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U.S. Citizenship
and Immigration
Services

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RB6

MAR 22 2004



FILE: SRC 01 168 52476 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for a 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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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 additional evidence and asserts that director failed to adequately review the petitioner's financial information.

Section 203(b)(3)(A)(i) of 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) states in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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). Here, the petition's priority date is September 20, 2000. The beneficiary's salary as stated on the approved labor certification is \$14.43 per hour or \$30,014.40 annually.

The petitioner initially submitted insufficient evidence of its ability to pay the beneficiary's offered wage of \$30,014.40. The director requested further evidence on January 7, 2002 pursuant to the regulatory requirements as noted above at 8 C.F.R. § 204.5(g)(2). The petitioner responded by submitting copies of its Form 1120 U.S. Corporation Income Tax Return for the years 1999 and 2000. Copies of an income statement and balance sheet as of January 31, 2002 and one- month figures ending January 31, 2002 and January 31, 2001 were also provided. The 2000 corporate tax return, which includes the period covering the priority date of September 20, 2000, shows that the petitioner had gross receipts/sales of \$234,627, officers' compensation of \$34,250, \$56,339 in salaries and wages, and a taxable income before net operating loss (NOL) deduction of \$16,972. Schedule L of this tax return also reflected that the petitioner had \$5,569 in net current assets.

The director denied the petition on March 29, 2002, determining that the petitioner had not established its ability

to pay the proffered wage as of the priority date of the visa petition and continuing until the present.

On appeal, counsel submits copies of an income statement and balance sheet covering the period ending March 31, 2002. An accountant's letter dated April 26, 2002 again represents, that like the previous income statement and balance sheet, that the figures represented are management representations only and are unaudited and unreviewed. Counsel also submits another accountant's letter, dated April 26, 2001, indicating that the petitioner has employed the beneficiary since 2000. Copies of the beneficiary's W-2s for 2000 and 2001 are also included. In 2000, the petitioner paid the beneficiary \$11,428.56. The beneficiary received \$29,295.36 in wages in 2001.

Although it is noted that the petitioner's taxable income (before NOL deduction) as set forth on its 2000 tax return could meet the beneficiary's proffered wage in 2000 if only the prorated portion of the beneficiary's proposed salary of approximately \$8,390 were considered (102 days @ \$82.23 per day as of 9/30/2000), it is noted that the petitioner did not pay the full proffered wage to the beneficiary in 2001. Nor did it submit a federal tax return for 2001 or an audited financial statement covering the period subsequent to the year 2000. The income statements and balance sheets submitted in conjunction with the petitioner's other evidence were neither audited nor reviewed and were management representations only. As such, they carry little evidentiary weight in determining the petitioner's ability to pay the beneficiary's offered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires audited financial statements, federal tax returns or annual reports. While additional material may be considered, the regulation neither states nor implies that such material may be substituted in lieu of the basic evidentiary requirements. It is further noted that the quarterly tax returns submitted on appeal do not identify or segregate the beneficiary's wages. The AAO cannot conclude that the evidence contained in the record supports counsel's assertion that the petitioner has had the continuing ability to pay the beneficiary's wage offer of \$30,014.40 per year.

Counsel also asserts that depreciation should be considered when evaluating the petitioner's ability to pay. 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. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The figures presented in the various income statements and balance sheets contained in the record were unaudited and unreviewed. While the petitioner may be a financially viable company that has been in business for a long time in one form or another, as counsel may suggest, a petitioner must establish the elements for the petition's approval as of the priority date and continuing until the beneficiary obtains lawful permanent resident status. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); 8 C.F.R. 204.5(g)(2). The AAO cannot conclude that the petitioner has persuasively demonstrated its continuing ability to pay the proffered wage as of the visa priority date of the petition.

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.

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ORDER: The appeal is dismissed.