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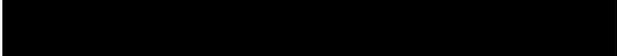


U.S. Citizenship  
and Immigration  
Services

**B6**



FILE: WAC 02 195 51724 Office: CALIFORNIA SERVICE CENTER Date: **MAR 30 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 landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscaper. 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 proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement 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 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 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 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 proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on February 18, 2000. The proffered wage as stated on the Form ETA 750 is \$10.42 per hour for a forty-hour workweek, which equals \$21,673.60 per year.

With the petition, counsel for the petitioner initially provided unsigned copies of the petitioner's 1999 and 2000 federal tax returns, a profit and loss statement for the period from January 2001 through March 2002, and a balance sheet showing the petitioner's financial status as of March 31, 2002. The director found that none of these documents established the petitioner's ability to pay the proffered wage as of the priority date. On September 17, 2002, the director issued a request for evidence. In addition to requesting regulatory-sanctioned evidence such as audited financial statements, copies of annual reports, and tax returns, the director made a specific request for the following evidence:

- (1) signed and certified copies of the petitioner's federal tax returns for the years 1998, 1999, 2000, 2001, and 2002, with all schedules and attachments; and
- (2) copies of the beneficiary's W-2 forms, pay stubs, or equivalent for the years of claimed work experience to corroborate the employment verification letter(s) in the record.

In response to the director's request, counsel submitted signed copies of the petitioner's federal tax returns for 1998, 1999, 2000 and 2001, and stated that the petitioner's 2002 tax return was not yet available. Included with the returns were all the accompanying schedules and tables, as requested in the request for evidence. The director, however, found this additional evidence to be deficient, and consequently issued a denial of the petition on March 17, 2003.

On April 16, 2003, counsel filed a statement and supporting documentation with the AAO on behalf of the petitioner.<sup>1</sup>

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<sup>1</sup> Form I-290B (Notice of Appeal to the Administrative Appeals Unit) and Form G-28 (Notice of Entry of Appearance) filed on April 16, 2003, identify Hispanic Legal Services (HLS) and [REDACTED] as counsel for the beneficiary. These documents, therefore, would generally be found unacceptable, because only the petitioner may authorize counsel to appear. See 8 C.F.R. § 292.4(a). Since the record in this case previously evidences HLS as counsel for both the beneficiary and the petitioner, and the address provided by counsel on appeal is the same as the previously filed documentation in the record, the AAO will presume, for purposes of simplicity, that counsel inadvertently omitted the petitioner's name from the Form I-290B and Form G-28. Please note, however, that the record in this

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. Although W-2 forms, pay stubs, or the equivalent were specifically and clearly requested by the director in its request for evidence, counsel declined to provide copies of such documentation, claiming the beneficiary was compensated in cash and therefore no such documentation existed.

On appeal, however, counsel introduces copies of the beneficiary's W-2 forms for the years 1999, 2000, and 2001, and requests favorable review of this new evidence in determining the petitioner's ability to pay the proffered wage during the relevant period. The introduction of this evidence for the first time on appeal is untimely and inappropriate, and consequently, the AAO will not consider this evidence for any purpose. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). In the request for evidence issued by the director on September 17, 2002, the petitioner was put on notice and given a reasonable opportunity to provide copies of W-2 forms or their equivalent before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The appeal will be adjudicated based on the record

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case contains confusing documentation regarding the legal representatives of the petitioner and the beneficiary. Specifically, the labor certification designates HLS as the petitioner's representative. [REDACTED] of "The Law Offices of [REDACTED]" however, filed the I-140 petition. Correspondence from Mr. [REDACTED] to CIS during these proceedings, however, was presented on letterhead that included both "Hispanic Legal Services" and "The Law Offices of [REDACTED]" operating as one entity at the same address, which suggests, although not conclusively, that the two offices are one and the same. The letterhead on which the appeal statement is presented, however, only lists HLS. Counsel is advised for future reference that such discrepancies could potentially cause serious problems and delays with the processing of visa petitions.

of proceeding before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983).

In this case, the proffered wage is \$21,673.60 per annum. The petitioner's net income for the tax years 1999, 2000, and 2001 was \$6,484, \$18,348, and \$24,771, respectively.<sup>2</sup> The regulations require proof of eligibility at the priority date. See 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12). While the petitioner's net income as reflected on its 2001 tax return clearly establishes its ability to pay the proffered wage for that particular tax year, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition, which in this case was February 18, 2000. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). Since the petitioner's net income of \$6,484 for the 1999 tax year was substantially less than the proffered wage of \$21,673.60, the petitioner did not have the ability to pay the proposed salary as of the priority date.<sup>3</sup>

Finally, counsel presents adjusted annual income figures for the petitioner which reflect the re-addition of depreciation amounts to the petitioner's net income. Counsel encourages this office to consider the depreciation amounts and their impact on the

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<sup>2</sup> The office notes that the petitioner's tax year is the 12 month period beginning October 1 and ending September 30.

<sup>3</sup> The 1999 tax year covers the period from October 1, 1999 to September 30, 2000, which includes the priority date of February 18, 2000.

petitioner's financial state in reviewing the petitioner's ability to pay the proffered wage. The consideration of these amounts is not permitted. In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. Based on these decisions, counsel's re-addition of depreciation to the petitioner's net income will not establish the petitioner's ability to pay the proffered wage.

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.