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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 097 54537 Office: California Service Center Date: APR 15 2004

IN RE: Petitioner: [redacted]
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: [redacted]

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer-based electronic instrumentation systems management firm. It seeks to employ the beneficiary permanently in the United States as a purchasing agent. 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 brief.

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 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 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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on January 14, 1998. The proffered salary as stated on the labor certification is $13.68 per hour which equals $28,454.40 annually.

With the petition, counsel submitted the petitioner's balance sheet for December 31, 1998 and Statement of Income and Expenses for the 1998 calendar year. The accompanying accountant's report clearly indicates that it is a compilation report, and that the financial statements were not audited.

Because the evidence submitted was inconsistent with the requirements of 8 C.F.R. § 204.5(g)(2), and did not show the continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 26, 2002, requested additional evidence of that ability. The Service Center requested, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner provide copies of annual reports, signed federal tax returns, or audited financial statements showing its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that the petitioner provide copies of its California Form DE-6 quarterly wage reports for the preceding four quarters.

In response, counsel submitted the petitioner's Form 1120-A U.S. corporation short-form tax returns for 1998 and 1999, and its 2000 Form 1120 U.S. corporation income tax return. In addition, the petitioner submitted a copy of a Form 7004 showing that it had applied for an extension of time to file its 2001 tax return.

The 1998 return shows that during that year, the petitioner declared a taxable income before net operating loss deduction and special deductions of $1,418. The return also reveals that at the end of that year, the petitioner had current liabilities greater than its current assets.

The 1999 return shows that during that year, the petitioner declared a taxable income before net operating loss deduction and special deductions of -$12,372. The return also reveals that at the end of that year, the petitioner had current liabilities greater than its current assets.

The 2000 return shows that during that year, the petitioner declared a taxable income before net operating loss deduction and special deductions of $163,554. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities were greater than its current assets.

Counsel also submitted Form W-2 wage and tax statements showing the wages the petitioner paid to the beneficiary during 1996, 1997, 1998, 1999, 2000, and 2001. During 1998, 1999, 2000, and 2001 the petitioner paid the beneficiary $21,497.42, $20,758.50, $20,171.53, and $17,802.53, respectively. Because the priority

date of this petition is January 14, 1998, the amounts the petitioner paid the beneficiary during 1996 and 1997 are not directly relevant.

Additionally, counsel submitted the petitioner's California Form DE-6 quarterly wage reports for the second, third, and fourth quarters of 2001, and the first quarter of 2002. Those wage reports show that the petitioner employed the beneficiary during all four of those quarters.

On July 22, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director relied upon the fact that, because the petitioner's net income during 1998 and 1999 was less than the amount of the proffered wage, the petitioner could not have paid the proffered wage out of its net income.

On appeal, counsel submitted (1) unaudited summaries of the petitioner's payroll expenses during 1998, 1999, 2000, and 2001, (2) copies of the petitioner's 1998, 1999, 2000, California Form DE-7X annual reconciliation statements, and (3) copies of the petitioner's 1998, 1999, 2000 Form 940-EZ Unemployment (FUTA) Tax Returns. All of the documents submitted indicate that the petitioner paid $186,991.06 in wages during 1998, $192,991 during 1999, $219,149.81 during 2000, and $183,750.19 during 2001.

Counsel also submitted a letter, dated August 15, 2002, from the petitioner's vice president. The vice president states that the petitioner's finances are improving, that it has always paid its workers, and that it has a good credit rating. The vice president implies that this shows the ability to pay the proffered wage.

Counsel argued that the petitioner's gross income demonstrates that it has always been able to pay the proffered wage. Counsel argued that the director's reliance on net income alone was improper. Counsel noted that the beneficiary's W-2 forms show amounts the petitioner paid to the beneficiary during various years. Finally, counsel argued that the amounts the petitioner paid in wages is a clear indication of the petitioner's ability to pay the proffered wage.

The petitioner must show not only that it paid its expenses, including payroll expenses, since the priority date, but that it had the ability to pay the proffered wage in addition to those expenses or, in the alternative, that hiring the beneficiary would obviate a sufficient amount of its expenses to pay the proffered wage.

Counsel's point pertinent to the amount the petitioner paid in wages during each of the salient years is unclear. This office recognizes that the petitioner paid wages in excess of the amount of the proffered wage. For that amount to be relevant to the determination of the petitioner's ability to pay the proffered wage, however, counsel must show that the petitioner would replace a current employee, whose wages would then be available, and sufficient, to pay the proffered wage. If the beneficiary will not replace a current employee, then counsel must show that, in addition to the wages it currently pays, the petitioner has the ability to pay the proffered wage.

Counsel presented no evidence to show that the beneficiary would replace an employee whose salary could be used to pay the proffered wage, nor any evidence that hiring the beneficiary would eliminate any expenses in any other way. Counsel must show, therefore, that the petitioner had additional funds available to pay the proffered wage in addition to the other expenses which it paid. This cannot be demonstrated with the petitioner's gross receipts before expenses are paid. This may only be shown by the funds remaining after expenses are met.

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). 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.

The proffered wage is $28,454.40. During 1998, the petitioner paid the beneficiary $21,497.92. The petitioner, therefore, must show that it was able to pay $6,956.48, the balance of the proffered wage, during that year. The petitioner's taxable income before net operating loss deduction and special deductions of $1,418 was insufficient to pay that balance, and the petitioner had negative net current assets. Therefore, the evidence the petitioner submitted does not show that the petitioner was able to

pay the proffered wage during 1998.

During 1999, the petitioner paid the beneficiary $20,758.50. The petitioner must show the ability to pay the difference between that amount and the proffered wage, which difference is $7,695.90. During that year, the petitioner declared a loss on its tax return, and declared that it had no net current assets. Therefore, the evidence the petitioner submitted does not show that the petitioner was able to pay the proffered wage during 1999.

The evidence submitted demonstrates that the petitioner was able to pay the proffered wage during 2000, but not during 1998 or 1999. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.