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U.S. Department of Homeland Security
Citizenship and Immigration Services

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

PUBLIC COPY



File: LIN 01 074 50540 Office: Nebraska Service Center Date: **SEP 09 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)

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

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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 financial ability to pay the beneficiary the proffered wage as of 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 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 August 7, 2000. The beneficiary's salary as stated on the labor certification is \$71,015.00 per annum.

Counsel initially submitted copies of the petitioner's 1998 and 1999 Internal Revenue Service (IRS) Form 1120 U.S. Corporation

Income Tax Return and IRS Form 941 Employer's Quarterly Federal Returns for October 16, 2000, July 25, 2000, and April 10, 2000.

On July 23, 2001, the director requested additional financial evidence, namely copies of the 2000 U.S. corporate federal income tax return with schedules and attachments, audited or reviewed financial statements for 2000, or W-2 Wage and Tax Statements for the beneficiary showing the salary actually paid by the petitioner.

In response, counsel emphasized petitioner's statement on Form I-140, Part 4, which listed the petitioner's gross annual revenue at approximately \$50 million. This statement was uncorroborated by additional evidence. Additionally, counsel submitted a copy of the petitioner's 2000 IRS Form 1120 U.S. Corporation Income Tax Return, which reflected a net income loss of \$10,473; gross receipts of \$832,670; and salaries and wages paid of \$402,417. The IRS Form 941 Employer's Quarterly Federal Tax Form from April 24 and July 26, 2001 were resubmitted. The beneficiary's 1999 and 2000 W-2 Wage and Tax Statement were not provided despite the director's request.

Upon review, the director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel maintains that the 1999 federal income tax return is immaterial to establish the petitioner's ability to pay. Since the year of filing is, in fact, 2000, the 1999 federal income tax return is irrelevant for this analysis.

Counsel asserts that the director incorrectly interpreted the facts from the 2000 federal tax return. Specifically, counsel contends that the director failed to consider the petitioner's gross income of \$832,670, and incorrectly relied on the net taxable income instead. Counsel questions the figures computed by the director in finding a net income loss of \$8,439 and unfavorable current liabilities to current assets ratio.

Counsel's first assertion is not 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. 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. 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 CIS 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 specifically rejected the argument that CIS 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*, 719 F.Supp/ at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In this case, the director adjusted the taxable income loss of \$10,473 for the depreciation expense of \$2,034. The total is a loss of \$8,439. Although the director was not required to add back the depreciation expense, the director, nevertheless, considered the expense, even though counsel did not provide evidence that depreciation is an expense previously incurred and, therefore, not an actual expense for the year of filing.

Counsel further asserts that the director erroneously gave greater weight to the petitioner's negative taxable income over salaries and wages paid. Specifically, counsel states that "it is irrelevant that the petitioners [sic] taxable income is a negative number due to the fact that all salaries and wages are paid prior to reaching this figure." Counsel primarily depends on the petitioner's quarterly federal tax returns and the figure from line 13 of the 2000 federal corporate income tax return.

CIS is not persuaded by counsel's argument. The director had properly considered the taxable income over the salary and wages actually paid because the evidence of salary paid does not establish that the petitioner has the ability to pay the proffered salary and still remain a financially viable business. The 2000 IRS Form 1120 federal corporate tax return indicates that the petitioner had paid total salaries of \$402,417 for all staff in the year 2000. The copies of IRS Form 941 Employer's Quarterly Federal Tax Returns detail the salaries paid quarterly. None of the submitted evidence specifically indicates that the beneficiary was paid in the year 2000. Since no evidence was provided to show that the beneficiary had, in fact, been paid in 2000, CIS must assume that the beneficiary's salary is not included in the total figure for salaries paid and therefore, it must be considered an additional expense. The net income loss for the year 2000 clearly cannot cover the beneficiary's salary of \$71,105.00 per annum.

Standing alone, the copies of the IRS Form 941 Employer's Quarterly Tax Returns do not provide favorable additional evidence of the petitioner's ability to pay such that CIS would be convinced to look beyond the 2000 federal income tax return, which in this instance reflects an unfavorable net income for year 2000.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the priority date of the petition and continuing to 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.