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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]

JUL 21 2003

File: [REDACTED] Office: Vermont Service Center Date:

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an automobile service center. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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 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 March 28, 1996. The proffered wage as stated on the labor certification is \$18.70 per hour which equals \$38,896 annually. The name of the employer listed on the labor certification is McGrath's Auto Center.

Counsel has submitted two petitions for this petitioner and beneficiary. As required by statute, the first petition was

accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. With the first petition, submitted April 15, 1999, counsel provided a balance sheet and a copy of the 1996 Form 1120 U.S. corporation income tax return of another company the petitioner's owner also owns. Because the owner is not obliged to use the funds of that other corporation to pay the petitioner's debts and obligations, that other return is irrelevant to the instant petition.

Counsel also provided copies of the petitioner's 1997 and 1998 Form 1120 U.S. corporation income tax returns.

The 1997 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$0 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$14,500 and no current liabilities, which yields net current assets of \$14,500.

The 1998 return shows that the petitioner declared a loss of \$62,802 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,624 and current liabilities of \$9,262, which yields net current assets of \$15,362.

Because the evidence of record did not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 23, 2000, requested additional evidence of that ability. In addition, the Service Center specifically requested the petitioner's 1996 federal income tax returns or, in the alternative, audited or reviewed financial statements for 1996.

The Service Center asked whether the proffered position was a newly created position. If not, the Service Center requested that the petitioner state how long the position had existed and what wage the petitioner had been paying the incumbent in the position. The Service Center asked the petitioner to identify the incumbent, submit evidence of the salary he earned, evidence that the position would be vacated, and copies of the petitioner's Form 941, employer's quarterly tax returns.

In response, counsel returned the Notice of Action. On it, someone had responded that the position was not newly created, but had existed at least ten years, and that the incumbent was earning \$29,640 per year.

In her cover letter, counsel declined to provide copies of the

petitioner's Form 941 quarterly returns, citing confidentiality. Counsel stated that the beneficiary currently holds the proffered position, and is paid \$570 per week in cash. Counsel provided no evidence of that assertion.

Counsel also submitted a letter, dated November 17, 2000, from the petitioner's accountant. That letter states that the current petitioner bought the business from its predecessor-in-interest at the end of 1997 and began business during the first week of 1998. The accountant further stated that the petitioner had the ability to pay the proffered wage, but provided no evidence of that assertion. The accountant stated that the petitioner would not submit its tax returns because they are confidential.

Counsel provided the 1996 tax return of the other business owned by petitioner's owner. Again, information pertinent to that other business is irrelevant to the instant petition. Counsel also provided a notarized affidavit from the beneficiary stating that he worked for [REDACTED] from April 1995 to May 1997, when the current petitioner bought the business from [REDACTED]

On February 8, 2001, the Director, Vermont Service Center, denied the petition. The director found that insufficient evidence had been submitted to demonstrate that the petitioner, [REDACTED] is the successor-in-interest of [REDACTED]. As such, the director found that the record did not contain evidence of a labor certification issued to the petitioner.

Counsel submitted a second petition on April 18, 2001. In the accompanying cover letter, dated April 14, 2001, counsel stated that the petitioner is not incorporated, but owned by [REDACTED] apparently as a sole proprietorship. Counsel did not explain why the petitioner's income tax is submitted on the Form 1120, U.S. corporation income tax return.

In submitting the second petition, counsel relied upon the same labor certification which was submitted with the first petition. Counsel submitted a copy of that labor certification.

On August 30, 2001, the Vermont Service Center issued a Notice of Action in this matter. The Service Center requested a new Form ETA-750 labor certification and additional evidence of the petitioner's ability to pay the proffered wage.

Counsel submitted a response dated on November 23, 2001. In that response, counsel cited 8 C.F.R. 204.5(d) for the proposition that under these circumstances the original labor certification remains valid and no new Form ETA-750 is necessary.

Counsel submitted a letter, dated November 7, 2001, from the petitioner's accountant. In that letter, the accountant stated that he knew the petitioner's financial situation and further stated, "I find that (the petitioner) is able to pay a current salary of \$36,400 annually to (the beneficiary.)"

Counsel submitted a letter, dated September 12, 2001, from the petitioner's owner, stating that the beneficiary is paid \$570 per week. The owner stated that the payment is in cash because the beneficiary has no social security number. That letter does not state how long the beneficiary has been paid that amount.

