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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

[REDACTED]

SEP 29 2003

File: WAC 02 150 52878 Office: CALIFORNIA 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 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, California 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 member of the professions who holds a baccalaureate degree or a foreign equivalent degree. The petitioner is a plating company. It seeks to employ the beneficiary permanently in the United States as a chemist. 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 asserts that the petitioner's financial information was not correctly evaluated and requests reversal of the director's decision.

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

The regulation at 8 C.F.R. § 204.5(g) provides 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 12, 1998. The beneficiary's salary as stated on the labor certification is \$4634.84 per month or \$55,618.08 annually.

In support of the petition, the petitioner initially included a copy of its Form 1120 U.S. Corporation Income Tax Return for the tax year of 1999. As noted by the director, this return and others subsequently submitted, indicate that the petitioner files on a fiscal year covering the period from December 1st through November 30th. The petitioner's 1999 tax return indicated that its gross receipts/sales were \$1,923,910; officers' compensation was \$67,600; salaries and wages were \$867,019; taxable income before net operating loss deduction and special deductions was \$32,378, and its net current assets reflected on Schedule L were \$17,210.

On May 24, 2002, the director requested further evidence from the petitioner to establish its ability to pay the beneficiary's proffered wage as of the visa petition date continuing until the beneficiary receives lawful permanent resident status. The director requested evidence for the years 1998, 2000, and 2001.

The petitioner responded by submitting copies of its tax returns for 1997, 1998, another copy of its 1999 tax return, and a copy of its application for automatic extension of time to file its 2000 return. The 1997 Form 1120 showed gross receipts/sales at \$1,326,278; officers' compensation at \$160,647; salaries and wages at \$64,484; taxable income before net operating loss deduction and special deductions at \$41,230, and its net current assets as indicated by Schedule L at -\$13,344. The petitioner's 1998 return showed gross receipts/sales at \$1,588,501, officers' compensation at \$87,681, salaries and wages at \$429,670, taxable income before net operating loss deduction and special deductions at \$171,353, and Schedule L net current assets at \$105,395.

The director concluded that the petitioner had not established the ability to pay because its 1997 and 1999 tax returns failed to establish that it had sufficient income or net current assets to meet the beneficiary's proffered wage. We concur, although as noted by counsel on appeal, the correct figure for the petitioner's taxable income before net operating loss deduction was \$32,378 in 1999. As noted by the director, however, although the petitioner's taxable income of \$171,353 would be sufficient to satisfy the beneficiary's wages in 1998, either the taxable income of \$41,230 or its net current assets of -\$13,344 would be sufficient to establish its ability to pay the beneficiary's wage in 1997. Insufficient figures were also presented on the 1999 tax return.

On appeal, counsel submits a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The taxable income before net operating loss deduction and special deductions is shown as \$47,731, less than the beneficiary's offered salary. Schedule L shows the petitioner's net current assets, however, as \$179,505, which could be considered as available funds to pay the beneficiary's wages for the time period covered by the tax return. However, this still represents only two of the four years of tax returns submitted by the petitioner that reflect the petitioner's ability to pay the beneficiary's proffered wage.

Counsel submits a letter from the petitioner's bank noting that the petitioner's average balance is \$13,359.74 and that it has a line of credit up to \$100,000. There is no indication that the petitioner's bank balance represents funds that somehow have not been included on its tax returns. Counsel further contends that the line of credit is available to use to support any deficiency in the petitioner's net income. We note that a line of credit, if utilized, becomes an obligation that the petitioner must pay back.

Counsel also submits a letter from an accountant who adds back the depreciation, interest and officer's compensation to present figures that the accountant characterizes as the petitioner's yearly net operative profit. Counsel contends that these funds such as the officers' compensation figures should be considered as monies available to pay the beneficiary's offered salary. We do not agree. Compensation already disbursed is not available to prove the ability to pay the proffered wage to the beneficiary as of the priority date of the petition and continuing to the present.

Counsel additionally argues that depreciation should be added to the equation as it represents a "paper" deduction only. Counsel cites no authority for this proposition. We note that CIS may properly rely upon 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 recognized. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1954 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *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). There is no precedent that would allow the petitioner to add to net income the depreciation expense charged for the year. See *Elatos Restaurant Corp. v. Sava*, *supra*. Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage.

Based on the evidence contained in the record and the foregoing discussion, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.