

PUBLIC COPY
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

File: WAC-03-035-53577 Office: California Service Center

Date: APR 21 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tour and travel agency. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined the petitioner failed to establish its ability to pay the proffered wage.

On appeal, the petitioner counsel argues that the petitioner has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 26, 1999. The beneficiary's salary as stated on the labor certification is \$2,454.40 per month or \$29,453 per year.

With its initial petition, the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Return for the years 1999, 2000 and 2001. The tax return for 1999 reflected gross receipts of \$3,681,919; gross profit of \$2,729,341; compensation of officers of \$51,000; salaries and wages paid of \$548,385; and a taxable income before net operating loss deduction and special

deductions of \$47,793. The tax return for 2000 reflected gross receipts of \$3,905,023; gross profit of \$2,700,327; compensation of officers of \$72,000; salaries and wages paid of \$498,568; and a taxable income before net operating loss deduction and special deductions of -\$119,116.

The tax return for 2001 reflected gross receipts of \$2,779,812; gross profit of \$1,924,862; compensation of officers of \$51,000; salaries and wages paid of \$447,728; and a taxable income before net operating loss deduction and special deductions of -\$422,598.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 21, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax returns, previously submitted, and the petitioner's Form W-3 Transmittal of Wage and Tax Statements for the years 1999 through 2002, inclusive. The W-3's provided in response to the director's RFE indicated that the petitioner paid \$599,385.33 in wages, tips and other compensation during 1999, \$570,568.73 in 2000, \$498,728.24 in 2001, and \$428,267.27 in 2002. However, there was no evidence that the petitioner employed or paid the beneficiary any wages.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states, in pertinent part, that:

However, CSC (California Service Center) did not consider a very crucial piece of information in the Tax Returns that would have established the Petitioner's ability to pay the proffered wage in the years 2000 and 2001. Depreciation claimed by the Petitioner was never considered by CSC. On the issue of whether a sponsor in the United States can pay the proffered wage, depreciation claimed in the sponsoring business' federal tax return should always be considered in determining ability to pay since depreciation is always a non-cash expenditure. (Emphasis in original.)

Counsel states that by failing to consider the "true effect" of depreciation, CIS is ignoring the "totality of circumstances" by emphasizing "form over substance."

Counsel's assertion on appeal that a depreciation deduction does not correspond to a real expense is incorrect. A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as buildings and equipment deteriorate. The depreciation deduction represents the expense of buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The depreciation deduction represents an

accumulation of funds necessary to replace perishable equipment and buildings, and the amount of that expense is not available to pay wages. No precedent exists that would allow the petitioner to include the amount of its depreciation deduction in the calculation of its ability to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

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, then the Immigration and Naturalization Service, had properly relied upon 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's tax returns show that during 1999 it had a taxable income before net operating loss deduction and special deductions of \$47,793 and was, therefore, able to pay the proffered wage out of its ordinary income. During 2000 and 2001 the petitioner had taxable income before net operating loss deduction and special deductions of -\$119,116 and -\$422,598, respectively and was, therefore, unable to pay the proffered wage out of its ordinary income. Further, the petitioner's Form 1120, Schedule L for 2000 indicated negative current assets and current liabilities totaling \$129,430. For 2001 the petitioner's Form 1120 Schedule L indicated negative current assets and current liabilities totaling \$93,131. Therefore, the petitioner reflects negative net current assets for both 2000 and 2001.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000 or 2001. 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.