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Bureau of Citizenship and Immigration Services

BE

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



File: WAC 02 190 51231 Office: CALIFORNIA SERVICE CENTER

Date: JUL 31 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 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 tour company. It seeks to employ the beneficiary permanently in the United States as a consultant. 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$39,682.94 per year.

With the petition the petitioner submitted its 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1999 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$6,520 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 2000 return shows that the petitioner declared a loss of \$3,449 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 exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 9, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements. The petitioner was also informed that if it employed 100 or more workers, a statement from a financial officer of the company would suffice to demonstrate the ability to pay the proffered wage.

In response, counsel submitted a computer printout purporting to show the workers the petitioner employed in the state of Nevada during the second, third, and fourth quarters of 2001 and the first and second quarters of 2002. Those printouts show that the petitioner employed 25, 26, 19, 18, and 29 employees in Nevada during those quarters, respectively. The beneficiary was among the petitioner's employees during all of those quarters, and was paid \$9,240, \$9,180, \$8,430, \$8,040, and \$8,400 during those quarters, respectively.

Counsel submitted copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the second, third, and fourth quarters of 2001 and the first and second quarters of 2002. Those forms show that the petitioner employed 52, 52, 62, 37, and 48 workers in California during those quarters, respectively.

Counsel also submitted copies of the petitioner's 1998 and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a loss of \$163,801 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 exceeded its current assets.

The 2001 return shows that the petitioner declared a loss of \$185,971 as its taxable income before net operating loss deduction and special deduction 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 that the petitioner had the ability to pay the proffered wage and, on November 29, 2002, denied the petition.

On appeal, counsel argues that the petitioner's gross income shows its ability to pay the proffered wage. Counsel also noted that the petitioner has been paying wages to the beneficiary, which counsel argues shows the ability to pay the proffered wage.

The petitioner's expenses, however, exceeded its gross income during all but one of the salient years. Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages and other expenses in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses*, the petitioner is obliged to show the ability to pay the proffered wage in addition to the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income, which is shown on the petitioner's Form 1120 tax return as taxable income before net operating loss deduction and special deductions.

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

* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

That the petitioner has paid wages to the beneficiary would be dispositive only if those wages had exceeded the proffered wage during each year since the priority date. If the wages paid were less than the proffered wage, then they only show the ability to pay a portion of the proffered wage, and the petitioner must still show the ability to pay the balance.

The proffered wage is \$39,682.94 and the priority date is January 12, 1998. The petitioner need not show the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the beneficiary on the priority date. Eleven days of 1998 had elapsed on the priority date. The petitioner must show the ability to have paid the proffered wage during the remaining 354 days of that 365-day year. The petitioner must show the ability to pay 354/365th of \$39,682.94, or \$38,487.02, during 1998.

Counsel submitted no evidence that the petitioner paid any wages to the beneficiary during 1998. During 1998, the petitioner declared a loss of \$163,801. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has not shown the ability to pay the proffered wage during 1998 out of either its income or its assets.

The petitioner is obliged to show the ability to pay the entire \$39,682.94 proffered wage during each of the remaining salient years. The petitioner has submitted no evidence that it paid any wages to the beneficiary during 1999. During 1999 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$6,520. At the end of that year, the petitioner's current liabilities exceeded its current assets. The petitioner has not shown the ability to pay the proffered wage during 1999 out of either its income or its assets.

The petitioner has submitted no evidence that it paid any wages to the beneficiary during 2000. During 2000 the petitioner declared a loss of \$3,449. At the end of that year, the petitioner's current liabilities exceeded its current assets. The petitioner has not shown the ability to pay the proffered wage during 2000 out of either its income or its assets.

Counsel presented evidence that the petitioner paid a total of \$26,850 to the beneficiary during 2001. The petitioner must also demonstrate the ability to pay the \$12,832.94 balance of the proffered wage. During 2001, the petitioner declared a loss of \$185,971. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has not shown the ability to pay the proffered wage during 2001 out of

either its income or its assets.

The petitioner submitted evidence that it paid \$16,440 to the beneficiary during 2002. That evidence is insufficient to show the ability to pay the proffered wage. The request for evidence in this matter, however, was issued on August 9, 2002, when the petitioner's 2002 tax return was unavailable. This decision will not be based, even in part, on the petitioner's failure to show its ability to pay the proffered wage during 2002.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. 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.