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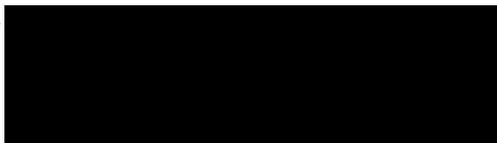


FILE: LIN 02 106 53767 Office: NEBRASKA SERVICE CENTER Date: APR 07 2004

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:



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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) 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 a roofing contractor. It seeks to employ the beneficiary permanently in the United States as a "roof systems restorer." 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, the petitioner submits additional information and contends that it has financially recovered and is capable of paying the proffered wage.¹

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) also 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 [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 9, 1998. The beneficiary's salary as stated on the labor certification is \$30,000 per year, based on a 40-hour week. The record indicates that the petitioner was established in 1976 and is organized as a corporation.

As evidence of its ability to pay, the petitioner initially submitted copies of its corporate tax returns for 1998, 1999, and 2000. In 1998 and 1999, the petitioner filed Form 1120-A, U.S. Corporation Short-Form Income Tax Return(s). They indicate that the petitioner files its tax returns using a standard calendar year. The 1998 return shows that the petitioner declared \$53,255 in officer compensation, \$30,895 in salaries and wages, and \$1,028 in taxable income before net operating loss (NOL) deduction and special deductions. Part III of this tax return also shows that the petitioner had \$34,610 in current assets and \$18,988 in current liabilities, producing \$15,622 in net current assets. CIS will consider net current assets because it represents the amount of liquidity that a petitioner

¹ The petitioner filed the appeal, although an attorney had previously entered an appearance on behalf of the petitioner. As no withdrawal of representation is contained in the record, a copy of this decision will be provided to the attorney.

has as of the date of filing. It signifies the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the balance sheet accompanying the corporate return. Here, neither the petitioner's taxable income of \$1,028 nor its net current assets of \$15,622 were sufficient to cover the beneficiary's proposed annual wage offer of \$30,000.

The petitioner's 1999 corporate tax return reflects that the petitioner declared \$16,730 in officer compensation, \$83,136 in salaries and wages, and -\$21,944 in taxable income before NOL and other special deductions. The balance sheet shows that the petitioner had \$43,178 in current assets and \$10,372 in current liabilities, resulting in \$32,806 in net current assets. In this year, the petitioner's net current assets were sufficient to cover the beneficiary's proffered annual salary of \$30,000.

In 2000, the petitioner filed Form 1120, U.S. Corporation Income Tax Return. It indicates that the petitioner declared no officer compensation, \$12,603 in salaries and wages, and -\$20,591 in taxable income before NOL and other special deductions. The balance sheet at Schedule L shows that the petitioner had \$20,959 in current assets and \$30,000 in current liabilities, resulting in -\$9,041 in net current assets. Neither the petitioner's taxable income nor its net current assets were sufficient to meet the proffered wage.

On April 3, 2002, the director requested additional evidence from the petitioner relevant to its ability to pay the beneficiary's proffered wage. The director instructed the petitioner to provide an explanation of how its federal tax returns established its ability to pay the proffered annual salary of \$30,000. The director also advised the petitioner to submit a copy of its 2001 tax return or an audited financial statement for that year.

The petitioner's president, [REDACTED] did not submit a 2001 tax return or an audited financial statement, but responded with a letter outlining the company's history and some of the obstacles it has encountered. He stated that the company was undergoing a transition from being a small company to being a larger firm that he managed, but was less personally involved in all jobs. Mr. [REDACTED] also explained that he had family issues in the last few years, but expressed confidence that the petitioner's revenue would continue to increase. He enclosed a check deposit register for April and part of May 2002 to illustrate this assertion.

The director denied the petition, recognizing some of the sympathetic factors in the case, but concluding that the underlying financial documentation, including the petitioner's corporate tax returns, does not establish the petitioner's continuing financial ability to pay the proffered wage beginning at the visa priority date of January 9, 1998.

On appeal, the petitioner submitted a copy of its 2001 federal tax return and copies of financial statements for 2001 and the first six months of 2002 prepared by its accountant, [REDACTED]. The petitioner maintains that this evidence, as well as additional supporting letters from a variety of individuals, submitted on appeal, establishes that it can pay the beneficiary's proposed wage of \$30,000 per year.

The petitioner's 2001 corporate tax return shows that the petitioner declared \$3,750 as officer compensation, \$240 in salaries and wages, and \$2,591 in taxable income before NOL and other deductions. Schedule L of the tax return reflects that the petitioner had \$5,229 in current assets and \$17,935 in current liabilities, yielding net current assets of -\$12,706. The regulation at 8 C.F.R. § 204.5(g)(2) requires audited financial statements, federal tax returns, or annual reports to establish a petitioner's ability to pay a proposed salary. The petitioner's financial statements, submitted on appeal, indicate that they have neither been audited nor reviewed. As such, they cannot offer significant probative value. It is noted, however, that the petitioner's financial statements for 2001 indicate

that the petitioner's current liabilities exceeded current assets and that its net income is reflected as a negative balance. Its 2002 financial statements also indicate that current liabilities exceed current assets and that its net ordinary income is only \$7,360.52, as of June 2002. Although the tax returns reflect that the petitioner's sales have increased since 1998, so have its expenses. With the exception of 1999, none of the petitioner's financial documentation establishes that either its net income or its net current assets were adequate to cover the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS reviews 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. See *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). In this case, the AAO cannot concur with the petitioner's claim that its tax returns and other financial documentation establish its ability to pay the beneficiary's annual wage offer of \$30,000.

The petitioner included several letters and copies of e-mails from members of the local community expressing support for the petition's approval. [REDACTED] publisher of the *Shepherd Express*, extols the skills of the beneficiary and the community activism of Mr. [REDACTED]. A letter from [REDACTED] a Member of Congress, has also been submitted on appeal. It references Mr. [REDACTED] letter and summarizes the accompanying documentation. Although the AAO respects the sentiments contained in these and other letters, they do not offer any specific financial documentation that is new to the record. The fundamental focus is whether the petitioner's evidence persuasively establishes its continuing ability to pay the proffered wage as of the visa priority date of January 9, 1998.

The petitioner must establish the elements for the petition's approval at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Following a review of the evidence contained in the record, the AAO cannot conclude that the petitioner has persuasively established its continuing financial ability to pay the proffered wage as of the visa 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.