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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 02 036 51033 Office: California Service Center

Date: **JUL 21 2003**

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.

Helen E Crawford for
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 general building contractor. It seeks to employ the beneficiary permanently in the United States as a plasterer. 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 argues that the evidence demonstrates the petitioner's ability to pay the proffered wage.

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 wage offered 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 August 9, 2000. The proffered salary as stated on the labor certification is \$9.57 per hour which equals \$19,905.60 annually.

With the petition, counsel submitted what purports to be a copy of the petitioner's owner's 2000 Form 1040-SS, U.S. Self-Employment Tax Return. That return shows that the petitioner's net profit during that year was \$19,614.

On March 6, 2002, the Acting Director, California Service Center, issued a Notice of Intent to Deny in this matter. The Acting Director noted that the petitioner's tax return does not appear to show the ability to pay the proffered wage. In addition, the Acting Director noted that the petitioner has five pending petitions each promising to pay the beneficiary the same proffered wage.

In response, the petitioner submitted a letter dated April 1, 2002. In that letter, the petitioner noted that it paid considerably more for labor than the Notice of Intent to Deny stated. The petitioner also urged that the amount deducted for depreciation should be added into the calculation of the amount available to pay the proffered wage.

With that response, the petitioner submitted considerable evidence to demonstrate that it is in the contracting business, but no additional evidence of profits sufficient to pay the proffered wage.

On June 13, 2002, the Director, California Service Center, denied the petition, finding that the petitioner had not demonstrated its ability to pay the proffered wage. The director also noted that the petitioner has five outstanding I-140 petitions, including the petition in the instant case.

On appeal, counsel argued that the decision of the director assumes that, if all of the Form I-140 petitions are approved, costs will increase but earnings will not. Counsel also urges that gross receipts, rather than net profits, ought to be considered in the computation of the ability to pay the proffered wage.

With the appeal, counsel submitted a copy of the petitioner's owner's 2001 Form 1040, U.S. individual income tax return. The return states that the petitioner's owner had an adjusted gross income of \$22,063 during that year, which included the income from the petitioner.

Curiously, the petitioner also provided what purports to be the petitioner's owner's 2000 Form 1040 income tax return, notwithstanding that the petitioner had previously submitted what purported to be the petitioner's owners 2000 Form 1040-SS tax return. That return states that the petitioner's adjusted gross

income during that year was \$19,738, which includes the income from the petitioner reduced by one-half of the self-employment tax. The significance of the petitioner's owner submitting two different, mutually exclusive, tax returns, both purporting to be his 2000 tax return, is unknown.

In any event, whichever return is taken to be the petitioner's authentic return for the year 2000, the return does not demonstrate the ability to pay the proffered wage. If the Form 1040 is to be believed, then the petitioner's owner had an adjusted gross income of \$19,738. If the 1040-SS is legitimate, then the petitioner's owner had a net profit of \$19,614. Neither amount is sufficient to pay the proffered wage of \$19,905.60.

Counsel urged that gross receipts and amounts of wages paid should be considered in determining the ability to pay, rather than profits. Counsel also urged, previously, and apparently in the alternative, that the depreciation deduction should be added back into profits to determine the ability to pay the proffered wage.

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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

Counsel argued that the basis of the director's decision of denial was speculative, in that it assumed that hiring four new employees would result in increased costs, without increasing profits. The finding today does not rely on the other pending petitions. As

such, counsel's point is inapposite, and no further discussion of those petitions is necessary.

The petitioner is obliged, by 8 C.F.R. § 204.5(g)(2), to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 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.