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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, DC 20536*



File:  Office: CALIFORNIA SERVICE CENTER

Date: **APR 07 2004**

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 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 preference 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 is an auto repair facility. It seeks to employ the beneficiary permanently in the United States as an automotive electrician. 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 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 nature, for which qualified workers are not available in the United States.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on September 18, 2000. The proffered wage as stated on the Form ETA 750 is \$800 per week, which equals \$41,600 per year.

With the petition, the petitioner's previous counsel submitted a one-page statement of revenues and expenses for the three months ended March 31, 2002. Although an accountant prepared that statement, the accountant's report was not included with it. The statement indicates that it was prepared pursuant to a compilation, rather than an audit. On the statement, the accountant noted that "The accompanying Notes to Financial Statement are an integral part of this statement." No notes were included with the statement.

Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The representations of management are insufficient to demonstrate the ability to pay the proffered wage. Further, 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent and probative primary evidence of a petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. This office will not consider the unaudited financial statement submitted by counsel.

On January 8, 2003, the Director, California Service Center, issued a Notice of Intent to Deny in this matter. The director observed that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director requested that the petitioner provide copies of its tax returns for 2000 and 2001 and copies of any Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary.

In addition, the director requested that, if the petitioner's owner intended to rely on personal assets to pay the proffered wage, that he submit a statement of monthly expenses for his family.

In response, the petitioner's previous counsel submitted the 2000 and 2001 Form 1040 joint income tax returns of the petitioner's owner and the owner's spouse including the corresponding Schedules C, Profit or Loss from Business (Sole Proprietorship) for the petitioner. Counsel submitted no W-2 forms. The petitioner has not demonstrated that it paid any wages to the beneficiary since the priority date.

The 2000 Schedule C shows that the petitioner earned a net profit of \$25,704 during that year. The Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$23,888 during that year, including all of the petitioner's profits.

The 2001 Schedule C shows that the petitioner earned a net profit of \$29,686 during that year. The Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$27,589 during that year, including all of the petitioner's profits.

In the cover letter, dated January 28, 2003, which accompanied the response, counsel stated that the petitioner's owner had been incapacitated by an injury and therefore sought to hire an employee. Counsel further stated that the petitioner's owner estimates that, if he is permitted to hire the beneficiary, the petitioner's revenues will increase by approximately \$100,000.

Counsel provided the petitioner's owner's budget as requested. The budget shows that the petitioner's monthly expenses are \$2,070, which equates to \$24,840 annually. Counsel stated that the petitioner's owner has a home worth \$290,000 encumbered only by a first mortgage of \$69,000, leaving equity of \$221,000. Counsel stated that the petitioner's owner is willing to encumber that property further with an additional mortgage as necessary. Counsel stated that the petitioner has three vehicles, worth \$15,000, \$6,000, and \$10,000, and is willing to sell two unspecified vehicles of those three. Counsel stated that the petitioner's owner owns property in Israel worth \$1,000,000. Finally, counsel stated that "the debtor [sic] owns miscellaneous personal assets in the sum of \$20,000."

Counsel, however, provided no evidence of the asserted holdings, values, and encumbrances. The assertions of counsel are not evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Absent evidence of their existence, value, and the extent to which they are encumbered, the assets described by counsel shall not be considered.

In that same cover letter, counsel offered, upon request, to provide evidence of his assertions. The burden of proof is on the petitioner. See section 291 of the Act. If counsel intended to rely upon the petitioner's assets to prove its ability to pay the proffered wage, counsel was obliged to provide evidence of those assets, their value, and the extent to which they are encumbered, rather than offering to do so in the future, upon request.

The director determined that the evidence submitted did not establish that the petitioner had the

continuing ability to pay the proffered wage beginning on the priority date, and, on March 24, 2003, denied the petition.

On appeal, counsel submitted a copy of the beneficiary's auto insurance policy. The proposition which counsel intended this submission to support is unclear to this office.

Subsequently, counsel submitted a brief, dated May 21, 2003, to supplement the appeal. In the brief, counsel asserted that the director erred in ignoring probative evidence. Counsel cited the existence of five lines of credit as additional evidence of the petitioner's ability to pay the proffered wage. Counsel provided monthly statements pertinent to two of those credit lines, and states that "statements are still pending" pertinent to the other three.

Counsel states that the petitioner maintains a substantial savings account in Israel, funds from which are available to pay the proffered wage. Counsel concludes, "It will take some time to obtain these records."

With a cover letter dated September 12, 2003, Counsel submitted additional evidence to supplement the appeal. Counsel submitted statements pertinent to one of the three remaining credit lines. Counsel also submitted one page of each monthly statement of the personal checking account of the petitioner's owner and owner's spouse for 2000, 2001, and 2002.

In the cover letter, counsel stated that the petitioner's owner "has extensive assets in Israel, but as of this date we have not been able to obtain much documentation from the Israeli financial institutions."

Counsel's reliance on bank statements is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and probative evidence of a petitioner's ability to pay a proffered wage.

Counsel's reliance on credit lines is similarly misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel has asserted that the petitioner's owner has various valuable assets, both in the United States and in Israel, but has provided no evidence of those assets, their value, or the extent to which they are encumbered. Those alleged assets will not be considered.

Counsel asserts that hiring the beneficiary will result in an increase of \$100,000 in the petitioner's gross receipts, but provides no evidence in support of that contention. The anticipated increase will not be considered.

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. CIS may rely on federal income tax returns in determining a petitioner's ability to pay a proffered wage. *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 the INS, now 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 the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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.

The petitioner, however, is a sole proprietorship. As such, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own funds as necessary. Therefore, the petitioner's owner's income and assets, if proven, are an appropriate consideration.

The priority date is September 18, 2000. The proffered wage is \$41,600 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2000, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 261 days of that 366-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 105 days. The proffered wage multiplied by 105/366th equals \$11,934.43, which is the amount the petitioner must show the ability to pay during 2000.

The petitioner's owner's 2000 tax return shows that he and his spouse declared an adjusted gross income of \$23,888 during that year, including all of the petitioner's profits. The budget submitted by counsel indicates that the petitioner requires \$24,840 annually to support himself and his household, an amount that exceeds his income and leaves no remaining funds to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not shown the ability to pay the salient portion of the proffered wage during 2000.

During 2001, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. The petitioner's owner's 2001 return shows that he and his spouse declared an adjusted gross income of \$27,589 during that year, including all of the petitioner's profits. The budget submitted by counsel indicates that the petitioner requires \$24,840 annually to support himself and his household. After paying his personal expenses, the petitioner would have been left with \$2,749 of his adjusted gross income. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not shown the ability to pay the salient portion of the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.