



U.S. Citizenship  
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FILE: WAC-02-161-50857 Office: CALIFORNIA SERVICE CENTER

Date JUN 22 2004

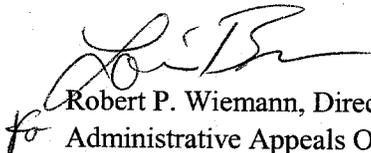
IN RE: Petitioner:  
Beneficiary:

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:

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a cook. 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 argues that the petitioner has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on January 20, 1998. The proffered salary as stated on the labor certification is \$11.55 per hour which equals \$24,024 annually.

With the petition, counsel submitted copies of the petitioner's 1998 through 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1998 reflected gross receipts of \$155,158; gross profit of 155,158; compensation of officers of \$0; salaries and wages paid of \$56,631; and a taxable income before net operating loss deduction and special deductions of -\$20,918. The tax return for 1999 reflected gross receipts of \$204,154; gross profit of \$204,154; compensation of officers of \$4,252; salaries and wages paid of \$57,960; and a taxable income before net operating loss deduction and special deductions of \$16,505.

The tax return for 2000 reflected gross receipts of \$226,116; gross profit of \$226,116; compensation of officers of \$3,942; salaries and wages paid of \$64,277; and a taxable income before net operating loss deduction and special deductions of \$13,475.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated June 18, 2002, the director required additional evidence to establish the petitioner's

ability to pay the proffered wage as of the priority date and continuing #to the present until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last eight (8) quarters that were accepted by the State of California.

Counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and the Form DE-6, Quarterly Wage Reports for the years 2000 and 2001. The tax return for 2001 reflected gross receipts of \$234,361; gross profit of \$234,361; compensation of officers of \$20,582; salaries and wages paid of \$57,705; and a taxable income before net operating loss deduction and special deductions of \$16,812.

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

On appeal, counsel argues for the first time that by simply eliminating "contract labor," the petitioner has the ability to pay the proffered wage. Counsel states that an undisclosed amount of contract labor will provide sufficient funds to pay the beneficiary. Counsel does not even provide evidence that the contract labor suggested on the tax returns covers cooking staff, such as the actual contract setting forth the services to be provided.

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 that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. at 1084.

Counsel's assertions that the funds paid to independent contractors could be used to pay the beneficiary's salary is not persuasive. At the outset, the petitioner has provided no evidence of its use of independent contractors. The assertions of counsel do not constitute evidence. See *Matter of Obaighena*, 19 I & N Dec. 533, 534 (BIA 1988), *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980). Additionally, even if these assertions were corroborated, there is also no evidence that these funds could be retained by the petitioner for future use. Instead, these monies would have been expended on compensating the contractors, and therefore, would not have been readily available for payment of the beneficiary's salary in 1998.

The tax returns for 1998 through 2001 show taxable income of -\$20,918; \$16,505; \$13,475; and \$16,812, respectively. The petitioner could not have paid the proffered wage from these amounts. While CIS will consider the petitioner's net current assets (current assets less current liabilities) if its net income is insufficient to establish an ability to pay the proffered wage, Schedules C for the petitioner's tax returns also reflect that during all of the years documented, the petitioner's current liabilities exceeded its current assets.

Accordingly, after a review of the federal tax returns, 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 to present.

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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.