

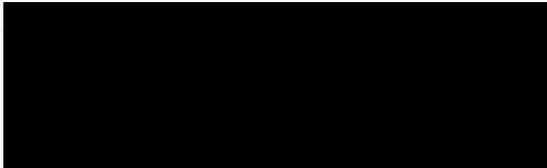
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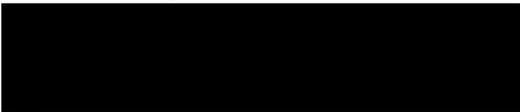
U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



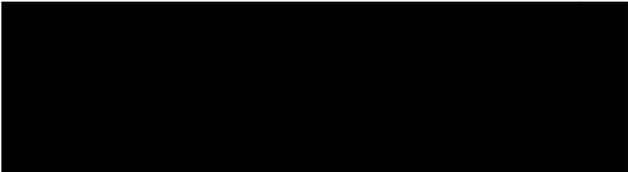
File: LIN 02 068 54278 Office: NEBRASKA SERVICE CENTER Date: **DEC 17 2003**

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:



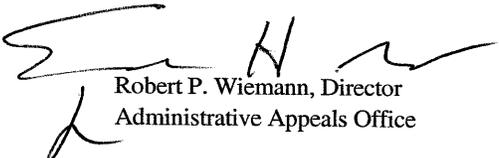
INSTRUCTIONS:

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 by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of orthodontic services. It seeks to employ the beneficiary permanently in the United States as an orthodontist. 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 January 11, 2000. The beneficiary's salary as stated on the labor certification is \$110,000 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 March 15, 2002 (RFE), the director required the petitioner's

complete corporate income tax returns for 1999 and 2000 and additional evidence such as audited profit and loss statements, bank account records, or personnel records.

Counsel submitted the petitioner's unaudited Consolidated Income Statements for periods ending December 31, 1999, 2000 and 2001 (unaudited financial documents) for the petitioner's Puyallup and Tacoma offices. Counsel offered the letter dated May 15, 2002 from [REDACTED] Jr., Chief Operating Officer of Orthodontic Members of America (OCA), characterizing the "structure of the affiliation between OCA and the professional association" (OCA letter). Audited financial statements of OCA, given in response to the RFE, contain no evidence of the petitioner's ability to pay.

The director reasoned that the bare assertion of the OCA letter, alone, supported the mere affiliation of OCA and the petitioner. The decision weighed, also, the suggestion that OCA, rather than the petitioner, would pay the beneficiary's wage and found that it undermined the premise that the petitioner was the intended employer. Finally, the director remarked on the absence of evidence, as requested in the RFE, of the petitioner's ability to pay. The director 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 appeal, counsel submits a brief and the same unaudited financial documents of the petitioner.

The OCA letter claims a close contractual relationship between OCA and the petitioner and states:

[The petitioner] reimburses OCA for [the expense of the beneficiary's salary] through charges included in the service fees that [the petitioner] pays OCA...

Thus, while OCA is not the employer of its affiliated orthodontists such as [the beneficiary], for financial accounting and reporting purposes, the professional associations that employ the orthodontists (in this case, [the petitioner]) are considered to be a part of OCA.

The petitioner presents no contract defining OCA's obligation to guarantee the petitioner's ability to pay the proffered wage at the priority date. The petitioner documents no payments under the supposed contracts.

The OCA letter only concedes that the petitioner must, one day, pay, but offers no evidence of ability to pay at the priority date:

[The petitioner] reimburses OCA for [the beneficiary's wages] through charges included in the service fees that it pays OCA, but the charges do not have to be repaid by the [petitioner] until the office for which the charges have been incurred has become profitable (usually two to three years after opening).

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 response to the RFE included unaudited financial statements as proof of the petitioner's ability to pay the proffered wage. They are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel urges on appeal only that unaudited financial documents, consolidated from the petitioner's Puyallup and Tacoma practices, are enough evidence of the ability to pay the proffered wage. Contrary to this claim, the regulation requires audited statements or federal tax returns clearly identifying the petitioner. The director explicitly requested them.

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. 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.

Beyond the scope of the limited evidence for this Immigrant Petition for Alien Worker (I-140), the Form ETA 750 reveals, in Section 15a, third page, that the beneficiary has actually worked for the petitioner since November 1999. The record has no offer of proof of federal tax records, Forms W-2, or audited financial statements. No evidence establishes that the salary paid to the beneficiary since the priority date of the petition equaled, or exceeded, the proffered wage.

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 states in the transmittal of the response to the RFE that the unaudited financial documents prove the petitioner's ability to pay the proffered wage to the beneficiary. To the contrary, the record makes no reference to payments to the beneficiary equal to or greater than the proffered wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

After a review of unaudited financial documents and the OCA letter, 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.