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U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

*Handwritten initials: BL*



FILE: WAC 02 023 56785 Office: CALIFORNIA SERVICE CENTER Date: **MAY 11 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 residential care management company. 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. 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 for the petitioner submits a brief 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 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 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. Here, the petition's priority date is February 1, 2000. The beneficiary's salary as stated on the labor certification is \$15.66 per hour for a forty-hour workweek, which equates to \$32,572.00 per annum.

With the petition, counsel submitted a copy of the petitioner's 1999 corporate tax return and copies of the beneficiary's W-2 forms for the years 1999 and 2000. In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned financial evidence, counsel submitted federal tax returns for the years 2000 and 2001 for a partnership. The director reviewed the income figures set forth in these returns, and found that the petitioner had not established that it had the ability to pay the proffered wage during the relevant period.

On appeal, counsel submits a brief accompanied by additional evidence. Specifically, counsel resubmits copies of the partnership tax returns for 2000 and 2001 as well as the W-2 forms for the beneficiary for 1999 and 2000. Newly-submitted evidence on appeal includes copies of the beneficiary's tax returns for 1999 and 2000, and copies of the beneficiary's pay stubs for the period from May 1, 2002 through July 31, 2002. The AAO will first review the director's decision based on the evidence in the record prior to adjudication, and will then address the assertions presented on appeal.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at a salary greater than the proffered wage.

In this case, the petitioner submitted copies of the beneficiary's W-2 statements for the years 1999 and 2000, which showed that the beneficiary received wages in the amount of \$27,600.00 in 1999, and \$30,000.00 in 2000. The proffered wage in this case is \$32,572.80. Since the 2000 W-2 form displayed an income of \$30,000.00, which was \$2,572.80 less than the proffered wage, the director concluded that the petitioner had not established its ability to pay the proffered wage.<sup>1</sup> The AAO concurs with the director's conclusion.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may 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).

The petitioner submitted a copy of its 1999 corporate tax return, and in response to the director's request for evidence issued on March 13, 2002, counsel for the petitioner submitted partnership tax returns for the years 2000 and 2001.<sup>2</sup> The director determined that these financial documents did not establish the petitioner's ability to pay the proffered wage from the establishment of the priority date and continuing thereafter. The partnership tax return for 2000 demonstrated an ordinary loss of \$44,553.00, and the 2001 return presented an ordinary income of \$62,594.00. Although the figure displayed on the 2001 return clearly exceeds the proffered wage, the failure of the petitioner to provide evidence of its ability to pay the wage offered at the time the priority date was established in 2000 warranted a denial of the petition. In addition, the record does not contain a copy of Schedule L for the 2000 return, which therefore precluded the director from examining the partnership's net current assets as an alternative means of establishing the petitioner's ability to pay.<sup>3</sup>

On appeal, counsel alleges that the beneficiary's continued employment with the petitioner is vital for the petitioner's business, and states that the petitioner's potential earnings as a result of the beneficiary's employment should also be considered. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently

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<sup>1</sup> Since the priority date was not established until February 1, 2000, the W-2 form for 1999 has no bearing on this decision and it was correctly excluded by the director.

<sup>2</sup> Although not addressed by the director, there is a discrepancy between the partnership listed on the 2000 and 2001 returns, and the petitioning corporation listed on the visa petition and labor certification. The AAO will address this issue separately.

<sup>3</sup> In accordance with the treatment of the 1999 W-2 form, the 1999 tax return was similarly not considered by the director.

become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Since counsel's comments are merely speculation, they cannot be construed as proof of the petitioner's ability to pay the proffered wage. Additionally, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also refers to the partnership's gross receipts of \$105,394.00 and its total income of \$60,779.00 for 2000, and asserts that the availability of these funds clearly proves that the petitioner had the ability to pay the proffered wage at the establishment of the priority date. The AAO finds two problems with this assertion. First, an entity's income before expenses is not representative of the financial status of that entity. 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.

Second, and most importantly, counsel refers to this partnership as "the petitioner." The petitioner, however, as set forth on the labor certification and visa petition, is a corporate entity. There is no evidence in the record of proceeding to suggest that this partnership has assumed the rights and duties of the petitioning entity.

The record of proceeding contains the following documents:

- 1999 W-2 form for the beneficiary
- 1999 Corporate tax return
- 2000 W-2 form for the beneficiary
- 2000 Partnership tax return
- 2001 Partnership tax return
- 2002 Pay stubs for the beneficiary from May 1 - July 31

As previously discussed, the 1999 documents have no bearing on this decision, since the petitioner is only required to establish an ability to pay the proffered wage from the priority date (February 1, 2000) and thereafter. For purposes of this discussion, however, the AAO notes that the Employer Identification Number (EIN) set forth on both the 1999 W-2 form and the 1999 tax return corresponds with the EIN for the petitioning entity on the visa petition.

The 2000 W-2 form, 2000 and 2001 tax returns, and the 2002 pay stubs all reference a partnership with a separate and distinct EIN number than that of the petitioning entity. The record contains no evidence that the partnership qualifies as a successor-in-interest to the petitioning entity, which was a corporation. This status requires documentary evidence that partnership has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Finally, the partnership returns indicate that the partnership was formed on January 1, 2000. The labor certification was accepted and certified one month later, on February 1, 2000, in the name of the corporate entity.

Furthermore, the visa petition, filed on October 3, 2001, was also filed in the name of the corporate entity. Since the partnership tax returns indicate that the predecessor corporation most likely was dissolved on or before January 1, 2000, it is unclear why the labor certification and visa petition were filed by an entity that apparently was no longer in existence at that time.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In the event that the petitioner elects to take further action in this matter, these discrepancies in the record must be clarified or reconciled.

Accordingly, it is concluded that the record of proceeding contains no evidence that establishes the petitioner's ability to pay the proffered wage during the relevant period. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.