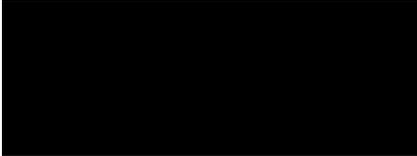


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U.S. Department of Homeland Security
Citizenship and Immigration Services

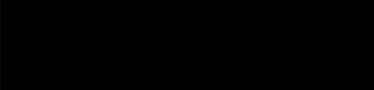
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



File: EAC 01 230 58877 Office: VERMONT SERVICE CENTER

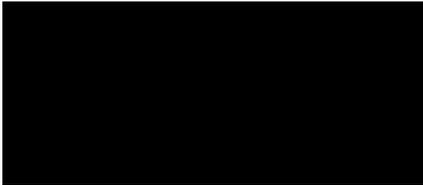
Date: APR 13 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner for Examinations (now the Administrative Appeals Office, AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a banquet service. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as an apprentice electrician. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief. In the brief, counsel states that the decision dismissing the appeal was incorrect as the petitioner's tax returns showed that it was able to pay the proffered wage. Counsel also states that the 2001 return submitted was a draft, and that the petitioner was attempting to get a copy of its own finalized return, which would further demonstrate its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(A)(2) states, in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion does not qualify as a motion to reopen because counsel provided no new evidence, but merely stated that he would. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the evidence of record at the time the appeal was dismissed demonstrates that the director's decision was

incorrect.

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 or seasonal nature, for which qualified workers unavailable 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility 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, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 15, 1999. The proffered wage as stated on the Form ETA 750 is \$11.27 per hour, which equals \$23,441.60 per year.

With the petition counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$1,048 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 September 16, 2001, requested additional evidence pertinent to that ability. The Service Center also requested a complete copy of the petitioner's 1999 tax return. Finally, the Service Center requested that, if the petitioner employed the beneficiary during 1999, it provide copies of the beneficiary's Form W-2 Wage and Tax Statements showing how much the beneficiary was paid.

In response, counsel submitted a copy of the petitioner's 1999 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$45,967 during that year. At the end of that year, the petitioner's current liabilities exceeded its current assets. Counsel did not provide any W-2 forms.

The Director, Vermont Service Center 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 January 25, 2002, denied the petition.

On appeal, counsel submitted a copy of what purports to be the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, except that it contains the words, "Preliminary Form," and "DRAFT as of 06/22/01" in bold type on the first two pages and on several other pages.

The return explicitly states that it covers the 2000 calendar year. The return further states, though obviously prospectively, the petitioner's 2001 taxable income before net operating loss deduction and special deductions to be \$16,509. The corresponding Schedule L states that at the end of that year the petitioner's current liabilities exceeded, or would exceed, its current assets.

Counsel also cited the petitioner's increased gross receipts as evidence of its ability to pay the proffered wage. Further, counsel stated,

It is not true, however, that the petitioner's **current** liabilities exceed his [sic] **current** assets. [Emphasis in the original.] In the year 2000, the gross receipts or sales were \$82,210.00 as contrasted against [sic] the total deductions, which were \$83,258.00. The figures refer to cash and do not refer to the value of the building and other depreciable assets which the petitioner owns. The building itself for the Corporation Income Tax Return for the year 2000 had a value at the beginning of the year of \$56,157.00 and had a depreciation [sic] of \$10,854.00, which still left a value of \$45,303.00. The value of the property is such that it is not completely correct to say that the current liabilities exceeded the current assets. The value of the building and tangible personal property is actually even higher than its depreciable use. [sic] The petitioner wishes to clarify any misimpression [sic] received from reading the Income Tax Return for the year 2000.

The AAO dismissed the appeal on November 4, 2002. In that decision, the AAO observed that gross receipts are an inappropriate indicator of a petitioner's ability to pay the proffered wage. The AAO also observed that net current assets are calculated from specific line items on the Schedule L balance sheet and that gross receipts, total deductions, value of long-term assets, and depreciation deductions are not directly relevant to that calculation.

In the instant motion to reconsider, counsel again asserts that the petitioner's 2000 year-end current liabilities do not exceed its 2000 year-end current assets. Apparently to support that assertion, counsel cites the petitioner's gross receipts, total deductions, the depreciated basis of the petitioner's real estate at the beginning of the year, the depreciation deduction claimed against that building during that year, and the depreciated basis at the end of that year. Counsel did not, however, explicitly state the formula from which he determined that the petitioner's current liabilities did not exceed its current assets.

Counsel also stated that:

The 2001 corporation Income Tax Return was a preliminary form draft. The Petitioner is still trying to obtain the finalized copy of that return for submission. The submission of this return would prove that the current assets exceed the current liabilities. This information will be submitted as soon as it is available. This is new information which was previously not available. It will be submitted within ninety (90) days.

Although a year has passed since that motion was filed, no further information, argument, or documentation has been received from the petitioner or counsel.

Counsel's reliance on the amount of the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. 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

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.

remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

In the alternative, if the amount of the petitioner's net current assets during a given year exceeds the amount of the proffered wage, the petitioner may rely on the amount of those net current assets to demonstrate its ability to pay the proffered wage during that year.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

In the instant case, the petitioner's 1999 Schedule L shows that its year-end current assets were \$3,200 and its year-end current liabilities were \$83,730. Therefore, the petitioner's current liabilities exceeded its current assets at the end of that year. At the end of that year, the petitioner had negative net current assets.

The petitioner's 2000 Schedule L shows that its year-end current assets were \$7,331 and its year-end current liabilities were \$53,981. Therefore, the petitioner's current liabilities exceeded its current assets at the end of that year. At the end of that year, the petitioner had negative net current assets.

The petitioner's tentative 2001 Schedule L shows that the petitioner predicted that its year-end current assets would be \$21,338 and predicted that its year-end current liabilities would be \$52,981. Thus, the petitioner predicted that its current liabilities would exceed its current assets at the end of that year. The petitioner predicted that, at the end of that year, it would have negative net current assets.

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 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. *Supra* 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, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The priority date is September 15, 1999. The proffered wage is \$23,441.60 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1999, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 257 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 108 days. The proffered wage multiplied by 108/365th equals \$6,936.14, which is the amount the petitioner must show the ability to pay during 1999.

During 1999, the petitioner declared taxable income of \$45,967. That amount is clearly sufficient to pay the proffered wage during that year.

During 2000 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 2000, the petitioner declared a loss of \$1,048. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during 2000 out of its income. At the end of that year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

The 2001 Form 1120 U.S. Corporation Income Tax Return which counsel submitted is not the petitioner's actual income tax return, but a projection as of June 22, 2001. The source of the figures on that form is unstated and unknown to this office. Counsel stated that he would provide the petitioner's actual 2001 return, but did not. The petitioner has submitted no reliable evidence pertinent to its ability to pay the proffered wage

during 2001. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.³

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 2000 or 2001. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is to reconsider granted. The AAO's decision of November 4, 2002 is affirmed. The petition is denied.

³ Even if the unsubmitted 2001 return were used, the projected taxable income is less than the proffered wage and the projected net current assets are negative; therefore, neither would demonstrate the ability to pay the proffered wage.