



U.S. Citizenship
and Immigration
Services

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: APR 26 2004

IN RE:

Petitioner:

Beneficiary:

PETITION: 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:

PUBLIC COPY

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

The petitioner is a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is September 5, 2000. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 24, 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, for 2001, a copy of the petitioner's signed federal income tax return, as submitted, annual report or audited financial statement, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary. The RFE questioned that the petitioner had the resources to make monthly living expenses and pay the beneficiary in 2001. The petitioner is a sole proprietor. The record contained the signed 2000 Form 1040 of the petitioner's owners (MWB and MAB).

Counsel submitted the 2001 Form 1040, U.S. Individual Income Tax Return, of the sole proprietors. Forms 1040 for 2000 and 2001 reported adjusted gross income (AGI) of, respectively, \$182,215 and \$30,396, equal to, or greater than, the proffered wage.

The director, however, considering that the 2001 AGI could not reasonably meet the sole proprietors' living expenses and pay the proffered wage, 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 submits a brief, a bank statement, and copies of two (2) stock certificates of Adchek, Inc. (A, Inc.) These stock certificates register 20,000 shares for the MWB and MAB Family Trust, dated February 1, 2000 and 30,000 shares for the sole proprietors, dated December 25, 2002. Counsel avers that the petitioners "have an idea" of their value, as \$1.00 per share, or \$50,000 total.

The offer of proof of assets through share certificates is incomplete because the sole proprietors do not respond to the RFE with information on their living expenses, in order to determine the ability to pay in accord with 8 C.F.R. § 204.5(g)(2). Even on appeal, counsel merely advises that more assets “cover the proffered wage for two years,” but never discusses or presents the proof of living expenses.

The petitioner and counsel, without explanation, withhold the requisite proof of living expenses. Since the petitioner is a sole proprietor, the owner is not separate from its business, the petitioner. The sole proprietor’s AGI will be the source of the proffered wage. Thus, the petitioner’s AGI must be reduced by its expenses to ensure that it can support itself, its dependents, and still pay the proffered wage. Seeking the petitioner’s expenses is a material line of inquiry concerning the petitioner’s ability to pay the proffered wage. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Additionally, where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceeding before Citizenship and Immigration Services (CIS), formerly the Service or the INS, *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Thus, any evidence submitted on appeal need not be considered.

However, even after exercising favorable discretion and considering the appellate evidence, the sole proprietors’ stock certificates are of little evidentiary value as they bear the date December 25, 2002, and, therefore, they do not represent assets available at the priority date. For the same reason, little evidentiary value attaches to one (1) bank statement, for the period March 1 to March 31, 2003. Counsel observes that it “alone almost covers the proffered wage for a year.” The bank’s beginning balance is \$29,503.41, equal to, or greater than, the proffered wage, and its ending balance is \$21,984.92, less than the proffered wage. It is irrelevant to the ability to pay the proffered wage at the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Moreover, counsel concedes that neither stock certificate states a public value, and each, on its face, conditions its value on undocumented terms, thus:

The shares represented by this certificate are subject to a Buy-Sell Agreement – See reverse side for legend.

The reverse side of the copies in the record tells no legend. Counsel’s offers of proof include no buy-sell agreement.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

The petitioner presents the March 31, 2003 bank statement, additionally, to prove sufficient cash flow to pay the proffered wage. This assertion fails to demonstrate that the balance somehow represents any funds beyond those shown on tax returns, financial statements, and living expenses, as required by the RFE. Cash, as reflected in a bank account, has little evidentiary value without a balance sheet to show the current liabilities that offset cash and other current assets. 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).

Counsel's brief justifies this appeal, in part, by the petitioner's 2001 Schedule C, since it reflects gross income of \$412,527, business profit of \$40,780 (instead of AGI at \$30,396), and depreciation of \$23,819. Counsel, further, interprets the 2001 Form 1040 and asserts that CIS must add certain "tax break" expenses back to AGI, since Congress has made a tax deduction gift of them. Tax break gifts from Congress, it is said, include a capital loss of \$3,000 on stock sales and expenses for half of self-employment tax and self-employed health insurance. No authority supports these gifts.

Contrary to counsel's contentions, CIS places primary reliance on adjusted gross income. 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. Tex. 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.*, 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The petitioner's AGI and other evidence in the record of proceeding fail to establish its continuing ability to pay the proffered wage because the AGI in 2001 was too low to reasonably support the petitioner and the petitioner's dependents in addition to paying the proffered wage.¹

Beyond the director's decision, there are discrepancies concerning the petitioner's identity. For example, the bank statement, presented on appeal, addresses the sole proprietors, "dba Cottage Inn," at 1738 Vista Del Mar in Ventura, CA. In contradiction, Forms 1040 for 2000 and 2001, in Schedule C, support net profit for Cottage Inn, employer identification number (EIN) 77-0454583, but at 7520 Van Buren Street, Ventura, CA. The appeal, in further contradiction, names Cottage Inn II as the petitioner, not Cottage Inn, the subject of the evidence. The petitioner's most recent Notice of Entry of Appearance of Attorney or Representative (G-28), dated July 1, 2000, names the petitioner as Cottage Inn Inn [sic] with a third address yet, 350 S. Arcade Drive

¹ The petitioner failed to submit comprehensive evidence of its living expenses and its additional supporting documentation was deficient.

in Ventura, California. The brief on appeal does not name the petitioner or reconcile the discrepancy of addresses for this business.

The Immigrant Petition for Alien Worker (I-140) and ETA 750 identified Cottage Inn II, at 350 South Arcade Drive, Ventura, CA, as the petitioner, the RFE exacted evidence in respect to it, and counsel brings this appeal for it. Cottage Inn II, however, offers no EIN, federal tax return, financial statement, or pertinent data to support its ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. Since the RFE did not address this particular lack of evidence concerning the place at which the beneficiary will work, its absence is not now a basis of this decision.

After a review of federal tax returns, the bank statement, stock certificates, and the failure of proof of the sole proprietors' living expenses, the AAO concludes that the petitioner has not established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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