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**U.S. Citizenship
and Immigration
Services**



FILE: LIN 02 187 50857 Office: NEBRASKA SERVICE CENTER Date: **APR 08 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 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 preference 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 is a naturopathic clinic. It seeks to employ the beneficiary permanently in the United States as a naturopathic doctor. 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 submits a Form I-290B stating the petitioner's reasons for appealing the decision of the director.

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

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

Eligibility in this matter hinges on 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. Here, the petition's priority date is March 6, 2001. The beneficiary's salary as stated on the labor certification is \$65.00 per hour for a forty-hour workweek, which equates to \$135,200.00 per annum.

Counsel initially submitted a financial statement for the petitioner, as well as documentary evidence of the petitioner's qualifications and professional experience. The director found this evidence insufficient to establish the petitioner's ability to pay the proffered wage, and therefore issued a request for evidence on August 1, 2002.¹ The request for evidence specifically requested regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments, annual reports, and audited financial statements. In response to the director's request, counsel submitted a copy of the petitioner's 2001 tax return and a statement showing a breakdown of the petitioner's owner's monthly expenses.

After reviewing the documentation provided, the director concluded that this evidence failed to establish the petitioner's ability to pay the proffered wage. Consequently, a second request for evidence was issued on December 20, 2002, which required the petitioner to submit additional information regarding its owner's personal expenses. In response to this request, counsel submitted a copy of the petitioner's recent balance

¹ The request for evidence also requested evidence of the beneficiary's professional experience. The petitioner provided experience verification letters from former employers, which satisfied the director's request. Since the decision to deny the petition was not based upon the beneficiary's experience, the issue will not be discussed within the scope of this decision.

sheet as well as a letter from the petitioner, which discussed its financial status and reconfirmed its owner's monthly expenses. The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a Form I-290B, stating that a brief would be submitted in support of the appeal within 30 days. As of the date of this decision, no additional documentation has been received in this office. Therefore, the AAO will review counsel's statements set forth on the Form I-290B in addition to the evidence contained in the record.

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. 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. 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).

A review of the evidence in the record shows that the petitioner first submitted unaudited copies of a profit and loss statement and a balance sheet. Unaudited financial documents are of little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). This regulation neither states nor implies that an *unaudited* document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Therefore, the director's request for additional financial evidence was appropriate in this case.

In response to the director's first request for evidence, counsel submitted copies of the petitioner's 2001 federal tax return. Noting that the petitioner is a sole proprietorship, the director examined both the petitioner's adjusted gross income and its net profit, as set forth on Schedule C.² In this case, the petitioner's 2001 tax return shows an adjusted gross income of \$133,916.00, and a net profit of \$144,326.00.

The beneficiary's proposed salary is \$135,200.00 per annum. Clearly, the petitioner's adjusted gross income of \$133,916.00 is insufficient to pay the proffered wage. Additionally, although the petitioner's net profit of \$144,326.00 exceeds the proffered wage by \$9,126.00, this amount fails to reflect the petitioner's personal expenses. The petitioner is a sole proprietorship. Since a sole proprietorship is not separate from its owner, the personal expenses of the owner must be considered in determining the petitioner's ability to pay. Documentation provided by the petitioner lists the owner's monthly expenses as \$4,250.00, which equates to \$51,000.00 annually. After subtracting these expenses from the petitioner's net profit, the remaining amount of \$93,326.00 is significantly less than the proffered wage.

Although the petitioner submitted several statements in support of its financial ability to pay the proffered wage in response to the second request for evidence, the AAO does not find these statements persuasive. Specifically, the petitioner submitted a three-page letter outlining its current financial situation in response to the director's request. This letter is not credible evidence for purposes of this decision, because simply going

² The director appears to have inadvertently cited the petitioner's total income of \$146,874.00 instead of the petitioner's adjusted gross income of \$133,916.00 in his decision.

on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, in determining the petitioner's ability to pay the proffered wage, CIS will examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary. Although the petitioner alleges that its payment of \$122,465.00 in wages for 2001 is persuasive evidence of its ability to pay the proffered wage to the beneficiary, the petitioner did not employ the beneficiary in 2001. The wages paid to its other employees, therefore, do not serve as evidence of the petitioner's ability to pay an additional salary of \$135,200.00 to the beneficiary. Furthermore, since there is no evidence in the record that the beneficiary will be replacing one of the petitioner's current employees, the payment of these wages is irrelevant for purposes of determining the petitioner's ability to pay the proposed salary.

Therefore, based on a review of the evidence in the record, the AAO concurs with the director's findings that the petitioner did not establish its ability to pay the proffered wage as of the priority date and continuing thereafter.

Counsel's statement on appeal alleges that the petition was incorrectly denied based on incorrect calculations as to the petitioner's ability to pay the proffered wage. Specifically, counsel asserts that the petitioner's gross income of approximately \$600,000.00 for both 2001 and 2002 is more than sufficient to pay the beneficiary's salary. Counsel further contends that the director's rejection of the petitioner's claim of discretionary income was inappropriate. The AAO finds these statements unpersuasive for several reasons.

First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has failed to submit any additional evidence in support of these assertions. Second, CIS will not consider gross income without also considering the expenses that were incurred to generate that income. Counsel's reliance on the petitioner's gross income figure is erroneous, since it fails to account for all the expenses incurred by the petitioner. When the petitioner's business expenses of \$298,895.00 and its owner's personal expenses of \$51,000.00 are subtracted from the gross income, the funds remaining are insufficient to pay the proffered salary. Finally, although the petitioner made numerous assertions with regard to its "discretionary" allocation of income and the manner in which it has chosen to distribute its gross income for 2001 and 2002, no independent documentary evidence has been submitted to support the assertions contained in its three-page letter. Counsel's assertions on appeal regarding the petitioner's discretionary income also lack supporting documentation. Therefore, these claims are not substantiated by independent evidence and will not be considered.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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.