

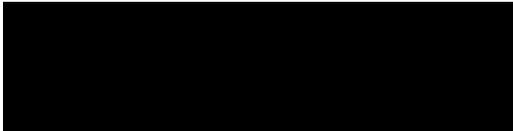
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U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536*



File: EAC 01 254 53561 Office: VERMONT SERVICE CENTER

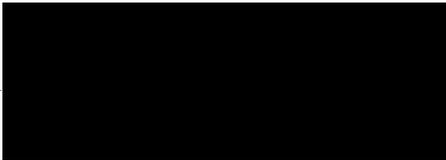
Date: **APR 13 2004**

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.

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpentry crew supervisor. 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 statement.

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.

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.

The petitioner must demonstrate the 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. The petitioner must also demonstrate the beneficiary's eligibility for the proffered position as of the priority date. Here, the Form ETA 750 was accepted for processing on December 26, 1996. The proffered wage as stated on the Form ETA 750 is \$30.38 per hour, which equals \$63,190.40 per year.

With the petition, counsel submitted the first page of the petitioner's 1996 Form 1065 U.S. Return of Partnership Income. The return shows that the petitioner had ordinary income of

\$10,417 during that year. Counsel also provided an undated statement signed by the petitioner's owner/president stating that the petitioner employed the beneficiary from December 1992 through December 1994.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 23, 2001, requested additional evidence pertinent to that ability. The Service Center also specifically requested that the petitioner, if it employed the beneficiary during 1996, provide copies of Form W-2 Wage and Tax Statements showing the amount it paid to the beneficiary.

In response, counsel submitted the first page of the petitioner's 2000 Form 1065 U.S. Return of Partnership Income. The return shows that the petitioner declared a loss of \$6,271 as its ordinary income during that year. The petitioner provided no W-2 form.

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 September 27, 2002, denied the petition.

On appeal, counsel states that,

Petitioner's gross income constitutes sufficient evidence that he had the capacity to pay the preferred (sic) salary and thus the job offer was bona fide.

No other argument or evidence was submitted with that appeal. No subsequent submissions were received to supplement the appeal.

Counsel's reliance on the petitioner's gross receipts is misplaced. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that 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 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 priority date is December 26, 1996. The proffered wage is \$63,190.40 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1996, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 360 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 5 days. During that year, the petitioner declared \$10,417 in ordinary income. That amount was sufficient to pay the salient portion of the proffered wage.

During 1997 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. The petitioner did not provide any evidence pertinent to 1997, 1998, or 1999. The petitioner has not demonstrated that it had any funds available with which to pay the proffered wage during 1997, 1998, or 1999. The petitioner has not demonstrated the ability to pay the proffered wage during those years.

The petitioner's 2000 tax return shows that the petitioner declared a loss of \$6,271 during that year. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage during 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the Form ETA 750 Labor Certification states that the proffered position requires four years experience as a carpentry crew supervisor or four years experience as a carpenter or cabinet maker. The only evidence the petitioner submitted in support of the beneficiary's claimed employment history is an undated note from the petitioner's owner/president stating that the petitioner employed the beneficiary from December 1992 through December 1994 installing wallboard, flooring, cabinetry, roofing and siding. That evidence falls short of demonstrating the requisite work experience as stated on the Form ETA 750.

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.