

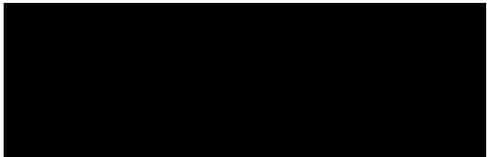
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



File: EAC 02 137 54681

Office: VERMONT SERVICE CENTER

Date: OCT 21 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:



PUBLIC COPY

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an electronic repair store. It seeks to employ the beneficiary permanently in the United States as an electronic repair technician. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel argues that the former corporation president's wages should be included in the determination of the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition'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). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the approved labor certification is \$15.00 per hour or \$31,200 annually. The evidence in the record indicates that the petitioner has employed the beneficiary since 1992.

To support its ability to pay the proffered wage, the petitioner initially submitted a copy of its 1998 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of the beneficiary's 1998 and 1999

W-2s showing that the petitioner paid \$14,880 and \$17,280 in wages to him, respectively, and copies of the petitioner's bank statements for the period from January 1, 1998 through March 25, 1998. The petitioner's 1998 tax return indicated that it declared \$5660 as ordinary income. Schedule L indicated that the petitioner had -\$4,179 in net current assets. The approximate difference between the proffered wage and the amount paid to the beneficiary is \$16,300. As noted by the director, this difference could not be met by the figures submitted as the petitioner's ordinary income or its net current assets.

On May 29, 2002, the director requested further evidence relevant to the petitioner's ability to pay.

The petitioner included copies of its 1999, 2000 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation and copies of the beneficiary's 2000 and 2001 W-2s in its response. In 2000, the petitioner paid \$16,640 in wages to the beneficiary. In 2001, the petitioner paid \$16,000 in wages to the beneficiary.

The petitioner's 1999 tax return showed that the petitioner had \$888 in ordinary income. Schedule L indicated that it had -\$1,679 in net current assets.

The petitioner's 2000 tax return reflected that the petitioner declared \$8,922 in ordinary income. Schedule L reflected net current assets at -\$1,679.

The petitioner's 2001 tax return shows that the petitioner had \$19,043 in ordinary income. Schedule L indicates its net current assets were \$17,314.

In his denial, the director determined that the petitioner had not established its continuing ability to pay the beneficiary's proffered wage as of the priority date of January 14, 1998. We concur. As noted by the director, neither the petitioner's net current assets nor its ordinary income for 1999 and 2000 were sufficient to cover the difference between the amount paid to the beneficiary in wages and the proffered wage of \$31,200. The only year in which the petitioner's ordinary income could meet the difference of \$15,200 between the wages paid to the beneficiary and the offered wage, was the year 2001. As such, the evidence failed to establish that the petitioner had demonstrated its continuing ability to pay beginning on the priority date of January 14, 1998.

On appeal, counsel resubmits a copy of the petitioner's 1997 and 2001 tax returns and partial copies of its 1999 and 2000 tax returns. Counsel also provides copies of corporate documents indicating that the former 100% shareholder [REDACTED] resigned as of July 9, 2001. Another sole director and shareholder, [REDACTED] took over as president, secretary, and treasurer. Counsel erroneously refers to 1997 as the year of filing instead of 1998. Counsel also asserts that \$40,340 paid as wages to [REDACTED] O in 2000 would be available to pay the beneficiary. We do not find this argument persuasive.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the

petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Precedent does not support counsel's assertion that the former president's salary should be included in the calculation of the petitioner's ability to pay. This compensation represents funds already disbursed and was not available to pay the wage of the beneficiary during the year 2000. We note that the tax returns for 1998 and 1999 showed no amounts expended as officers' compensation or salaries and wages. The evidence also does not support counsel's speculation that the beneficiary replaces the former director and shareholder in either title or duties.

An affidavit from the new owner, [REDACTED] states that the company's performance has improved and that he is not responsible for the losses of previous years. While this may be true, the approved labor certification established the priority date of the immigrant visa petition as January 14, 1998. This is the date from which the petitioning employer must establish that it has had a continuing financial ability to pay the proffered wage to the beneficiary. The record in this case indicates that the beneficiary has never been paid the proffered wage and that only in 2001 did the financial data support the petitioner's ability to pay that wage.

Based on the evidence contained in the record, the petitioner has not submitted sufficient persuasive evidence to establish its ability to pay the beneficiary's offered wage as of the visa priority date of January 14, 1998 and continuing until the present

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.