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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, Rm 3042
425 I Street, N.W.
Washington, DC 20536



DEC 17 2003

File: WAC 01 283 59704 Office: CALIFORNIA SERVICE CENTER Date:

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:



Identifying data deleted to prevent disclosure of information invasion of personal privacy

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Oriental art auctioneering firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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 November 14, 1997. The beneficiary's salary as stated on the labor certification is \$19.03 per hour or \$39,582.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent

residence. In a request for evidence dated January 29, 2002 (Form I-797), the director required federal tax returns for 1997 through 2000, the last four (4) quarterly wage reports (Forms DE-6) for all employees, and letters from previous employers evidencing the beneficiary's prior experience.

In response to the I-797, the petitioner submitted 11 exhibits, comprised of unsigned, uncertified federal tax returns for 1997 through 2000, Forms DE-6, and a letter from Continental Micronesia relative to the beneficiary's duties dated December 12, 1996.

The tax returns on Form 1120S, U.S. Income Tax Return for an S Corporation, reflected ordinary income and (loss) for 1997 through 2001, respectively, of \$26,013, (\$34,673), \$40,214, \$9,732, and \$51,118.

In a notice of intent to deny dated April 17, 2002 (NOID), the director evaluated the evidence of net income in federal tax returns and concluded that the petitioner could not pay the beneficiary's wage.

In response to the NOID, counsel submitted 16 exhibits, comprised of signed tax returns for 1997 through 2001, Tax Return Listings from the Internal Revenue Service (IRS) for 1998 through 2001, and Forms DE-6 for October 1, 2000 through March 31, 2002.

Counsel's brief countered the NOID with two contentions, reiterated on appeal. One point holds that a (loss) is evidence of excellent tax planning. The second argues that wage payments to the beneficiary, as shown in Forms DE-6 prove the ability to pay the proffered wage.

The director determined that the net income did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief with 17 corresponding exhibits. New matter amplified Forms DE-6 to include those for December 31, 1997 through June 30, 2002 (exhibit 11). For the first time on appeal, counsel introduces bank balances and statements. Exhibits 12-17.

As in the response to the NOID, counsel avers on appeal:

The Petitioner's tax returns, while showing a "negative" operating or ordinary income, clearly demonstrate excellent tax planning on the part of the Petitioner and its accountant, by maximizing deductions, in order to reduce taxable income and tax

liability.

Counsel does not clarify the particulars of such planning and maximization as may have produced the much-desired low or negative ordinary income from trade or business activities. 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).

As in the response to the NOID, counsel again points out that:

The documentation submitted, specifically records showing that the Beneficiary is already on the payroll (i.e., Form DE-6s for the last six quarters), is prima facie evidence that the Petitioner has the financial ability to pay the Beneficiary her full-time salary.

The Forms DE-6, as completed on appeal reveal payments to the beneficiary in 1997 to 2002 of, respectively, \$961.32, \$10,235.50, \$12,331.50, \$13,602.75, \$9,390.31, and \$4,965, less than the proffered wage of \$39,582.40 in each instance. These sums do not prove the ability to pay the beneficiary's "full-time salary."

Counsel's further arguments on appeal are not persuasive. The brief insists on a detailed examination of gross income, total assets, and salaries and wages paid, but cites no authority. Thus, counsel relies, initially, on the petitioner's gross income of over one (1) million dollars (\$1,000,000). Gross income weakened from 1997 to 2001, showing, respectively, \$2,114,886, \$1,922,100, \$1,708,731, \$1,441,996, and \$1,639,343. It does not support the ability to pay the proffered wage at the priority date or continuing until the beneficiary obtains lawful permanent residence.

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.

Ordinary income was equal to or greater than the proffered wage only in 1999 and 2001. Counsel emphatically insists that wage payments to the beneficiary prove the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. Despite counsel's primary assertion, the wage payments were less than the proffered wage except in 1999 and 2001.

In 1997, the sum of the petitioner's net income of \$26,013, plus \$961.32 in payments to the beneficiary, totaled \$26,974.32, less than the proffered wage. In 1998, the petitioner's ordinary (loss) of (\$34,673) offset payments of \$10,235.50 to the beneficiary and created a negative difference of (\$24,437.50), less than the proffered wage. Finally, in 2000, ordinary income of \$9,732, plus \$13,602.75 in payments to the beneficiary, totaled \$22,334.75, less than the proffered wage.

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 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)

Next, counsel urges, without authority, that total assets are critical factors to consider in determining the ability to pay. If so, data for 1997 to 2001 recorded a general decline in total assets with, respectively, sums of \$125,636, \$71,891, \$43,759, \$43,239, and \$63,802. Total assets are not available to pay the proffered wage without regard to liabilities.

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 asserts that salaries and wages paid to other employees show the petitioner's ability to pay the proffered wage. They declined, however, from 1997 to 2001, being, respectively, \$231,594, \$186,821, \$123,461, \$171,793, and \$156,591. In any event, 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 until the beneficiary obtains lawful permanent residence.

Finally, exhibits 12-17 of the brief on appeal present monthly bank records. 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.

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).

Counsel urges in summation a view of the "employer's overall financial wherewithal to pay the proffered wage in a pragmatic and realistic (or "real world") light." The argument identifies no fact as carrying evidentiary weight. The net current assets, defined as the difference between current assets and current liabilities, as found in Schedule L of the federal tax returns, for example, does not offer such light for this record. The net current assets were (negative) amounts of (\$18,817) in 1998, (\$2,662) in 1999, (\$10,079) in 2000, and (\$23,911) in 2001.

After a review of the federal tax returns, employment records, financial statements, bank records, and documentation, 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.