

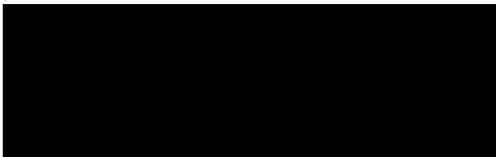
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



APR 07 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: SELF-REPRESENTED

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, 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 skilled worker. The petitioner is manufacturer of figurines and statues. It seeks to employ the beneficiary permanently in the United States as a model maker. 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 asserts that the beneficiary's full-time services are required because his business is in the process of expanding.

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) 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].

The issue in this case is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 August 14, 1998. The beneficiary's salary as stated on the approved labor certification is \$19.00 per hour or \$39,520 annually.

As evidence of its evidence of its ability to pay, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the years 1999 and 2000. The 1999 return indicates that the petitioner claimed a taxable income before the net operating loss deduction (NOL) and other

special deductions of -\$2,094. Schedule L reflecting the assets and liabilities of the petitioner was not submitted. The petitioner's 2000 corporate tax return shows that the petitioner declared a taxable income before NOL and other special deductions of \$2,330. Schedule L was not included with this return either.

On September 30, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). The director specifically instructed the petitioner to attach all schedules and attachments to tax returns.

The petitioner resubmitted partial copies of its 1999 and 2000 tax returns. It also included an incomplete copy of its 2001 corporate tax return. The return showed that the petitioner declared a taxable income before NOL and other special deductions of -\$56. Schedule L showing assets and liabilities was not submitted.

The petitioner also submitted three copies of its customers' invoices, a copy of a payroll record from August 2002 showing that the petitioner paid the beneficiary \$500 for 25 hours work, copies of the beneficiary's individual tax returns for 1999, 2000 and 2001, and copies of the beneficiary's 2000 and 2001 Wage and Tax Statement (W-2). The W-2(s) reflect that the petitioner paid the beneficiary \$18,590 in 2000 and \$13,280 in 2001.

In denying the petition, the director concluded that the petitioner's tax returns failed to demonstrate the petitioner's continuing ability to pay the offered wage. The AAO concurs.

As noted by the director, 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 (formerly INS) 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).

In this case, the petitioner's evidence showed that its taxable income in 1999 was -\$2,094. This negative figure does not demonstrate its ability to pay the proposed salary of \$39,520. Although the petitioner asserts that he has employed the beneficiary for several years, he did not provide a copy of the beneficiary's 1999 W-2. The beneficiary's individual income tax return for that year does not show the derivation of his income. As noted above, the petitioner's corporate tax returns failed to include a copies of its balance sheets as reflected on Schedule L, so its net current assets cannot be reviewed as an available source of funds to pay the beneficiary's salary.

It is further noted that the beneficiary's taxable income in 2000 and 2001 also fell short of covering the difference between the actual wages paid to the beneficiary and the proposed salary.

In 2000, the beneficiary was paid \$26,240 less than the proposed salary of \$39,520. The petitioner's taxable income of \$2,330 could not meet this difference. Similarly, in 2001 the petitioner paid the beneficiary \$20,930 less than the proffered salary. Its declared income of -\$56 was obviously far short of the necessary sum needed to cover the difference.

On appeal, the petitioner's owner contends that his business is in the process of expanding and that he requires the beneficiary as a full-time employee beginning May 1, 2003 because his "expertise is crucial to my business." As noted above, 8 C.F.R. § 204.5(g)(2) requires that the continuing ability to pay the proffered wage be demonstrated as of the visa priority date of August 14, 1998. The owner's bare assertion of his desire to employ the beneficiary full-time does not demonstrate that the petitioner has had an ongoing ability to pay the beneficiary's proposed salary since August 14, 1998.¹

Based on the evidence contained in the record, it cannot be concluded that the petitioner has demonstrated its continuing ability to pay the proffered salary 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.

¹ Correspondence received from the petitioner dated December 13, 2003, indicates that the beneficiary has received \$20,740 in wages thus far for 2003. Even if this information were to be considered as part of the evidence on appeal, it does not support the petitioner's ability to pay the proposed salary of \$39,520 as of 1998 when the labor certification was approved.