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Bureau of Citizenship and Immigration Services

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

[REDACTED]

JUL 16 2003

File: EAC 01 251 50731 Office: Vermont Service Center

Date:

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. 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.

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 continuing ability to pay the proffered wage beginning on the priority date, 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). Here, the request for labor certification was accepted for processing on October 7, 1996. The proffered salary as stated on the labor certification is \$25.60 per hour which equals \$53,248 annually.

With the petition, counsel submitted Schedule C from the petitioner's owner's 1996 tax return. Counsel also submitted the petitioner's quarterly wage reports for the first, second, third, and fourth quarters of 1996. Those reports show that the petitioner employed the beneficiary during the third and fourth quarters of 1996 but not that the petitioner employed the beneficiary during the second quarter of 1996. Additionally, the report for the first quarter of 1996 indicates that the petitioner paid no wages to employees during that quarter.

Counsel also submitted the W-2 forms issued by the petitioner for 1996, and the petitioner's New Jersey quarterly contributions reports for the first, second, third, and fourth quarters of 1996, the petitioner's 1996 Form 940 Employer's Annual Federal Unemployment (FUTA) Return, and the petitioner's Form 941 quarterly tax returns for the second, third, and fourth quarters of 1996.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 22, 2001, requested additional evidence pertinent to that ability. In addition, the Service Center specifically requested a copy of the petitioner's 1996 federal income tax return, or the return of the petitioner's owner if the petitioner is organized as a sole proprietorship, with all schedules and attachments.

In response, counsel submitted a copy of the 1996 Form 1040 of the petitioner's owner. That return shows that the petitioner's owner declared an adjusted gross income of \$25,675 during that year, including the profit from the petitioner. The associated Schedule C shows that the petitioner had a net profit of \$5,096 during that year, which was included in the petitioner's owner's adjusted gross income.

Counsel also submitted an unaudited cash flow report for 1996, and the Form W-2 wage and tax statements showing wages paid by Baires Pool Plastering to the beneficiary during 1996, 1997, 1998, 1999, and 2000. The petitioner paid the beneficiary \$15,840, \$20,130.30, \$26,400, \$24,900, and \$30,360 during those years, respectively.

Counsel's cover letter which accompanied those submissions was dated January 14, 2002, but counsel submitted no evidence of the petitioner's ability to pay the proffered wage during 1997, 1998, 1999, or 2000. This office notes that the Service Center, on October 22, 2001, requested "additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$53,248 as of October 7, 1996, the date of filing(,) and continuing to the present."

On April 5, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage during 1996.

On appeal, counsel provided 2000 and 2001 Form 1099 miscellaneous income statements showing that [REDACTED] paid the petitioner \$324,000 and \$366,700 during those years, respectively. Counsel states that because the petitioner is a sole proprietorship the proprietor is free to allocate whatever portion of that income he wishes to pay the proffered wage.

In so stating, counsel is arguing that the petitioner's gross income or receipts should be considered in determining the petitioner's ability to pay the proffered wage, rather than its net profit, or the adjusted gross income of the petitioner's owner.

In addition, counsel provided settlement sheets showing that the petitioner's owner purchased a property for \$151,000 on December 12, 1997, and another for \$139,000 on January 30, 2002. Those settlement sheets were accompanied by a sworn statement from the petitioner's owner, dated May 10, 2002, indicating that the market value of those properties now exceeds \$400,000, and that the petitioner's owner is willing to pledge his interest in those properties toward payment of the proffered wage.

Initially, we note that the petitioner is a sole proprietorship. Therefore, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own income and assets as necessary. The petitioner's owner's income and assets may very correctly be included in the calculation of the petitioner's ability to pay the proffered wage.

The petitioner's owner has demonstrated that he purchased two properties on two different dates, but not that he still owns either. Even if he owned both, as he may, his own statement of their current market value, without any indication of the accuracy of his estimate, is insufficient. Even if ownership and value were established, the petitioner has not shown whether, or to what extent, those properties may be encumbered. As such, no portion of the value of those properties may be included in the calculation of the petitioner's ability to pay the proffered wage.

The argument that the ability to pay the proffered wage should be based upon the petitioner's gross receipts, rather than the petitioner's net profit or the petitioner's owner's adjusted gross income is unconvincing.

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau,

then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the petitioner's net profit. If that amount is insufficient then, because the petitioner is a sole proprietorship and the proprietor is obliged to pay the petitioner's debts and obligations out of his own funds as necessary, the petitioner's income and assets shall be considered, to the extent they have been proved. 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 Bureau 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).

The proffered wage is \$53,248 per year. The 1996 W-2 form establishes that the petitioner paid the beneficiary \$15,840 during that year. The petitioner is obliged to demonstrate that it was able to pay the beneficiary the additional \$37,400 which is the balance of the proffered wage. During that year, the petitioner's owner declared an adjusted gross income, including all of the petitioner's net profits, of \$25,675, which was insufficient to pay the balance of the proffered wage.

Beyond the decision of the director, this office notes that the petitioner was obliged to demonstrate the ability to pay the proffered wage during 1997, 1998, 1999, and 2000. During those years, the petitioner paid the beneficiary \$20,130.30, \$26,400, \$24,900, and \$30,360, respectively. The petitioner, therefore, was obliged to demonstrate the ability to pay the balance of the proffered wage, which was \$33,118, \$26,848, \$26,348, and \$22,618 during each of those years, respectively. The petitioner submitted no evidence of its ability to pay the balance of the proffered wage during any of those years.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1996, 1997, 1998, 1999, or 2000. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.