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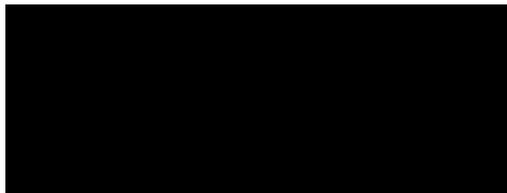
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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 034 54246 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 2004

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

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:

N/A

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 on appeal. The appeal will be dismissed. The petition will be denied.

At the outset, a Form G-28 Notice of Entry of Appearance as Attorney or Representative is in the file. However, the form indicates that the purported representative is not an attorney or representative recognized by CIS. Therefore, a copy of this decision will not be furnished to the purported representative.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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)(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.

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 July 18, 1997. The beneficiary's salary as stated on the labor certification is \$18.63 per hour which equates to \$38,750.40 per annum.

With its initial petition, the petitioner submitted the first page of its tax returns from 1997 through 2000. Because this was insufficient evidence of the petitioner's ability to pay the proffered wages, the director requested additional regulatory-sanctioned evidence such as the petitioner's complete tax returns including all schedules and attachments and any documentation concerning wages paid to its employees.

In response to the director's request for evidence, counsel submitted complete copies of the petitioner's Internal Revenue Service (IRS) Forms 1040 for the years 1997 through 2000. The IRS Forms show adjusted gross incomes of \$59,504; \$20,174; \$43,306; and \$33,531, respectively. The returns indicate that the petitioner is a family of four.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the petitioner's business and personal bank statements for the years from 1997 through 2002 and a letter from the petitioner's accountant who states that the beneficiary will replace some part-time employees and one full-time employee.

The accountant's assertion that the funds paid to other employees could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the other employees, and therefore, not readily available for payment of the beneficiary's salary in 1997.

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 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).

The petitioner's IRS Form 1040 for calendar year 1997 shows an adjusted gross income of \$59,504. The petitioner might be able to pay a proffered wage of \$38,750.40 a year out of this income. The petitioner's IRS Form 1040 for calendar year 1999 shows an adjusted gross income of \$43,306. The petitioner might be able to pay a proffered wage of \$38,750.40 a year out of this income.

The petitioner's adjusted gross incomes for 1998 and 2000, however, show an inability to pay the wage offered because they are less than the proffered wage. Even though the petitioner demonstrated the ability to pay the wage offered in 1997 and 1999, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.¹ See 8 C.F.R. § 204.5(g)(2).

Finally, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Likewise, there is no independent evidence concerning the employee(s) the beneficiary might replace such as his or her name, position, and planned termination. 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).

Accordingly, after a review of the record, 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.

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. The petition is denied.

¹ If the petitioner has shown adjusted gross incomes greater than the proffered wage, then the case would have been remanded to the director to obtain the petitioner's monthly expenses to determine if the petitioner could pay the proffered wage and support himself and his family. However, since the petitioner's adjusted gross income is less than the proffered wage for 1998 and 2000, this is not necessary.