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APR 05 2004

FILE: 

Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary:

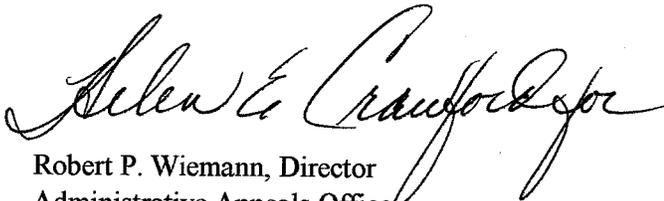
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the acting director determined that the beneficiary was not eligible for the benefit sought. The acting director served the petitioner with a notice of intent to revoke the approval of the preference visa petition, together with her reasons therefore. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought 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 a guest home for the mentally ill. It sought to employ the beneficiary permanently in the United States as a live-in resident manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on April 13, 2000. It was initially approved on December 5, 2000. The alien beneficiary filed an application to adjust his status to that of lawful permanent resident. Following the receipt of information from both the petitioner and beneficiary relevant to the beneficiary's application to adjust to permanent resident status, the acting director concluded that the I-140 was approved in error and issued an intent to revoke the petition on April 1, 2002. The acting director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on December 6, 2002, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, asserts that the director's analysis did not accurately reflect the petitioner's ability to pay the proffered wage.

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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)(2) provides 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. . . . 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is September 23, 1991.¹ The beneficiary's salary as stated on the labor certification is \$9.39 per hour based on a 40-hour week, or \$19,531.20 annually. The record indicates that the petitioner's owner is also employed as a registered nurse at another business

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$19,531.20, copies of the petitioner's owner's Form 1040, U.S. Individual Income Tax Return for the years 1991 through 2001 are provided in the record. The director concluded that out of the eleven years represented on the tax returns, the petitioner failed to show its ability to pay the proffered wage in 1995, 1996, 1998, 1999, and 2000. Those tax returns contained the following information:

Year	Business Income	Adjusted Gross Income
1995	\$ -38,384	\$ 42,788
1996	-49,636	15,013
1998	-23,699	43,371
1999	-18,986	42,304
2000	-58,094	5,013

The record also indicates that the petitioner is organized as a sole proprietorship. Because a sole proprietorship is not legally separate from its owner, all income and expenses generated by the sole proprietor and her dependents may be taken into consideration when reviewing the petitioner's ability to pay the beneficiary's proffered salary. The sole proprietor must demonstrate that she can meet the existing business expenses as well as pay the proposed wage offer and sustain herself and her dependents until the beneficiary obtains lawful permanent resident status. Here, the sole proprietor filed a joint tax return with her spouse and claimed four additional dependents in 1995 and 1996. She claimed three dependents in 1998. She filed as a head of household in 1999 and 2000 and claimed two dependents in each of those two years.

In response to the director's request, the petitioner also provided a summary of her monthly living expenses. Her living expenses are approximately \$2,832 per month or \$33,984 per year.

As noted by the director, to the extent that the petitioner has already employed the beneficiary in any of the relevant years, his wages can also be considered in determining the petitioner's ability to pay the proposed salary set forth on the approved labor certification. In this case, the record contains copies of the beneficiary's Wage and Tax Statements (W-2s) for 1996, 1998, 1999, and 2000. The petitioner paid him \$1,600, \$9,600, \$9,600, and \$9,800, respectively, in those years.

The acting director stated in her notice of intent to revoke the petitioner's approved I-140, that the sole proprietor's business had sustained several years of consecutive losses. The director also observed that the individual federal income tax return for the year 2000 revealed that the sole proprietor's adjusted gross income fell well short of meeting the beneficiary's proffered wage of \$19,531 even without considering any reasonable monthly expenses. The AAO agrees. After crediting the \$9,800 already paid to the beneficiary, the petitioner must show that it can pay the remaining \$9,731 of the proffered wage as well as sustain the sole proprietor and her two dependents. The sole proprietor's declared adjusted gross income of \$5,013 is insufficient to cover those additional expenses.

