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U.S. Citizenship
and Immigration
Services



File: LIN 02 160 51497 Office: NEBRASKA SERVICE CENTER

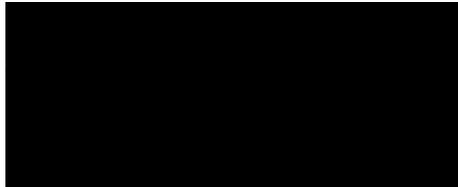
Date: APR 13 2004

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 sustained.

The petitioner is a dry cleaning and alteration business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 found 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. The director denied the petition accordingly.

On appeal, counsel submits a brief 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.

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 on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24,000 per year.

With the petition, counsel submitted a letter, dated April 5, 2002, from the petitioner's president. That letter asserts that the petitioner has the ability to pay the proffered wage, stressing the petitioner's 2001 gross and net income.

Counsel also submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports income based on the calendar year. During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of \$26,435. The 2001 Schedule L shows that at the end of that year the petitioner had current assets of \$9,782 and no current liabilities, which yields net current assets of \$9,782.

The Director, Nebraska Service Center, on June 21, 2002, requested additional evidence of the petitioner's ability to pay the proffered wage. The director requested that the evidence submitted include the petitioner's 2000 federal tax return or audited financial statements.

In response, counsel submitted another copy of the petitioner's 2001 tax return. Counsel also submitted Form W-2 Wage and Tax Statements for two employees, including the president. Further still, counsel submitted copies of the petitioner's Form 941 Quarterly Tax Returns for the first and second quarters of 2002. Counsel submitted an accountant's compilation of the petitioner's financial statements for the period from January 1, 2002 through July 31, 2002. Finally, counsel submitted a letter, dated July 31, 2002, from the petitioner's accountant, stating that the petitioner "is in good financial standing."

The director noted that the petitioner had failed to submit its 2000 tax return as directed, and determined, therefore, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On November 22, 2002 the director denied the petition.

On appeal, counsel submits a copy of the petitioner's 2000 Form 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 \$2,042 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,325 and no current liabilities, which yields net current liabilities of \$12,325. Counsel also submits a letter, dated December 19, 2002, from the petitioner's president, observing that 2000 was not an especially productive year.

Counsel observes, however, that 8 C.F.R. § 204.5(g)(2) does not require the petitioner to demonstrate the "ability to pay [the proffered wage during] *the year before the labor certification application (was) filed.*" [Emphasis in the original.] Counsel is correct.

The petitioner is required to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The

petitioner's low profits during 2000 are not directly relevant to the petitioner's ability to pay the proffered wage since April 30, 2001. The petitioner is required to demonstrate the ability to pay the proffered wage during the portion of 2001 after the priority date. The petitioner is also required to present evidence of its ability to pay the proffered wage during any subsequent period for which reliable financial data might reasonably be expected to be available.

The request for evidence in this matter was issued on June 21, 2002. The petitioner reports taxes based on the calendar year. The petitioner's 2002 tax returns were clearly unavailable. The only salient year for which reliable financial data could reasonably be expected to be available, then, was 2001.

The petitioner's reliance on its gross income and the amount of its wage expense as indices of its ability to pay the proffered wage is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of 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 remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income.

The petitioner's reliance on 2002 unaudited financial statements is also misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the preferred evidence to demonstrate a petitioner's ability to pay a proffered wage. Those three types of evidence include audited financial statements, but do not include unaudited statements. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As was observed above, however, the petitioner was not required to submit evidence of its ability to

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.

pay the proffered wage during 2002.

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 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. 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 proffered wage is \$24,000 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 petitioner on the priority date. On the priority date, 119 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 246 days. The proffered wage multiplied by $246/365^{\text{th}}$ equals \$16,175.34, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared net income of \$26,435. The petitioner has demonstrated the ability to pay the salient portion of the proffered wage during 2001 out of its income.

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 met that burden.

ORDER: The appeal is sustained.