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U.S. Citizenship
and Immigration
Services



File: LIN 02 227 51923 Office: NEBRASKA 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a real estate office. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

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.

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 are members of the professions.

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. Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$39,249 per year.

With the petition, counsel submitted Schedule C, Profit or Loss from Business (Sole Proprietorship), Page 1, from the petitioner's owner's 2001 Form 1040 individual income tax return. The Schedule C shows that the petitioner earned a net profit of \$24,801 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 10, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence must include the petitioner's latest annual report, federal tax return, or audited financial statements.

In response, counsel submitted copies of both pages of the petitioner's owner's 2000 and 2001 Schedule C. The copy of the 2000 Schedule C shows that the petitioner earned \$13,891 during that year. The figures on the copy of the 2001 Schedule C are consistent with the figures on the copy previously submitted.

With those documents, counsel also submitted a letter, dated October 15, 2002, from the petitioner's owner. In that letter, the owner emphasized the petitioner's gross income during 2000 and 2001 and stated that he anticipated the 2002 figures to be similar. The owner also stated that the petitioner has had the continuing ability to pay the proffered wage since on the priority date.

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 June 18, 2003, denied the petition.

On appeal, counsel emphasized the petitioner's gross receipts. Counsel also stated that the petitioner is confident that hiring the beneficiary will result in more efficient business operation, leading to a saving sufficient to pay the beneficiary's salary. Counsel submitted a letter, dated July 16, 2003, in which she asserted that the petitioner's bank balances demonstrate its ability to pay the proffered wage.

Counsel submitted another letter, also dated July 16, 2003, from the petitioner's president. In that letter, the president stated that the petitioner is fiscally sound and has substantial assets from which it can pay the beneficiary's salary. The president also stressed the petitioner's gross receipts. Finally, the president stated that he expects hiring the beneficiary to enable the petitioner to turn a larger profit.

With the appeal, counsel submitted a copy of the Schedule C from the petitioner's owner's 2002 Form 1040 tax return. The Schedule C shows that the petitioner earned a net profit of \$13,356 during that year. Counsel also submitted copies of the petitioner's bank statements from March, April, and May of 2003, showing ending balances of \$4,080.33, \$19,459.98, and \$7,491.59 during those months, respectively.

Counsel's and the petitioner's owner's emphasis on the petitioner's gross receipts and gross income is misplaced. Showing that the petitioner's gross receipts or gross income 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 income, 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 net income.

In this case, the petitioner's owner has stated that he is confident that hiring the beneficiary will result in an increase in profits, but has provided no evidence which might cause this office to share his confidence. The petitioner's owner's asserted confidence is not evidence and is not a substitute for evidence. The petitioner has not demonstrated that hiring the beneficiary would increase its profits.

Counsel's reliance on the bank statements in this case is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

¹ The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next 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 both CIS and 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 the Service 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.

Counsel provided the petitioner's owner's 2000, 2001, and 2002 Schedules C, Profit or Loss from Business (Sole Proprietorship). Because the priority date is March 21, 2001, figures from the 2000 Schedule C are not relevant to the petitioner's ability to pay the proffered wage beginning on the priority date or to any other issue before this office. This office notes that the petitioner did not provide complete copies of returns. Because the Service Center did not specify, however, that returns submitted must be complete, with all schedules and attachments, this office will not base today's decision, even in part, on the petitioner's failure to provide complete returns.

The proffered wage is \$39,249 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the beneficiary on March 21, 2001, the priority date. On the priority date, 79 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 286 days. The proffered wage multiplied by $286/365^{\text{th}}$ equals \$30,754.01, which is the amount the petitioner must show the ability to pay during 2001.

The 2001 Schedule C submitted shows that the petitioner earned a net profit of \$24,801 during that year. That amount is less than the salient portion of the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it might have paid the salient portion of the proffered wage. The petitioner has not demonstrated the ability to pay the salient portion of the proffered wage during 2001.

The petitioner must demonstrate the ability to pay the entire proffered wage during 2002. The 2002 Schedule C shows that the petitioner earned a net profit of \$13,396 during that year. That amount is less than the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 2002 with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered

wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.