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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 00 261 53567 Office: CALIFORNIA SERVICE CENTER Date: MAY 11 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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DISCUSSION: The preference visa petition was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

On October 20, 2000, the director approved the visa petition. On January 18, 2001, the beneficiary filed Form I-485 to apply for adjustment of status to lawful permanent resident based upon the approved visa petition. While reviewing this application, the director concluded that the visa petition had been granted erroneously. After a response to a request for evidence yielded no new information, the director issued a notice of intent to revoke on October 30, 2002. In response to this notice, counsel for the petitioner submitted a rebuttal accompanied by additional evidence, which the director found unpersuasive. 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 and continuing thereafter, and therefore revoked the petition on February 28, 2003.

Counsel is appealing the revocation of the visa petition, and submits a brief and additional evidence for consideration.

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.

After reviewing the previously approved visa petition, the director determined that the petitioner had failed to establish its continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

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 September 26, 1997. The beneficiary's salary as stated on the labor certification is $9.44 per hour for a forty-hour workweek, which equates to $19,635.20 per annum.

With its initial petition, the petitioner submitted a copy of Schedule C from its 1998 tax return, which demonstrated a net profit of $4,122.00.[1] Although this was the only financial evidence contained in the record, the petition was approved on October 20, 2000. On January 18, 2001, Form I-485 to apply for adjustment of status to lawful permanent resident was filed by counsel. Upon review of the application, the director issued a request for evidence which specifically requested complete copies of the petitioner's 1997, 1998, 1999, and 2000 tax returns, in addition to copies of the beneficiary's 2000 tax return, 2000 W-2 forms, and recent pay stubs. In response to this request, counsel submitted copies of the petitioner's complete tax returns for the years 1997 to 2000, copies of the beneficiary's 2000 tax returns and W-2 forms, and copies of the beneficiary's cancelled checks and pay stubs.

The director reviewed this documentation, but found the financial evidence insufficient to demonstrate that the petitioner had the ability to pay the proffered wage at the establishment of the priority date. Consequently, the director issued a notice of intent to revoke the petition on October 30, 2002.

In response to the notice of intention to revoke, counsel submitted a rebuttal and additional evidence. Specifically, counsel argues that the evidence provided established the petitioner's ongoing ability to pay the proffered wage to the beneficiary, and that the petitioner's employment of the beneficiary has increased the petitioner's overall profits. Additionally, counsel argues that the director was prohibited from revoking the petition because he failed to provide evidence of a distinct error, omission, or withholding of information.

The director found these assertions unpersuasive, and revoked the petition on February 28, 2003. The director cited the petitioner's failure to demonstrate its ability to pay as of the priority date of the petition as the basis for revocation. Counsel subsequently appealed the revocation on March 13, 2003, and provides a brief and additional evidence for review.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure 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 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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 (7th Cir. 1983).

In support of the petitioner's ability to pay the proffered wage in the initial petition, the petitioner submitted a copy of Schedule C from the petitioner's 1998 tax return, with no additional financial documentation. A review of this document shows a net profit of $4,122.00. Since this figure is the only financial evidence contained in the record at the time of the petition's approval in October of 2000, the AAO concurs with the director's determination that the petition lacked the requisite

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[1] Copies of documentation verifying the beneficiary's qualifications for the position were also submitted; however, the director's decision to revoke the petition was not based on this issue. Consequently, the beneficiary's qualifications will not be discussed in the present decision.

financial evidence for approval since the petitioner could not pay a salary of $19,635.20 from $4,122.00.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the *priority date* of the petition. In addition, it must demonstrate that continuing financial ability until the beneficiary obtains lawful permanent residence. *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). 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).

The director's request for additional evidence prior to revocation was warranted for two reasons. First, the priority date in this case was established on September 26, 1997. The initial record contained no financial evidence for 1997, thereby precluding a finding that the petitioner had the ability to pay the proffered wage at the establishment of the priority date. In addition, the petitioner's net profit of $4,122.00 for the 1998 tax year was insufficient to pay the proffered salary of $19,635.20.

