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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: SRC-03-059-50030 [redacted] Office: TEXAS SERVICE CENTER Date: JUN 15 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

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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.

The director denied the petition having determined that the petitioner had failed to establish its ability to pay the proffered wage.

On appeal, counsel for the petitioner 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $13.17 per hour or $27,394 per year.

With the initial petition, the petitioner submitted the Form 1040 tax return of its proprietor, Marie Diaz. This return reflected adjusted gross income of $18,018. The attached Schedule C relating to the petitioner reflected no wages and net income of $19,398.

In a request for evidence (RFE), dated April 9, 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 specified the petitioner's 2002 federal income tax return and evidence of wage payments to the beneficiary for 2001 and 2002, if any.

In response to the RFE, the petitioner submitted the beneficiary's 2002 Form 1040, U.S. Individual Income Tax Return. This return reflected wages of $23,738, business income of $9,833 and an adjusted gross income of $32,876. The beneficiary's spouse's occupation is listed as delivery driver and no occupation is listed for the beneficiary. On Schedule C-EZ, the beneficiary listed herself as the sole proprietor of the petitioning salon and listed her gross receipts as $10,333 with expenses of $500. The petitioner also submitted page two of Marie Diaz' Form 1040 tax return, with two attached Schedules C relating to the petitioner and Texas Soil. Page two of the Form 1040 reflects adjusted gross income of $21,529. The Schedule C relating to the petitioner reflected wages of $62,248 and a net profit of $12,514. Finally, the Schedule C relating to Texas Soil reflected a net profit of $10,652.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. Specifically, the director questioned whether the petitioner could pay the proffered wage above and beyond her personal expenses in 2001. The director also noted that the petitioner had not submitted the complete Form 1040 for [redacted] for 2002 and questioned how [redacted] and the beneficiary could both be the proprietor of the petitioning salon. Accepting $9,833[1] as wages paid by the petitioner to the beneficiary in 2002, the director determined that the difference between that amount and the proffered wage was $17,560. The director determined that [redacted] income in 2002 was insufficient to pay $17,560 in addition to her own personal expenses.

On appeal, counsel states that the beneficiary has been working for the petitioner since 1997, but that the director erred in requesting Forms W-2 as the law does not require that the petitioner employ the beneficiary prior to adjustment of status. Counsel further asserts that Citizenship and Immigration Service (CIS) must consider any assets of the petitioner in determining its ability to pay the proffered wage. Counsel further states that the petitioner is submitting an affidavit stating that the petitioner has rental property which pays her $1,100 per month rent, a real estate contract dated April 9, 2003, reflecting an income of $25,000 and bank statements for both Studio Cuts and Texas Soil.

The affidavit from the petitioner, submitted on appeal states that the petitioner has rental property that generates $1,100 per month income. However, the petitioner has submitted no evidence to corroborate this statement. Moreover, rental income would be listed on [redacted] Form 1040, line 17, and Schedule E. Also, we cannot consider rental income without balancing the cots of maintaining the rental property, which would also be listed on Schedule E. [redacted] Form 1040 lists no rental income in 2001. While the record does not contain page 1 from her Form 1040 for 2002, no Schedule E was submitted for that year. Thus, the record contains no evidence of any rental income in 2001 and 2002. The evidence of the sale of a house netting $25,000 occurred in 2003 and therefore could only be used for future payments of the proffered wage.

Counsel mischaracterizes the director's decision as requiring evidence that the petitioner employed the beneficiary at the full proffered wage. Rather, one of the ways to establish that the petitioner is able to pay the proffered wage is that it has, in fact, done so. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Thus, the director did not err in requesting evidence of the wages paid to the beneficiary by the petitioner in 2001 and 2002.

The proffered wage is $27,394 per year. The priority date is April 30, 2001. The record contains no evidence of the wages paid to the beneficiary in 2001. Thus, the petitioner must demonstrate its ability to pay the full proffered wage in that year. At best, the record establishes that the petitioner paid the beneficiary $10,333 in 2002. Thus, the petitioner must demonstrate its ability to pay an additional $17,061 in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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. 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the

[1] As stated above, the beneficiary claimed $10,333 in "gross receipts" from the petitioner and $500 in expenses in 2002.

petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

While counsel is correct that CIS should consider the income and assets of a sole proprietor, we must also consider the proprietor's liabilities and expenses. *Ubeda,* 539 F. Supp. 647, involved a sole proprietor. The court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or about 30% of the petitioner's gross income.

[redacted] federal tax returns reflected adjusted gross income of $18,018 in 2001 and $21,529 in 2002. These amounts include the petitioner's income from Texas Soil and any rental income that might have been reflected on page one of the petitioner's 2002 Form 1040. The petitioner could not pay the proffered wage in 2001 or the difference between the proffered wage and the amount actually paid to the beneficiary for 2002 from these amounts and support a family of four as reflected by the record. The bank statements submitted on appeal do not reflect a continuing balance sufficient to pay the proffered wage and do not relate to 2001.

After a review of the evidence 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.