



U.S. Citizenship
and Immigration
Services

PUBLIC COMMENT
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUL 22 2004

IN RE:

Petitioner:
Beneficiary:

[Redacted]

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
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and alterations business. It seeks to employ the beneficiary permanently in the United States as a tailor. 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 turns, in part, 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 10, 2001. The beneficiary's salary as stated on the labor certification is \$10.26 per hour or \$21,340.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and, in the initial Certificate of Employment, dated March 5, 2001 (initial certificate), of two (2) years of experience with Seoul Laundry Shop in the job offered, as required under Form ETA 750. In a request for evidence (RFE) dated February 10, 2003, the director exacted, for 2001 to the present, the petitioner's federal income tax return in computer printouts from the Internal Revenue Service (IRS). Further, the director exacted letters, contracts, and pay statements to verify the beneficiary's work with listed foreign employers.

Counsel submitted the 2001 IRS printout of Form 1040, U.S. Individual Income Tax Return, for the petitioner as a sole proprietor. It reflected adjusted gross income (AGI) of \$25,602. Counsel submitted two more letters from Seoul Laundry shop in response to the RFE. One was an agreement to employ the beneficiary dated March 3, 1992 (employment agreement), before any employment occurred. In the other, dated February 25, 2003 (the disavowal), the owner of Seoul Laundry Shop claimed to have paid the beneficiary cash, disavowed any record of a monthly payment, and denied the verification of any particular sum of cash paid to the beneficiary. The initial certificate established no particulars of how the beneficiary "has been worked" at Seoul Cleaners from March 1, 1992 to October 30, 1994.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, after subtracting from AGI the cost of maintaining the sole proprietor's household. The director, moreover, concluded that the petitioner never employed the beneficiary and did not otherwise establish its ability to pay the proffered wage, from the priority date until the present, and denied the petition.

On appeal, counsel submits a brief. Counsel reasons that the 2001 Form 1040, in Schedule C, Profit or Loss from Business or Profession, shows gross income of \$95,942, stipulates the exclusion of depreciation or other expenses, and concludes that gross income justifies the ability to pay the proffered wage. On the contrary, in determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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).

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 director concluded that the AGI minus the proffered wage (\$25,602-\$21,340.80) yields a difference of only \$4,261.20, less than the proffered wage.¹ Counsel makes no claim that any computation, based on net profit or AGI, establishes a sum adequate pay the proffered wage and to maintain the petitioner's household, said to consist of three (3) members in Los Angeles County, California. The petitioner made no offer of proof of living expenses and no showing that the remainder of AGI minus living expenses was equal to, or greater than, the proffered wage.

The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel submits an escrow agreement, dated November 15, 2002 (Regal escrow) and relates:

Here the petitioner purchased another dry cleaning business for \$145,000, with a cash deposit of \$125,000.00. The \$126,000.00 cash the petitioner had lying around during 2002 was enough to pay the proffered wage for 6 years.

Counsel does not state the source of such amounts. In any case, amounts lying around in 2002 do not demonstrate the ability to pay the proffered wage at the priority date, April 10, 2001. A petitioner must establish the elements for the approval of the petition at the priority date. Employment-based petitions depend on priority dates. Simply going on record without supporting documentary evidence is not sufficient for purposes of

¹ Counsel asserts that the computation should use net profit from Schedule C minus the proffered wage (\$27,536-\$21,340.80), for a difference of \$6,195.20.

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 return, Regal escrow documents, and counsel's brief, 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.