



U.S. Citizenship
and Immigration
Services

Blp



FILE: EAC 02 144 51725 Office: VERMONT 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gymnastics club. It 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 seeks to employ the beneficiary permanently in the United States as a gymnastics coach. 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 submits additional evidence and asserts that the petitioner has had the continuing ability to pay the beneficiary's wage offer as of the priority date of the visa petition.

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.

The regulation at 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. . . .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 matter is based upon 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. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is March 23, 2001. The beneficiary's salary as stated on the labor certification is \$24.21 per hour based on a 40-hour week or \$50,356.80 per year. The record reflects that the petitioner is organized as a corporation and has employed the beneficiary since 1998.

Counsel initially submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 as evidence of the petitioner's ability to pay the proffered wage. The W-2 shows that the petitioner paid the beneficiary \$29,288.45 in 2001. The petitioner also submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2000. It indicates that the petitioner filed the tax return based on a fiscal year running from September 1, 2000 and ending August 31, 2001. It shows that the petitioner declared -\$5,645 in taxable income before the net operating loss (NOL) deduction and special deductions. Schedule L reveals that the petitioner had \$4,698 in current assets and \$3,032 in current liabilities. The difference of \$1,666 represents the petitioner's net current assets. CIS will review net current assets because it represents a petitioner's cash or cash equivalent assets that would reasonably be available to pay the proffered wage during the year covered by the Schedule L balance sheet.

On June 15, 2002, the director requested the petitioner to provide additional evidence in support of the petitioner's ability to pay the beneficiary's proposed salary of \$50,356.80. The director advised the petitioner that

the beneficiary's W-2 showed that he was paid approximately \$21,000 less than the proffered wage and instructed the beneficiary to submit annual reports, federal tax returns, or audited financial statements. In response, the petitioner, through counsel, submitted a duplicate copy of the petitioner's 2000 corporate tax return accompanied by a letter from an accountant, James W. McCarthy. Mr. McCarthy maintains that the petitioner's total assets of \$141,270 and the depreciation of \$4,417, as shown on the petitioner's 2000 tax return, should be included in the determination of the petitioner's ability to pay the proffered wage. He also asserts that the wages already paid to the beneficiary should be considered.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted that the petitioner's tax return reflected that the beneficiary's proposed salary could not be covered out of either the petitioner's taxable income or its net current assets. The AAO concurs. 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. 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). Depreciation as the decreased value of the assets of a business is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

In this case, the petitioner's taxable income of -\$5,645 could not cover the beneficiary's proposed salary. Similarly, the petitioner's net current assets of \$1,666 represented a significant shortfall of resources available to meet the wage offer. While wages already paid to the beneficiary can be considered, as noted by the director, the difference between the proffered salary and the wages actually paid to the beneficiary could not be met by either its taxable income or its net current assets.

The accountant's suggestion that the petitioner's total assets, as shown on its tax return, should be included in the calculation is also unpersuasive. It does not include a consideration of total liabilities and does not represent readily available funds that could be used to meet the beneficiary's salary. As noted above, CIS will examine net income including, in appropriate cases, a petitioner's net current assets as monies that would be readily available to meet the proffered wage.

On appeal, counsel submits copies of the petitioner's bank statements covering a period between September 30, 2001 and August 31, 2002. The petitioner's accountant provides a summary of the monthly ending balances. Although the average monthly balance appears to be a creditable \$36,0476.15, these statements do not cover the period beginning as of the visa priority date and cannot be considered to represent a complete picture of the petitioner's financial status, as they may not reflect other relevant encumbrances. Even though the petitioner submitted its bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). It is further noted that 8 C.F.R. § 204.5(g)(2) requires audited financial statements, federal tax returns or annual reports as probative and competent evidence of a petitioner's ability to pay the proffered wage for third preference visa petition purposes.

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Following a review of the petitioner's federal tax return, as well as further argument and evidence presented on appeal, it is concluded that the petitioner has not convincingly established that it has had a continuing ability to pay the proffered wage as of the visa 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.