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U.S. Department of Homeland Security

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]

File: WAC 02 068 53211 Office: California Service Center

Date: **JUL 16 2003**

IN RE: Petitioner: [REDACTED]
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
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 real estate development and management firm. It seeks to employ the beneficiary permanently in the United States as a contract manager. 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 May 27, 1997. The proffered salary as stated on the labor certification is \$3,457.42 per month which equals \$41,489.04 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1065 Return of Partnership Income. That returns shows that the petitioner declared a loss of \$153,339 as its ordinary income for that calendar year. The corresponding Schedule L states that, at the end of that year, the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter, dated November 30, 2001, from the petitioner's accountant. That letter stated that the petitioner's 1999 and 2000 income tax returns reflected gross income of approximately \$696,893 and \$649,175 respectively and net income of approximately \$461,572 and \$5,483, respectively. The accountant did not reconcile those figures with the apparently unrelated figures shown on the 2000 income tax return submitted by the petitioner.

Because the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage, the California Service Center, on March 21, 2002, requested additional evidence pertinent to that ability. In addition to noting that the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the Service Center specifically requested complete copies of the petitioner's tax returns for 1997, 1998, 1999, and 2000.

In response, counsel submitted a letter, dated May 23, 2002. In that letter, counsel stated that he was submitting the petitioner's 1997, 1998, 1999, and 2000 income tax returns. In fact, the petitioner's 1997 return was not included with that letter, but the petitioner's 1998, 1999, and 2000 Form 1065 partnership income tax returns were included. The salient information from the 2000 return is shown above.

The 1998 return shows that the petitioner declared a loss of \$210,987 as its ordinary income for that year. The corresponding Schedule L shows that, at the end of that year the petitioner had current assets of \$1,093,119 and current liabilities of \$0, which yields net current assets of \$1,093,119.

The 1999 return shows that the petitioner declared a loss of \$34,357 as its ordinary income for that year. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of \$212,554 and current liabilities of \$185,014, which yields net current assets of \$27,540.

On July 30, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel observes that the petitioner may demonstrate its ability to pay with other evidence to supplement the evidence on its income tax returns. Counsel states that the petitioner's income from its commercial rentals was not shown on page one of the petitioner's tax return. Further, counsel states that the depreciation deduction which the petitioner claimed on his returns was not an actual expense, but only a paper loss. Counsel argues that both of those amounts must be added to the petitioner's income to calculate the petitioner's ability to pay the proffered wage.

With the appeal, counsel submits an undated letter from the petitioner's accountant. That letter notes that the petitioner's income from commercial rentals is shown on Schedule K, rather than on the first page of the petitioner's returns.

Counsel also submits a copy of the petitioner's 1997 Form 1065 Partnership Return. That return states that the petitioner declared ordinary income of -\$253,873 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$879,960 and current liabilities of \$14,094, which yields net current assets of \$865,866.

Although the petitioner's income from commercial rentals was reported on Schedule K rather than on the first page of the petitioner's return, the amounts of those rentals, and the expenses and deductions associated with carrying the underlying real estate, were reflected in the calculation of the petitioner's ordinary income. No justification exists for adding the amounts received from commercial rentals to the petitioner's income a second time.

Counsel's assertion on appeal that a depreciation deduction does not correspond to a real expense is incorrect. A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as buildings and equipment deteriorate. The depreciation deduction represents the expense of buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The depreciation deduction represents an accumulation of funds necessary to replace perishable equipment and buildings, and the amount of that expense is not available to pay wages. No precedent exists would allow the petitioner to include the amount of its depreciation deduction in the calculation of its ability to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

In determining the petitioner's ability to pay the proffered wage,

the Bureau 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 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). 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.

The petitioner's tax returns show that during 1997, 1998, 1999, and 2000 it was unable to pay the proffered wage out of its ordinary income. During 1999 and 2000 the petitioner was, in addition, unable to pay the proffered wage out of its net current assets.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 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.