



U.S. Citizenship
and Immigration
Services

FILE: LIN 03 008 51416 Office: NEBRASKA SERVICE CENTER

Date: APR 27 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:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a night auditor. 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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.

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. Here, the petition's priority date is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$9.00 per hour for a forty-hour workweek, which equates to \$18,720.00 per annum.

With the petition, counsel provided a copy of the petitioner's 2001 federal tax return and a letter from the petitioner's accountant.¹ In addition, a one-page bank statement was provided on behalf of the petitioner. The director found that the evidence in the record was insufficient to prove the petitioner's ability to pay, and consequently denied the petition.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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).

¹ The petitioner also submitted a second tax return for a separate entity, which was not considered by the director.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's net income was less than the proffered wage. The director based his decision solely on the figure displayed on line 21 of the petitioner's tax return, which was a net loss of \$98,211.00. The director did not consider the petitioner's net current assets, although CIS may review net current assets as an alternative means of determining the petitioner's ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

In this case, a review of Schedule L on the petitioner's 2001 tax return shows that the petitioner had current assets of \$126,430.00 and current liabilities of \$73,948.00. After subtracting the petitioner's current liabilities from its current assets, the petitioner's net current assets total \$52,482.00. Since the proffered wage in this case is \$18,720.00, the petitioner's net current assets clearly exceed the amount of the beneficiary's proposed salary.

After reviewing the record, it is concluded that the petitioner demonstrated its ability to pay the proffered wage from the establishment of the priority date and continuing thereafter.²

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

² Although counsel submits a brief and additional evidence on appeal, this evidence need not be considered.