¹ It is unclear from the record what caused the nine-year delay in filing the visa preference petition.

In response to the notice of intent to revoke, counsel submitted a letter dated May 1, 2002, from Cyrus K. Mostofi, a certified public accountant. Mr. Mostofi states that the 2000 tax return was incorrect and understated the petitioner's income by \$50,000. He adds that an amended tax return will be filed. Mr. Mostofi also asserts that the value of the sole proprietor's real estate, estimated inventories, and fixtures sufficiently support the petitioner's ability to pay the proffered wage. It is noted that no specific first-hand evidence of these holdings was offered. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). It is further noted that real property is not representative of assets that can be readily converted to cash to pay the proffered wage.

Mr. Mostofi also suggests that an adjustment for depreciation should be taken into consideration. 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).

The director subsequently concluded that the evidence failed to establish that the petitioner had the ability to pay the beneficiary's offered wage as of the priority date of September 23, 1991 and continuing until the present. The AAO concurs. For 1995, the director found that when adding the petitioner's living expenses to the proffered wage, the result exceeded the sole proprietor's declared adjusted gross income that year by \$10,727. The AAO also notes that even though the owner's income exceeded the proffered wage in 1995, the beneficiary's proposed salary of \$19,531 represented 46% of the owner's income that year. In *Ubeda v. Palmer*, *supra*, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or about 30% of the petitioner's gross income.

For 1996, after crediting the \$1,600 paid as wages to the beneficiary, the director similarly concluded that the sole proprietor's adjusted gross income of \$15,013 was far less than that necessary to cover the remaining portion of the proposed wage offer of \$17,931, as well as meet the sole proprietor's reasonable living expenses. The AAO agrees and notes that the amount needed to cover the beneficiary's proffered wage could not be paid out of the sole proprietor's adjusted gross income even without considering living expenses.

The director also found that in 1998 and 1999, the sole proprietor's adjusted gross income was \$544 less in 1998 and \$1,611 less in 1999 than the amount needed to cover the proffered wage after crediting the \$9,600 paid to the beneficiary as wages and adding the annual living expenses to the equation. The director further observed that the amended 2000 tax return was never submitted to the record and that the petitioner had shown losses in every year but 2001. Finally, the director questioned the propriety of the employment arrangement where the alien beneficiary is the brother-in-law of the sole proprietor.

On appeal, counsel basically maintains that the director's decision was wrong and that the response to the director's intent to revoke was sufficient to overcome the director's objections. Counsel also objects to the

director's observation about the validity of the employment offer based on the familial relationship between the beneficiary and the sole proprietor. Counsel did not offer further evidence or detail to support these assertions. As the record currently stands, the AAO cannot conclude that there is a sufficiently convincing reason to automatically question the validity of the job offer because of the relationship between the beneficiary and the petitioner's owner, however it is noted that it is within CIS' authority to examine whether a position is a bona fide job opportunity, and, in appropriate cases, to seek an advisory opinion from the Department of Labor. See *Matter of Silver Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

The AAO cannot conclude that the director erred in revoking the approval of the petitioner's I-140 based on the petitioner's failure to show its ability to pay the beneficiary's wage offer. A petitioner must establish its continuing ability to pay based on the requirements set forth in 8 C.F.R. § 204.5(g)(2), which provides that annual reports, federal tax returns and audited financial statements are the fundamental evidence to be considered. While additional evidence may be offered, it must contain sufficient independent probative value in order to be accepted as competent. Here, the petitioner's other submissions do not sufficiently overcome the evidence, that in several of the relevant years, the sole proprietor's federal tax returns fail to show that there was sufficient income to meet the beneficiary's proposed salary as well as cover the sole proprietor's reasonable living expenses.

Based on the financial data contained in the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.