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Citizenship and Immigration Services

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

File: WAC 01 287 52765 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 22 2003**

IN RE: Petitioner:
Beneficiary:

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

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 on appeal. The appeal will be dismissed.

The petitioner is a metal fabricator. It seeks to employ the beneficiary permanently in the United States as a sheet metal mechanic. 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.

The petitioner, through counsel, appeals.

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 wage offered beginning on the priority date, the day 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). Here, the request for labor certification was accepted on January 14, 1998. The proffered salary as stated on the labor certification is \$24 per hour, which equals \$49,920 per year.

With the petition, counsel submitted a copy of the petitioner's 1996 Form 1120 U.S. corporation income tax return. Because the priority date of the instant petition is January 14, 1998,

financial information pertinent to 1996 is not directly relevant.

Because the evidence submitted was insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on January 29, 2002, requested evidence of that ability. The Service Center specifically requested the petitioner's federal tax returns for 1998, 1999, and 2000.

In response, counsel submitted the petitioner's 1998, 1999, and 2000 Form 1120 U.S. corporation income tax returns. The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction of \$6,772 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 tax return shows that the petitioner declared a loss of \$23,835 as its taxable income before net operating loss deduction. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deduction of \$62,922 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish the petitioner's ability to pay the proffered wage and, on June 6, 2002, denied the petition.

On appeal, counsel stated,

The INS erroneously concluded that the petitioner does not have the ability to pay the proffered wage. By failing to consider all parts of the Employer's Income Taxes and the income that will be generated by the Beneficiary's employment, the Service has failed to reach the correct decision. Therefore, this appeal now follows.

Although counsel is clearly dissatisfied with the formula used to calculate the petitioner's ability to pay the proffered wage, counsel has suggested no formula that he deems appropriate. Further, counsel urges that CIS consider the amount by which the petitioner's income would increase as a result of hiring the beneficiary but has submitted no evidence from which this office might calculate or estimate any such increase.

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 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 should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The proffered wage is \$49,920 per year. During 1998 the petitioner declared a taxable income before net operating loss deduction of \$6,772 and ended the year with no net current assets. The petitioner has not demonstrated that it had the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared a loss of \$23,835 and ended the year with no net current assets. The petitioner has not demonstrated that it had the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared a taxable income before net operating loss deduction of \$62,922. The evidence demonstrates that the petitioner had the ability to pay the proffered wage during 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998 and 1999. 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.