living Trust bought real property on May 9, 2001 for \$301,000, secured by a first mortgage of \$210,700. In a cover letter dated August 5, 2002, counsel stated that the petitioner's owner, Mark R. Garrett, is the trustee of that trust. Counsel provided no evidence of

that assertion or of the terms of the trust and did not name the *cestui*, or beneficiary, of that trust. Further still, counsel submitted a monthly investment account statement of the Mark Garrett Living Trust for April 2002. That statement showed that the account balance at the beginning of the month was \$92,919.82 and that the account balance at the end of that month was \$103,205.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 30, 2002, denied the petition.

On appeal, the petitioner argues that the petitioner's adjusted gross income is the end result of a tax computation, and not a valid indicator of the petitioner's ability to pay the proffered wage. The petitioner urges that its Schedule C, Line 5, Gross profit (Line 1 Gross receipts or sales minus Line 4 Cost of goods sold) is the appropriate indicator of the petitioner's ability to pay the proffered wage.

In addition, the petitioner argued that the petitioner's owner's assets also contribute to the ability to pay the proffered wage. The petitioner stated that the petitioner's owner's investment account maintains a value of approximately \$100,000. The petitioner further referred to the closing statement described above, asserting that the petitioner's owner purchased a property worth \$300,000 of which the petitioner's owner paid approximately one-third.

Finally, in explaining the declared loss during 2001, the petitioner noted that the petitioner's owner "decided to take a brief hiatus from work." The petitioner did not state the timing or duration of that sabbatical, other than that it occurred during 2001.

The petitioner is a sole proprietorship. As such, the income and assets of the petitioner's owner may be considered in the determination of the petitioner's ability to pay the proffered wage. However, the petitioner's owner must also demonstrate the ability to support himself on the amount that would remain after paying the proffered wage.

The settlement sheet submitted shows that, on May 9, 2001, the petitioner's owner and the living trust bearing his name bought a property for \$301,000, secured by a first mortgage of \$210,700. If the purchase price is taken as synonymous with market value<sup>1</sup>, then the shared equity of the petitioner's owner and the trust was of \$90,300. The petitioner submitted no evidence; however, that the equity in that property has not subsequently been

<sup>1</sup> Although such an assumption is unwarranted, this office need not reach that issue.

further encumbered. The petitioner submitted no evidence that, under the terms of the trust, the petitioner's owner may dissolve the trust, sell the property, and use the proceeds, nor any part of them, for his own purposes. The equity of the petitioner's owner in that property shall not be considered in the determination of the petitioner's ability to pay the proffered wage.

The petitioner submitted evidence that, during April of 2002, the petitioner's owner had funds in an investment account worth approximately \$100,000. The petitioner implied, on appeal, that the funds in that account have remained at that approximate value at all times since the priority date, but submitted no additional evidence of that assertion other than the April 2002 account statement. Further that account is not held in the petitioner's owner's name, but in the name of a trust. Again, the petitioner has submitted no evidence that he may dissolve the trust and use its funds according to his whim.

The petitioner further argues that the adjusted gross income shown on the petitioner's owner's tax return is not an appropriate indicator of the petitioner's ability to pay the proffered wage. The petitioner argues that, instead, its gross profit should be considered as indicative of that ability.

Showing that the petitioner's gross income exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup>, 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. Those expenses include all expenses necessary to produce the income, rather than only those shown on the Schedule C at Line 4, as the petitioner urges. 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 net profit.

Counsel argues that the adjusted gross income on the petitioner's owner's tax returns does not correctly depict petitioner's ability to pay the proffered wage. The petitioner notes, correctly, that the adjusted gross income is the end result of a calculation intended to determine the petitioner's tax liability, rather than to reveal the petitioner's cash position. Pursuant to 8 C.F.R. § 204.5(g)(2), however, 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

---

<sup>2</sup> 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.

demonstrate its ability to pay the proffered wage, but chose to do so. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but declined to do so. 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.

In determining the petitioner's ability to pay the proffered wage, the Service will first examine the adjusted gross income figure reflected on the petitioner's owner'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 November 14, 1997. The proffered wage is \$45,739.20 per year. During 1997, the petitioner need not show 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, 317 days of that 365-day year had already elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 48 days. The proffered wage times  $48/365^{\text{th}}$  equals \$6,015.02, which is the amount the petitioner must show the ability to pay during 1997.

During 1997, the petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$55,481. The budget submitted indicates that the petitioner's owner requires \$1,279.08 for his monthly living expenses. That amount equals \$15,348.96 per year. The petitioner's 1997 adjusted gross income minus his living expenses equals \$40,132.04, which is sufficient to pay the indicated portion of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage

during 1997.

During 1998 and all ensuing years, the petitioner must show the ability to pay the entire proffered wage. During 1998, the petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$18,958. The petitioner's 1997 adjusted gross income minus his living expenses equals \$3,609.04, which is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$43,047. The petitioner's adjusted gross income minus his living expenses equals \$27,698.04, which is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner's adjusted gross income, including all of the petitioner's profit, was \$26,985. The petitioner's adjusted gross income minus his living expenses equals \$11,636.04, which is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner declared a loss of \$16,292 as his adjusted gross income. That amount, minus the petitioner's living expenses, leaves a deficit of \$31,640.96. The petitioner could not have paid the proffered wage out of that deficit. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated 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, 1999, 2000, or 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.