The request for evidence and the notice of intent to revoke gave the petitioner two distinct opportunities to demonstrate its ability to pay the proffered wage as of the priority date and continuing thereafter. While the petitioner's tax returns for the years 1997 to 2000 were submitted, the figures contained therein were insufficient to prove its ongoing ability to pay the proffered wage.

First, the director determined that the petitioner's net profits for 1997 and the subsequent years were less than the proffered wage. Second, the director determined that the petitioner's adjusted gross income for 1997 and the subsequent years, although greater than the proffered wage, must first be applied toward the maintenance and support of the petitioner's family of five.[2] Therefore, the petitioner's living costs would deplete the funds available to pay the proffered wage.

In response to the revocation of the petition, counsel submits a brief and additional evidence in support of the petitioner's ability to pay the proffered wage. Counsel alleges that (1) the director's decision was devoid of sufficient evidence upon which to revoke the petition; (2) the director failed to consider the rebuttal evidence submitted; and (3) the director did not have good and sufficient cause for revoking the petition. Moreover, counsel contends that the petitioner did in fact have the ability to pay the proffered wage, as evidenced by its continuous employment of the beneficiary since June 2001. The AAO will address each of these points separately.

First, counsel alleges that the written decision accompanying the revocation is deficient and fails to provide the reasons for the decision. Furthermore, counsel contends that the repetition of the language from the notice of intent to revoke suggests that the director failed to give serious consideration to the rebuttal evidence provided. The AAO disagrees.

In support of this position, counsel cites *Matter of Estime,* 19 I&N Dec. 450 (BIA 1987), which provides:

> . . . a notice of intention to revoke approval of a visa petition is not properly issued unless there is 'good and sufficient cause' and the notice includes *a*

[2] The petitioner, a sole proprietorship, filed a joint return in 1997 claiming three dependents.

> *specific statement* not only of the facts underlying the proposed action, but also of the supporting evidence.

(Emphasis added).

In this case, the director clearly presents a specific statement with regard to the facts underlying the revocation on page two of the decision. Specifically, the director states:

> After review, the petitioner has not established that the beneficiary qualifies for the classification sought because: The petitioner did not establish the ability to pay the proffered wage from the priority date, September 27, 1997.

In addition, the financial evidence provided by the petitioner is analyzed year by year in the paragraphs preceding this statement. The director also acknowledges the newly submitted evidence that accompanied the rebuttal. Therefore, the requirements set forth in *Estime* have clearly been satisfied by the director. In addition, the key issue in this case is whether the petitioner had established its ability to pay the proffered wage beginning at the priority date in 1997, and not whether the director's language in the decision is repetitive. The fact that the language from the intention to revoke is repeated in the decision accompanying the revocation merely reaffirms the director's finding that no acceptable evidence was received to satisfy this regulatory requirement.

Second, counsel asserts that the director did not have good and sufficient cause for the revocation. Counsel proffers that the director relies solely on *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), and that this reliance is misplaced. This AAO does not agree. Although the director refers to *Ho* as an example of the director's ability to revoke a previously approved petition upon the realization that an error in judgment was made, he does not claim that *Ho* is the controlling authority. Page three of the intention to revoke clearly states that the revocation was being proposed pursuant to 8 C.F.R. § 205.2. The regulation at 8 C.F.R. §205.2(a) states

> Any [CIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in 8 C.F.R. § 205.1 when the necessity of the revocation comes to the attention of [CIS].

The director, consequently, was justified in revoking the petition by the authority provided in the aforementioned regulation. Additionally, in both the intention to revoke and the actual revocation, the director cites 8 C.F.R. §204.5(g)(2), which provides, 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.

The director's decision to revoke the visa petition was based on the petitioner's failure to satisfy this regulatory requirement. When evidence is insufficient to establish the ability to pay as prescribed above, the office is precluded from approving the petition. When evidence of the deficient financial evidence came to the director's attention, he acted accordingly as provided for in 8 C.F.R. § 205.2(a).

