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U.S. Department of Homeland Security

Citizenship and Immigration Services

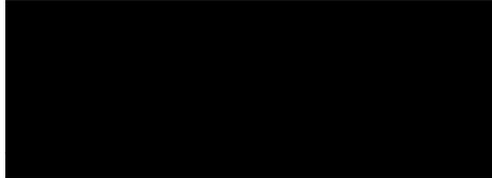
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

425 I Street, N.W.

Washington, DC 20536



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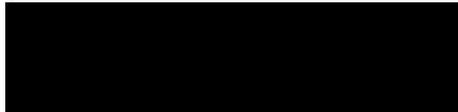
Office: NEBRASKA SERVICE CENTER

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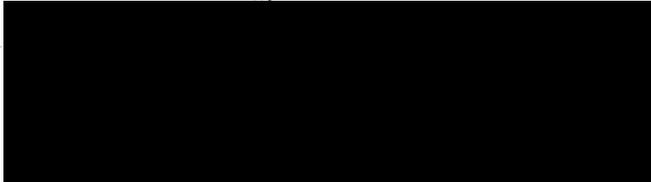


IN RE: Petitioner:  
Beneficiary:



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:



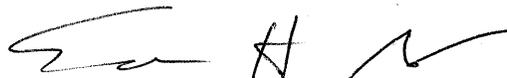
**INSTRUCTIONS:**

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 by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) pursuant to an appeal filed late and treated as a motion to reopen (motion). The motion will be denied and the appeal dismissed.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a software consultant. 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 September 28, 2000. The beneficiary's salary as stated on the labor certification is \$67,800 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. In a request for evidence

dated January 15, 2002 (RFE), the director required the petitioner's 2000 complete and signed federal income tax return and additional evidence of the ability to pay such as profit and loss statements, bank account records, or personnel records.

Counsel submitted the petitioner's 1999 and 2000 Forms 1120, U.S. Corporation Income Tax Returns, including Schedules L, the balance sheet. The federal tax returns showed taxable income before net operating loss deductions and special deductions as \$6,199 for 2000 and as a loss of (\$3,361) for 1999, less than the proffered wage. Schedule L reflected net current assets, the difference between current assets and current liabilities. They were negative, (\$1,615) for 1999 and (\$8,224) for 2000, less than the proffered wage. Counsel offered checking account statements for September 2000 through December 2001 and a brief.

The director concluded that the federal tax returns more accurately reflected funds available, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

On this motion, counsel submits only three (3) pages of the 2001 Form 1120, U.S. Corporation Income Tax Return and omits Schedule L. Form 1120 records taxable income before net operating loss deductions and special deductions as \$22,452, less than the proffered wage. Counsel, also, offers bank statements for the period from January 1 to August 31, 2002 and a brief.

Counsel's brief on the motion states of the 2000 tax return:

Further, [Citizenship and Immigration Services (CIS), formerly the Service or INS] has incorrectly concluded the petitioner's Taxable Income (line 30) as dispositive of the petitioner's ability to pay the proffered wage. Actually, the petitioner's Total Income (line 11) is representative of the petitioner's financial ability. Assuming, arguendo, that the petitioner's Taxable Income were representative of ability to pay the offered wage, this figure, in part, is reached **AFTER** all salaries and wages have been paid as indicated on Line 13.

Contrary to the primary argument, net income as found on federal tax returns is the appropriate measure of the ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, CIS 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, 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. 623 F.Supp. at 1084. 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. v. Sava*, 632 F.Supp. at 1054.

Counsel argues, also without any authority, that the payment of wages to all employees (line 13) proves the ability to pay the proffered wage. The petitioner has advised in its Immigrant Petition for Alien Worker (I-140) that this is a new position. The beneficiary will not replace any worker, and the record does not name any or state their wages. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Bank statements, including that at the priority date, reported balances less than the proffered wage, except for December 30, 2000, February 28 and December 31, 2001, and July 31, 2002. Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements.

The bank statements are unconvincing because the balance at the priority date, \$4,902.78, is less than the proffered wage and only rarely equals or exceeds it. They fail to establish that the petitioner 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).

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).

In passing, counsel's brief on the motion claims an election to present bank statements instead of federal tax returns. To the contrary, the RFE required the federal tax return and permitted other forms of evidence. In any event, the mandate of 8 C.F.R. § 204.5(g)(2), *supra*, is controlling.

After a review of the federal tax returns and bank statements, 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 motion is denied and the appeal dismissed.