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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
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Washington, DC 20536



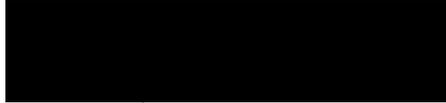
File: WAC 01 283 51367

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 16 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



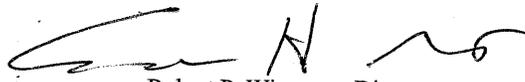
INSTRUCTIONS:

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, initially and on a motion to reopen and reconsider, by the Director, California Service Center, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner remodels residential property. It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 ability to pay the wage offered as of the petition's priority date, which is 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). The petition's priority date in this instance is July 8, 1997. The beneficiary's salary as stated on the labor certification is \$20.30 per hour or \$42,224 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 16, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1997, 1998, and 2000 as well as the last four (4) quarterly wage reports (Form DE-6). Counsel takes exception that the 1999 Form 1120, U.S. Corporation Income Tax Return, was not requested, but it was already in the record in connection with the Immigrant Petition for Alien Worker (I-140). It reported a fiscal year (FY), beginning November 1, 1999. It, alone, reflected the ability to pay the proffered wage, namely, taxable income before net operating loss deduction and special deductions of \$101,772.

Counsel submitted the petitioner's Forms 1120 for FYs beginning November 1, 1997, 1998, and 2000. The FY 1997 federal tax return reported taxable income before net operating loss deduction and special deductions of \$35,419, less than the proffered wage. Schedule L of the FY 1997 tax return reveals current assets of \$103,024 cash and of \$2,000 other, a total of \$105,024. Current liabilities of \$129,060 left a deficit of net current assets (\$24,036), less than the proffered wage.

The federal tax return for FY 1998 reported a loss of taxable income before net operating loss deduction and special deductions of (\$89,143) on line 28, less than the proffered wage. Schedule L for 1998 reflected current assets of \$7,461, minus current liabilities of \$136,187, for a deficit of net current assets, (\$128,726), less than the proffered wage.

For FY 2000, the federal tax return reported \$24,757 for taxable income on line 28, less than the proffered wage. Schedule L showed current assets of \$1,400, minus current liabilities of \$133,431, for a deficit of net current assets (\$132,031), less than the proffered wage.

The director issued a notice of intent to deny the petition (NOID), dated February 22, 2002. It reiterated that the petitioner must show the ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. The NOID discussed data from the FY 1998 return only and requested further evidence to establish the ability to pay until the beneficiary obtains lawful permanent residence.

Counsel responded to the NOID with three (3) letters of the petitioner's certified public accountant (CPA), respectively, for FY 1997, 1998, and 2000. The CPA's FY 1997 letter asserted that depreciation (\$12,003) plus taxable income before net operating

loss deduction and special deductions (\$35,419) totaled \$47,422. The authorities reject this computation, as will be discussed, below. Further, the CPA selected \$103,024 cash from the FY 1997 balance sheet, but did not consider net current assets. In fact, the FY 1997 Schedule L established a deficit of net current assets (\$24,036), less than the proffered wage.

In a Notice of Decision (NOD), dated May 10, 2002, the director set forth CPA FY 1997 in full, but did not analyze its contents. The director did evaluate FY 1998 and FY 2000 federal tax returns, stated the taxable income and net current assets, as summarized above, concluded that the petitioner had not established the ability to pay the proffered wage, and denied the petition.

On June 12, 2002, counsel filed a motion to reopen and reconsider (MTR). It states that taxable income before net operating loss deduction and special deductions, namely, line 28 of the federal tax returns, properly states net income. The AAO agrees. For every year except 1999, it is less than the proffered wage. The net current assets are a deficit, or less than the proffered wage, in every year. Also, the CPA listed selected accounts receivable and payable for FY 1998, but no other year. Their detail and effect appear, below.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The MTR insisted, contrary to the authorities, on adding depreciation into taxable income. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will 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 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. Tex. 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.*, 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

In a decision dated September 27, 2002 (DMTR), the director omitted any analysis of either the balance of accounts receivable and payable or of amounts of depreciation. The DMTR correctly stated that taxable income and net current assets for each of FY 1997, 1998, and 2000 were less than the proffered wage. The DMTR determined that the petitioner had not established the ability to pay the proffered wage, at the priority date and up to the present time, and affirmed the denial of the petition.

The petitioner appealed from the DMTR. On appeal, counsel complains that the director kept discussing eligibility for the various years until the beneficiary obtains lawful permanent residence. The director committed no error in that discourse. The outcome hinges on the ability to pay in each year.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Remarkably, the combined forces of the petitioner, the director, and counsel have yet, even on appeal, to produce the FY 1996 tax return which includes the priority date. See 8 C.F.R. § 204.5(g)(2), *supra*.

Counsel has reviewed, instead, CPA 1997, 1998, and 2000. The CPA letters appear anew in Exhibits B, E, and G on appeal with the tax returns from 1997-2000. The taxable income before net operating loss deduction and special deductions, except for 1999, is less than the proffered wage. Net current assets for FY 1997-2000 are all less than the proffered wage.

Counsel renewed the contention that CPA 1998 for FY 1998 proved the petitioner's ability to pay the proffered wage by means of selected accounts receivable and payable for FY 1998, but no other year. The argument relies on the premise that the petitioner is an accrual basis taxpayer. Nonetheless, CPA 1998 conceded that

the petitioner filed every tax return as a cash basis taxpayer. See Schedules K. A true picture, it was said, required the director to change the tax return, just for accounts receivable and accounts payable, as if the petitioner were an accrual basis taxpayer.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel and the CPA offered an informal attachment that listed year-end accounts receivable, \$592,533.41, minus accounts payable, \$122,101.06, and identified the difference, \$470,432, as FY 1998 "assets." No authority justified this accounting in CPA 1998, and the petitioner laid no foundation for the payment terms of the unidentified accounts receivable and payable, or of their obligees and holders.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the attachment is no more than an unaudited financial statement. Unaudited financial statements, as proof of the ability to pay the proffered wage, are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the federal tax returns, counsel's briefs, CPA letters, and the unaudited financial statement, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.