

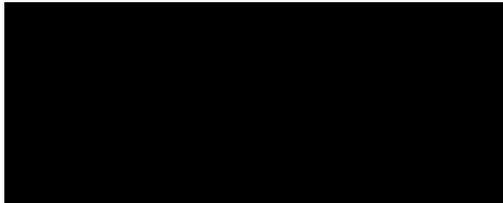
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

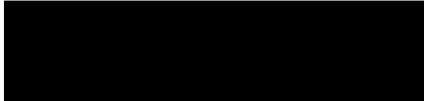


File: 

Office: California Service Center

Date: **MAR 08 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 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer parts and accessories distributor. It seeks to employ the beneficiary permanently in the United States as an operations research analyst. 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 asserts that the director erred in concluding that the petitioner did not demonstrate an 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.

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 petitioner'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 and continuing until the alien is granted permanent residence. The petitioner's priority date in this

instance is May 14, 2001. The beneficiary's salary as stated on the labor certification is \$42,500 per year.

With the petition, counsel submitted copies of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax year is October 1 to September 30. The petitioner's federal tax return for tax year 2000, which ran from October 1, 2000 to September 30, 2001, reflected taxable income before net operating loss deduction and special deductions of negative \$125,423.

In a request for evidence (RFE) dated November 1, 2002, the director requested evidence to establish the petitioner's ability to pay the proffered wage beginning at the time the priority date was established and continuing until the beneficiary obtains permanent residence. The director specified that the requested information was for 2001. In response, counsel submitted another copy of the Form 1120 for tax year 2000 stating that no return had yet been filed for tax year 2001, and copies of California Employment Development Department Form DE-6, Quarterly Wage Reports for calendar quarters ending January, April, July and October 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established and continuing until the beneficiary obtains lawful residence.

On appeal, counsel states that the petitioner's 2000 tax return showed it had assets of \$900,000, income in excess of \$1 million and paid out \$346,000 in wages. Counsel also states the beneficiary was paid \$3,000 per month until August 2002, when she began receiving \$3,560 per month.

With the appeal, counsel submitted a brief¹, a copy of beneficiary's 2001 W-2, Wage and Tax Statement, and 2002 monthly pay stubs from the petitioner. The W2 reflects the petitioner paid the beneficiary \$35,600 for 2001, less than the proffered wage. The pay stubs show the petitioner paid the beneficiary \$38,800 for 2002, less than the proffered wage.

The petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage. However, there is no proof that they somehow represent

¹ It is noted that the beneficiary's name on the brief is different from that of the beneficiary on the ETA 750 and I-140. However, the file number and body of the brief refer to the beneficiary who is the subject of this appeal.

additional funds beyond those of the tax returns and financial statements, particularly for the 2000 tax year. 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).

The petitioner's tax return for tax year 2000 shows taxable income before net operating loss deduction and special deductions of negative \$125,423. The return also shows net current assets of negative \$135,545. The petitioner could not have paid the proffered wage from net current assets. There is insufficient evidence for 2001.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 also held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses rather than net income.

Additionally, CIS does not consider the petitioner's long-term assets and liabilities in evaluating its ability to pay the proffered wage, as it does not assume or expect the petitioner will sell those assets in order to pay the proffered wage.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage in 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.