



U.S. Citizenship
and Immigration
Services

B6

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 10 2004**

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 floor covering establishment. It seeks to employ the beneficiary permanently in the United States as a hardwood floor installer. 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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 24, 2001. The beneficiary's salary as stated on the labor certification is \$23.83 per hour or \$49,566.40 per year.

The petitioner initially submitted its 2001 Form 1120S, U.S. Income Tax Return for an S corporation, its bank statements through July 31, 2002, and 2001 Wage and Tax Statements (Forms W-2) unrelated to the beneficiary. The director deemed these submissions insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 12, 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 and 2002, the petitioner's signed federal income tax return, annual report, or audited financial statement, with all tables and charts.

The petitioner submitted the petitioner's 2000, 2001, and 2002 Form 1120S U.S. Income Tax Returns. They reported, for 2001 and 2002, respectively, ordinary income or (loss) from business activities of \$15,186 and (\$46,437), less than the proffered wage. Schedules L reflected the difference of current assets minus current liabilities, or net current assets, currently available to meet obligations.¹ For 2001 and 2002, net current assets

¹ Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

of \$15,421 and (\$30,263), a deficit, were, also, both less than the proffered wage. Counsel stipulated the total of average monthly balances in three (3) various banks as \$7,411 (\$5,895 + 1,516) in 2001, \$7,996 (\$5,808 + \$2,188) in 2002, and \$4,052 in 2003. Each stipulated balance and the totals were less than the proffered wage, as of the date of the response, on July 2, 2003, to the RFE.

The director considered the ordinary income and (loss), for 2001 and 2002, and “negative cash assets” for both years. The director determined that the petitioner did not establish that it had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, an attorney submits a brief, received September 26, 2003 (2003 brief). The proceedings reflect this attorney’s Notice of Entry of Appearance of Attorney or Representative (G-28), dated February 11, 2003, before the response to the RFE, but it is improperly filed.² The petitioner properly filed a G-28, dated January 7, 2003, in favor of counsel at the address shown on the cover for this decision, in connection with the response to the RFE before Citizenship and Immigration Services (CIS). The appellate attorney appears to be affiliated with counsel, who appears to have switched firms. The AAO will consider all of the briefs and evidence, but notify only counsel, at the new address.

The attorney poses, and proposes to settle, a question in the 2003 brief:

Had [CIS] reviewed the Gross Income, depreciation and Assets, and also considered and added up the average balances of above-mentioned 3 different banks, which in fact are available funds? It is a question. As a matter of fact it is clear that the company had and has a net usable income to pay the proffered wages.

(Emphasis in original). The 2003 brief offers no definition for the concept of net usable income, and no authority suffers this application of it. Logic does not support the use of assets without the consideration of liabilities incurred to produce them. Furthermore, net current assets, as noted above, are less than the proffered wage at the priority date and at all times since. They contradict the ability to pay the proffered wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Judicial authority contradicts the use of gross income and depreciation. 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).

² Only the beneficiary has executed the G-28 filed by this attorney, Bitu L. Hoffman, California State Bar #159205. The beneficiary is not an affected party in the proceedings. *See* 8 C.F.R. §§ 103.3(a)(1)(iii)(B). Consequently, this G-28 for the beneficiary is improperly filed. *See* 8 C.F.R. 103.3(a)(2)(v)(A)(1) and (2)(i).

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 2003 brief calls attention to total salaries of \$188,937 and \$187,574, paid in 2001 and 2002, and states that "[The petitioner] has paid considerably good amount of money as wages to his employees." The attorney does not claim that the beneficiary received wages, or that the petitioner might replace any workers with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The 2003 brief specifies error in that CIS must reach a favorable conclusion on the ability to pay the proffered wage, based on the average monthly bank balance of all accounts, as set forth above. Even though the petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, as prorated for one (1) to three (3) months, the attorney did not explain where the funds might originate to continue beyond that time.

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).

In fact, there is no proof that bank balances represent any additional cash beyond that reported and considered in Schedule L of the 2001 and 2002 Forms 1120S. Net current assets have already been found wanting. 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).

After a review of the federal tax returns, briefs, bank statements, Forms W-2, and Form W-3, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered 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.