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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

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

B6

MAR 2004

[redacted]

File: EAC 02 076 52896 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 an iron works. It seeks to employ the beneficiary permanently in the United States as a fabricator. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the real value of the petitioner's assets was not correctly evaluated and requests reversal of the director's decision.

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) provides 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 [CIS].

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 April 2, 1997. The beneficiary's salary as stated on the labor certification is $30.621 per hour. As noted by the director, this represents an annual salary of $55,728.40. The information provided by the beneficiary on Form ETA 750-B indicates that the petitioner has employed the beneficiary as a fabricator since 1993.

In support of its continuing ability to pay the proffered wage, the petitioner initially included a December 2001 letter from its accountant affirming that the petitioner had always met its payroll and that its income should be sufficient to continue to meet its payroll. On February 23, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the beneficiary's proffered wage of $55,728.40 as of April 2, 1997, the date of filing, and continuing to the present. The director also specifically advised the petitioner to submit either a federal income tax return, annual report, or audited or reviewed financial statement for 1997, as well as a copy of the beneficiary's 1997 Wage and Tax Statement (W-2).

In response, the petitioner submitted a copy of the beneficiary's 1997 W-2 showing that he was paid $16,394.50. The petitioner also submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the tax

year of 1997. It contained the following information:

Gross receipts or sales	$ 553,241
Officers' compensation	58,800
Salaries and Wages	10,213
Ordinary Income	17,378

Schedule L of the petitioner's 1997 federal tax return indicated that the petitioner's net current assets were $30,655.00.[1]

The director denied the petition, noting that the petitioner had employed the beneficiary at a level well below the proffered wage, and that the evidence failed to show that the petitioner's ordinary income of $17,378 would cover the difference between the proffered wage of $55,728.40 and the beneficiary's 1997 wages of $16,394.50. The director also noted that a combination of the beneficiary's 1997 wages and the petitioner's net current assets did not equal the proffered wage.

On appeal, counsel asserts that the petitioner's net current assets of $30,655, the beneficiary's wages of $16,394.50, and the petitioner's ordinary income of $17,378 should be added together to evaluate the petitioner's ability to pay. The AAO does not concur. The level of net current assets on Schedule L, as well as the beneficiary's wages reflected on his W-2, both are incorporated within the figures shown on the first page of Form 1120S tax return. In this case, however, if the proffered wage is prorated to reflect the visa priority date of April 2, 1997, then the petitioner's obligation to pay the proposed wage offer is calculated at approximately $41,300. Following a deduction of $16,394 to reflect the beneficiary's wages already paid, the result of approximately $24,900 could covered by the petitioner's 1997 net current assets of $30,655.

That said, it must be noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish a *continuing* ability to pay the proffered wage as of the visa priority date. (Emphasis added.) In this case, the director's request for evidence specifically reflected that evidentiary requirement as well as information for 1997. The petitioner failed to submit any additional competent evidence related to its ability to pay the proffered wage relevant to any period subsequent to 1997. As noted above, the regulation requires copies of annual reports, federal tax returns, or audited financial statements. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The accountant's letter originally submitted with the petition is not accompanied by any first-hand evidence supporting the petitioner's ability to pay the proffered wage and holds little independent evidentiary value. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also contends that the director's decision does not take into consideration the value of the petitioner's other depreciable assets such as its real estate. Real property is not representative of assets that can easily be converted to cash. It is also noted that such non-cash deductions such as depreciation or amortization are not added back to a petitioner's net income. CIS will examine the net income figure reflected on the petitioner's

[1] Net current assets are the difference between current assets and current liabilities. It reflects the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the balance sheet.

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). Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage.

Based on the evidence contained in the record, although the ability to pay the proffered wage was sufficiently demonstrated for 1997, the petitioner failed to establish its continuing ability to pay the proffered wage to the present.

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.