



U.S. Citizenship
and Immigration
Services



FILE: WAC 01 245 55874 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a full-charge bookkeeper. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director erred in failing to consider all of the sole proprietor's income and assets in determining its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d). Here, the petition's priority date is March 5, 1996. The beneficiary's salary as stated on the labor certification is \$11.96 per hour or \$24,876.80 annually, based on a 40-hour week. The record indicates that the petitioner is organized as a sole proprietorship.

As evidence of its ability to pay the proffered wage, the petitioner initially submitted copies of the sole proprietor's Schedule C, Profit or Loss from Business from her Form 1040, U.S. Individual Income Tax Return for 1996 through 2000. They indicate that the petitioner showed a net profit of \$1,849.83 in 1996; \$2,184.98 in 1997; \$2,204.96 in 1998; \$2,975.42 in 1999; and \$152 in 2000.

On December 7, 2001, the director requested additional evidence to support the petitioner's continuing ability to pay the proffered wage. The director advised the petitioner that it must submit annual reports, federal tax returns, or audited financial statements. The director further instructed the petitioner to submit its tax returns from March 5, 1996 to the present, and to include all schedules and tables. Finally, the director requested the petitioner to submit copies of its state quarterly wage reports for all employees for the last four quarters filed.

In response, the petitioner submitted copies of its state quarterly wage report for another facility operated by the sole proprietor named "Marie's Home II." The petitioner also resubmitted copies of Schedule C with various supplemental attachments for 1996 through 2000, but failed to submit the complete tax return for any of the relevant years.

In denying the petition, the director reviewed the figures reflected on Schedule C of each of the years and concluded that the petitioner's net profit did not support the petitioner's ability to pay the beneficiary's proffered salary of \$24,876.80 per year.

On appeal, counsel submits copies of the sole proprietor's individual bank statements from February 1996 through June 2002 and copies of the petitioner's bank statements from January 1996 through May 2002, (omitting June and August 1998). Counsel asserts that if the proffered wage is deducted from the combined total balance of the individual and company accounts, the results would yield an excess of \$4,325.92 in 1996; \$12,410.71 in 1997; \$6,285.22 in 1998; -\$8,466.39 in 1999; \$2,783.22 in 2000; \$17,882.64 in 2001; and \$22,969.12.

A sole proprietorship is not legally separate from its owner. As the petitioner is a sole proprietor, her income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietor and her dependents must be reviewed when determining her continuing ability to pay the beneficiary's proposed annual salary of \$24,876.80. She must be able to demonstrate that she can sustain her individual living expenses as well as pay the beneficiary's proposed salary.

In this case, it is not possible to review all of the income and expenses of the sole proprietor and her dependents because the petitioner failed to submit the complete federal tax returns as requested by the director. The record does not contain an explanation for the omission. Failure to submit requested evidence that precludes a material line for inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(14). Moreover, even using counsel's method of calculating the petitioner's ability to pay the proffered wage from bank balance totals, it is noted that living expenses could not be covered in 1999 on -\$8,466.39. It is also implausible in 2000, if \$2,783.22 is the only resource left out of which to pay living expenses. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage. (Emphasis added.)

Counsel also maintains that the depreciation should be added back to the calculation of the petitioner's net income. The AAO does not agree. In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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Accordingly, based on a review of the evidence contained in the record, the AAO cannot conclude that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the present.

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.