

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

not to be distributed to
not to be distributed
Immigration and Naturalization Service

Bl
Bl

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 129 54461 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

DEC 18 2003

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
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 a "digital media institute." It seeks to employ the beneficiary permanently in the United States as a financial analyst. 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, counsel submits a brief and additional evidence.

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 February 27, 2001. The proffered wage as stated on the Form ETA 750 is \$6,356.15 per month, which equals \$76,273.80 per year.

With the petition counsel submitted the first page of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared a loss of \$160,601 as its taxable income before net operating loss deduction and

special deductions during that year. The return also shows that the petitioner reports taxes based on a fiscal year beginning April 1.

Counsel also submitted unaudited financial statements for the twelve months ending March 31, 2001. The regulations at 8 C.F.R. § 204.5(g)(2) makes clear that only three types of documents are competent evidence of the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and **audited** financial statements. (Emphasis added.) The unaudited financial statements are not competent evidence of the petitioner's ability to pay the proffered wage and will not be considered.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 23, 2002, requested additional evidence pertinent to that ability.

The Service Center reminded the petitioner that it is obliged to provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also stipulated, in accordance with 8 C.F.R. § 204.5(g)(2), that the evidence must be copies of annual reports, federal tax returns, or audited financial statements. The Service Center requested that the petitioner also provide either California Form DE-6 Quarterly Wage Reports or Form W-2 Wage and Tax Statements to show wages paid to the beneficiary.

In response, counsel submitted the petitioner's Form 1120 U.S. Corporation Income Tax Return Schedule L for 1997, 1998, and 1999. Counsel also provided 1998 and 1999 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years. Because the priority date of the petition is February 27, 2001, information from tax returns, or portions of tax returns, for years prior to 2001 have no direct relevance to the petitioner's ability to pay the proffered wage after the priority date. Similarly, wages the petitioner paid to the beneficiary prior to 2001 are not directly relevant to any issue before this office.

Counsel did not provide any evidence of wages paid to the beneficiary after the priority date and did not submit any additional evidence of the petitioner's ability to pay the proffered wage at any salient time.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on August 22, 2002, denied the petition.

On appeal, counsel provides a letter, dated September 12, 2002, from the petitioner's CFO. That letter recites the gross income and salary and wage expense figures from the petitioner's fiscal year 2000 tax return. That letter further notes that the petitioner's taxable income before net operating loss deduction and special deductions is net of salaries and wages.

In the brief, counsel argues that the petitioner's gross income demonstrates its ability to pay the proffered wage. Counsel also argues, possibly in the alternative, that the petitioner's salary and wage expense shows the ability to pay the proffered wage.

Counsel's argument is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages to other employees in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses*, 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. 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 taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS 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 that the INS, now 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. The court specifically rejected the argument that INS, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's nominal year 2000 tax return covers the period

* 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.

from October 1, 2000 to March 31, 2001. During that year, the petitioner suffered a loss of \$160,601. The petitioner could not have paid any part of the proffered wage out of that negative income. Because the petitioner did not submit a copy of its 2000 Schedule L, this office cannot calculate the petitioner's net current assets during that year. Therefore, the petitioner's net current assets cannot be included in the determination of the petitioner's ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during its 2000 fiscal year. Therefore, no amount of wages paid to the beneficiary can be included in the determination of the petitioner's ability to pay the proffered wage during its 2000 fiscal year. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during its fiscal year 2000. The petitioner has not demonstrated the ability to pay the proffered wage during its fiscal year 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000. 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.