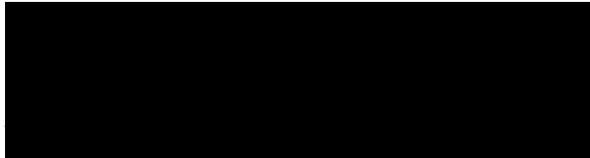


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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



MAR 31 2004

File: [Redacted] Office: CALIFORNIA 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:



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.

A handwritten signature in black ink, appearing to be 'R. P. Wiemann'.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

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 professional. The petitioner is a credit reporting agency. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

On December 20, 2001 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, November 10, 1998.

The AAO dismissed the petitioner's appeal on June 28, 2002. The AAO reviewed the financial information contained in the petitioner's 1999 and 2000 Form 1065, U.S. Partnership Return of Income and held that the petitioner's ordinary income of -\$52,105.43 and -\$96,596.25, respectively, were insufficient to cover the beneficiary's annual proffered salary of \$34,800.

In a motion to reopen, counsel submits a copy of the petitioner's 2001 Form 1065, U.S. Partnership Return of Income and a copy of an accountant's letter dated February 5, 2001. Two charts which purport to present the petitioner's bank statement balances and accounts receivables from November 1998 through December 2001 accompany the accountant's letter. The letter asserts that the petitioner's ability to pay the beneficiary's proposed salary is not shown by tax returns, but rather by its available funds that the charts reflect.

The petitioner's motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) since new facts, supported by evidence not previously submitted, are being presented.

The 2001 partnership tax return submitted with the motion shows an ordinary income of \$111,565. It also reflects that the filing entity has a slightly different address and a completely different employer tax identification number than shown on the 1999 and 2000 tax returns previously submitted to the record. Counsel provides no explanation for this discrepancy. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Nevertheless, although this figure represents a sufficient sum to cover the beneficiary's wage in 2001, it does not relieve the petitioner's burden to establish that it had the continuing ability to pay the proffered wage as of the visa priority date of November 10, 1998.

The assertion that the tax returns should not be considered when evaluating the petitioner's financial status is not persuasive. In determining the petitioner's ability to pay the proffered wage, CIS reviews 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); *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass).

It is further noted there is no proof that the petitioner's 1998-2000 bank balances and accounts receivable balances as presented on the two charts accompanying the accountant's letter somehow represent additional resources beyond those summarized by the relevant partnership tax returns. 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 regulation at 8 C.F.R. § 204.5(g)(2) requires the ability to pay to be shown by annual reports, federal tax returns, or audited financial statements. While additional material may be submitted, it may not be substituted for those evidentiary requirements.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has not demonstrated its continuing ability to pay the proffered salary of \$34,800 as of the 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.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.