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U.S. Department of Homeland Security

Citizenship and Immigration Services

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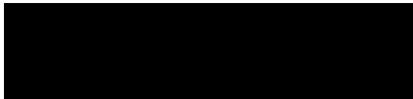


ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

File: SRC 02 179 53256 Office: Texas Service Center

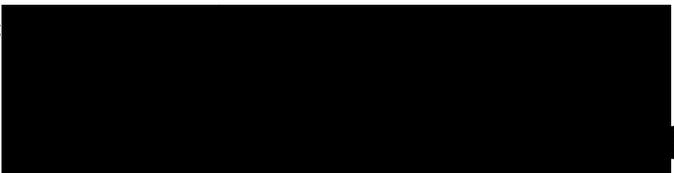
Date: OCT 16 2003

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:



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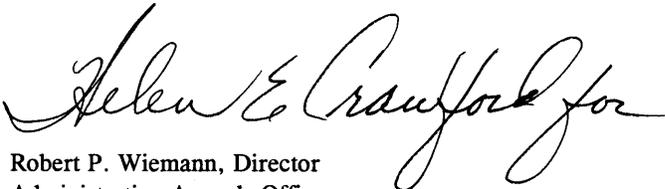
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Director
Administrative Appeals Office

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

The petitioner is an upholsterer. It seeks to employ the beneficiary permanently in the United States as an upholstery repairer. 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 has ample ability to pay the proffered wage since filing of the ETA 750.

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 ability to pay the wage offered as of the petitioner's priority date, which is 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). The petitioner's priority date in this instance is January 29, 2001. The beneficiary's salary as stated on the labor certification is \$16.65 per hour or \$34,632 per year.

With the petition, counsel submitted copies of the petitioner's 2000 and 2001 Form 1120, U.S. Corporation Income Tax Return. The federal tax return for 2001 reflected taxable income before net operating loss deduction and special deductions of \$15,797, less than the proffered wage.

In a request for evidence (RFE) dated December 12, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until present. In response, counsel submitted copies of checks petitioner paid to the beneficiary during 2002, copies of petitioner's Texas sales and use tax returns for 2002, and copies of Form 1099, Miscellaneous Income, for all subcontractors for 2000 and 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the statute does not require the petitioning employer to employ the beneficiary prior to the filing of the Form ETA 750 or the Form I-140, Immigrant Petition for Alien Worker, or to pay the prevailing wage when the Forms ETA 750 and I-140 are filed.

Nonetheless, the petitioner is required to show that it had the ability to pay the proffered wage at the time the priority date of the petition was established. In addition, it must demonstrate that financial ability continues until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

With the appeal, counsel submitted a brief, petitioner's 2002 Form 1120, and copies of unaudited financial reports for 2002 and the first quarter of 2003. Unaudited financial reports are of little evidentiary value because they are based solely on the representations of management. The regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

The petitioner's tax return for calendar year 2001 shows a taxable income before deductions for net operating loss and special deductions of \$15,797. The petitioner could not have paid the proffered wage from the taxable income. The return also shows current assets of \$30,820 and current liabilities of \$2,665. The petitioner could not have paid the proffered wage from net current assets.

The petitioner's tax return for calendar year 2002 shows a taxable income before deductions for net operating loss and special deductions of \$33,090, less than the proffered wage. The return also shows current assets of \$60,472 and current liabilities of \$1,875. Petitioner could have paid the proffered wage from net current assets.

Counsel urges that gross receipts, assets, cash on hand, deposits, and ordinary income must be considered in determining the ability to pay.

In determining the petitioner's ability to pay the proffered wage, CIS 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 CIS 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 CIS, 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

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 2001. 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.