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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 287 50574 Office: CALIFORNIA SERVICE CENTER Date: **AUG 16 2004**

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

CC: [Redacted]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 garment factory. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager of production and operating workers. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a statement.

Section 203(b)(3)(A)(iii) 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day 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). Here, the request for labor certification was accepted on March 29, 2001. The proffered salary as stated on the labor certification is \$24.02 per hour or \$49,961.60 per year.

With the petition, the petitioner failed to submit any evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to present. On December 17, 2002, the director requested evidence of that ability to pay the proffered wage.

In response, the petitioner submitted a copy of its profit and loss statement for the period January through December, 2002, a copy of the owner's 2001 Form 1040, U.S. Individual Income Tax Return, a copy of Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending March 31, 2001, copies of the petitioner's Employee Earnings Summary for the period January through March, 2001, and a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement. The profit and loss statement reflected an ordinary income of \$87,287.25. The 2001 tax return reflected an adjusted gross income of \$28,748, and the beneficiary's 2001 W-2 reflected wages earned of \$8,544.69. The Form 941 for the quarter ending March 31, 2001 indicated that the beneficiary did not work for the petitioner in January and February of 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on March 17, 2003, denied the petition.

On appeal, the petitioner provides the same evidence as previously submitted and states:

When this case was submitted with a date of 3/21/2001 was submitted with a rate of pay of \$6.25 Hr. We received an assessment notice stating that the prevailing wage of this type of work is \$24.02 per hour.

At the time of the establishment of the priority date the foreign worker was \$6.25 per hour, that mean that with this hourly salary was \$13,000 in year 2001.

If the employer reported \$23,004 in total wages and tips for 2001, the employer reported sufficient salary to meet the required \$13,000 for year 2001.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2001 and continuing to present.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. 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 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 AAO is satisfied that 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.

The 2001 tax return reflects an adjusted gross income of \$28,748. The petitioner could not pay \$41,406.91 (\$49,961.60 (the proffered wage) - \$8,544.69 (wages paid in 2001)) from that income. In addition, while the 2002 profit and loss statement reflects an ordinary income of \$87,287.25, there is no indication that any wages were paid that year and the statement, itself, has not been audited. CIS will not accept an unaudited profit and loss statement as proof of the petitioner's ability to pay the proffered wage. See 8 C.F.R. § 204.5(g).

The petitioner is mistaken in assuming that because it had written \$6.25 as the hourly wage when it initially submitted the labor certification, that \$6.25 was the prevailing wage at that time. The only thing established on the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, was the priority date. The labor certification was not approved until September 13, 2002, after the prevailing wage had been determined to be \$24.02 per hour by the Department of Labor.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. In the instant case, the petitioner's adjusted gross income is not enough to pay the proffered wage. No evidence was provided that the petitioner possessed other resources, such as bank accounts, CD's, etc., with which to pay the proffered wage.

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.