

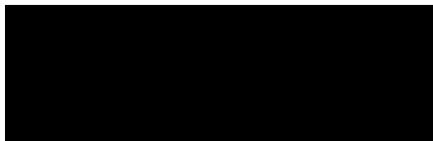
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: WAC 02 080 53438 Office: CALIFORNIA SERVICE CENTER Date: **JAN 23 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:

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prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

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 on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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, counsel submits a statement and the petitioner submits additional evidence.

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 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 proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$4,125.25 per month, which equals \$49,503 per year.

With the petition counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared a loss of \$556 as its taxable income

before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$311,703 and current liabilities of \$275,357, which yields net current assets of \$36,346.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 25, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also specifically requested copies of the petitioner's most recent California Form DE-6 Quarterly Wage Reports and the petitioner's 2001 Form W-2 Wage and Tax Statements and Form W-3 transmittal.

In response, counsel submitted the petitioner's Form DE-6 for the second quarter of 2002 and the petitioner's 2001 W-3 transmittal. Counsel did not provide the requested W-2 forms. The Form DE-6 shows that the petitioner did not employ the beneficiary during that second quarter of 2002. No evidence in the record of proceeding demonstrates that the petitioner has ever employed the beneficiary.

Counsel also submitted copies of the petitioner's 1998 and 1999 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,114 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$827,673 and current liabilities of \$783,800, which yields net current assets of \$43,873.

The 1999 return shows that the petitioner declared a loss of \$158 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$434,354 and current liabilities of \$418,874, which yields net current assets of \$15,480.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on September 12, 2002, denied the petition. In that decision, the director stated that the petitioner's net current assets at the end of 2000 were \$13,871.

On appeal, counsel argues that the petitioner's gross income and labor costs demonstrate its ability to pay the proffered wage. Counsel also stated that the director was incorrect that the petitioner's current assets for 2000 were \$13,871 because the petitioner's total assets were \$312,500.

Subsequently, the petitioner's owner provided a letter dated November 9, 2002, stating that its labor costs were understated on its 1999 and 2001 corporate income tax returns. The petitioner's owner stated that a portion of the amount shown at Line 26 of those returns, which portion was labeled "Operational Support" on Statement 1 of those returns, was also labor expense.

Initially, the AAO notes that counsel incorrectly equates net current assets with current assets and incorrectly equates both with total assets. Further, the AAO observes that the petitioner's net current assets were incorrectly calculated in the decision of denial.

The petitioner's year-end current assets are calculated by adding the assets shown on Schedule L, lines 1(d) through 5(d). The petitioner's year-end current liabilities are calculated by adding lines 15(d) through 17(d). The petitioner's year-end net current assets, the current assets net of the current liabilities, are calculated by subtracting the petitioner's current liabilities from its current assets. As was stated above, the petitioner's net current assets at the end of 2000 were \$36,346.

Counsel's reliance on the petitioner's gross receipts and labor expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or would otherwise have increased its net income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. Because the petitioner has not demonstrated that hiring the beneficiary will increase its profits, the petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

deductions.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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 the INS, now 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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.

The priority date is January 13, 1998. The proffered wage is \$49,503 per year. During 1998, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion of the proffered wage that would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 12 days of that 364-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 352 days of that year. The proffered wage multiplied by $352/364^{\text{th}}$ equals \$47,871.03, which is the amount the petitioner is obliged to demonstrate it could pay during 1998.

During 1998, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,114. That amount is insufficient to pay the proffered wage. The petitioner's year-end net current assets were \$43,873. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 1998 with which it might have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage the proffered wage during 1998.

During 1999 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 1999, the petitioner declared a loss of \$158 as its taxable

income before net operating loss deduction and special deductions and had net current assets of \$15,480. The petitioner was unable to pay the proffered wage during 1999 out of either its income or its net current assets. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss of \$556 as its taxable income before net operating loss deduction and special deductions and had net current assets of \$36,346. The petitioner was unable to pay the proffered wage during 2000 out of either its income or its net current assets. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage from the priority date to the end of 1998. The petitioner also failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.