Counsel noted that the beneficiary was paid in cash and issued no Form W-2 wage and tax statements. Counsel provided the petitioner's Form 1120 U.S. corporation tax returns for 1999 and 2000.

The 1999 tax return shows that the petitioner declared a loss of \$13,635 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,089 and current liabilities of \$14,191, which yields net current assets of \$7,898.

The 2000 tax return shows that the petitioner declared a loss of \$77,514 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities were greater than its current assets.

On April 5, 2002, the Director, Vermont Service Center, denied the second petition. In that decision, the director found that the petitioner had failed to establish that it was able to pay the proffered wage during 1996, 1997, 1998, 1999, or 2000.

On appeal, counsel again noted that the present petitioner, successor-in-interest to the original petitioner, did not begin operations until the end of 1997, and is therefore unable to demonstrate the ability to pay the proffered wage during 1996. Counsel noted the petitioner's gross profit and implied that it demonstrates the ability of the petitioner to pay the proffered wage. Finally, counsel stated, "It is incredulous (sic) to believe that [REDACTED] could not pay the prevailing wage since it is associated with a very well known name, Exxon."

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. If the present petitioner became the original

petitioner's successor-in-interest sometime after the priority date, then it is obliged to demonstrate that the original petitioner had the ability to pay the proffered wage when it was the petitioner **and** that the present successor-in-interest petitioner has had the ability to pay the proffered wage since it acquired the business.

Counsel has stated that the petitioner is not a corporation and implied that the petitioner is a sole proprietorship. If this were so, then the proprietor would be obliged to satisfy the petitioner's debts and obligations with his personal funds. Under those circumstances, the proprietor's personal income and assets would be included in the calculation of the petitioner's ability to pay the proffered wage. Counsel's statement, however, is contradicted by the petitioner's tax returns, which indicate that the petitioner is a corporation.

Because the petitioner is a corporation, the petitioner's owner is not obliged to satisfy its debts and obligations with his own funds. Under those circumstances, the petitioner's owner's personal finances are irrelevant to the determination of the petitioner's ability to pay the proffered wage.

Neither the petitioner's gross receipts, nor its gross profit, nor any other figure out of which expenses remain to be paid, may be used to show the ability to pay the proffered wage. The petitioner is obliged to show that during each salient year it had the ability to pay the proffered wage, **in addition to its other expenses**. If a Form 1120 U.S. corporation income tax return is used to show the ability to pay, one figure which might show this ability is the petitioner's taxable income. Another figure which might show this ability is the petitioner's net current assets, that is, its current assets minus its current liabilities. Those figures are indices of the income and assets the petitioner had after paying its expenses.

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. Further, 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.

The petitioner's accountant has stated that the petitioner is able to pay the proffered wage. Had the accountant provided the evidence upon which he based that assertion, that evidence should have been accorded the appropriate weight. The accountant's unsupported assertion, however, shall be accorded no weight.

Finally, that the petitioner's business is associated with Exxon is irrelevant unless Exxon is obliged to pay the petitioner's debts and obligations. The petitioner has submitted no evidence that it is.

If the petitioner had shown that it paid wages to the beneficiary during the pendency of this petition, it would have demonstrated the ability to pay that amount in wages. In this case, the petitioner's owner stated that it paid wages to the beneficiary, but provided no evidence of that assertion. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). No amount paid to the petitioner in wages may be included in the calculation of the petitioner's ability to pay the proffered wage absent any evidence of that amount.

The petitioner provided no evidence that the original petitioner, the current petitioner's predecessor-in-interest, had the ability to pay the proffered wage during 1996.

During 1997, the petitioner declared a loss and had net current assets of \$14,500, an amount insufficient to pay the proffered wage.

During 1998, the petitioner declared a loss and had net current assets of \$15,362, an amount insufficient to pay the proffered wage.

During 1999, the petitioner declared a loss and had net current assets of \$7,898, an amount insufficient to pay the proffered wage.

During 2000, the petitioner declared a loss and had negative net current assets.

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.

Beyond the decision of the director, this office notes that the labor certification was used with the original petition submitted by counsel for this petitioner and this beneficiary. That petition was denied. 8 C.F.R. § 204.5(e) makes clear that, under those circumstances, the labor certification may not be reused. Therefore, this petition was not accompanied by a valid labor certification as required by 8 C.F.R. § 204.5(1)(3)(i) and, pursuant to 203(b)(3)(C) of the Act, may not be approved.

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.