Finally, counsel states that the petitioner has established its ability to pay the proffered wage, and therefore, the adverse determination with regard to the visa petition should be reversed. Specifically, counsel refers to the petitioner's continuous employment of the beneficiary from June 2001 to the present. In support of this contention, counsel provides financial evidence in the form of the beneficiary's 2002 W-2 forms and cancelled payroll checks from June 2001 through August 2002; the petitioner's payroll record from January to March 2003; the petitioner's payroll summary from October 2001 through November 2002; DE-6s for the third and fourth quarters of 2001 and the first, second, and third quarters of 2003; and 2001 tax returns for both the beneficiary and the petitioner.

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 this case, counsel submits evidence of the beneficiary's employment by the petitioner from 2001 to the present. While the payment of the proffered wage to the beneficiary serves as prima facie evidence that the petitioner did indeed have the ability to pay during this period, counsel appears to disregard the language set forth in the request for evidence, the intention to revoke, and the director's decision. While the petitioner may currently be employing the beneficiary, the revocation of the visa petition is based on the petitioner's failure to show its continuing ability to pay the proffered wage *from the time the priority date was established*, which in this case is September 26, 1997. Since the petitioner's ability to pay the beneficiary since 2001 is not in dispute, the evidence provided from 2001 to the present need not be discussed further.

The revocation was based on the financial evidence contained in the record. Specifically, the petitioner's adjusted gross income and net profits for the relevant years are as follows:

<u>1997</u>
Adjusted gross income: $30,235.00
Net profit: $ 1,697.00

<u>1998</u>
Adjusted gross income: $30,138.00
Net profit: $ 4,122.00

<u>1999</u>
Adjusted gross income: $37,216.00
Net profit: $15,418.00

<u>2000</u>
Adjusted gross income: $42,204.00
Net profit: $15,648.00

The priority date was established on September 26, 1997. The petitioner, a sole proprietorship, earned an adjusted gross income of $30,235.00 in 1997. The petitioner's tax return indicates that it was filed jointly and claimed three dependents. The petitioner did not employ the beneficiary in 1997.

As stated by the director, a sole proprietor must demonstrate that he or she can meet existing business expenses *and* pay the proffered wage *in addition* to sustaining themselves and their family. The director determined that since any income earned by the petitioner must first be applied to the maintenance of his or her family's costs of living, the petitioner's adjusted gross income for 1997 was insufficient to demonstrate that the petitioner had the ability to pay the proffered wage at the establishment of the priority date.[3] Since the ability to pay as of the priority date of the petition is generally a prerequisite to determining the continuing ability to pay, the fact that the petitioner has demonstrated an ability to pay the proffered wage in 2001 and thereafter is irrelevant if the ability to pay as of the priority date has not been established.

The AAO, however, notes that the director failed to prorate the proffered wage for 1997. Since the priority date was established on September 26, 1997, the petitioner is only obligated to demonstrate an ability to pay the proffered wage from the priority date through December 31, 1997. The proffered wage, calculated on a prorated basis from the visa priority date, reflects that the petitioner would be obligated to pay $5,218.12 in salary to the beneficiary for the remaining portion of 1997. The AAO acknowledges that the petitioner had sufficient funds available to pay this amount, and therefore finds that contrary to the director's finding, the petitioner did have the ability to pay the proffered wage as of the priority date of the petition.

The fact that the petitioner had the ability to pay the proffered wage as of the priority date of the petition does not warrant the granting of the petition. Specifically, the petitioner failed to establish that it had the *ongoing* financial ability to pay the proffered wage from the establishment of the priority date and continuing until the beneficiary obtains lawful permanent residence. *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). Even though the petitioner's income in 1997 established its ability to pay the prorated wage at the priority date, the petitioner's income for 1998, 1999, and 2000 is not sufficient to demonstrate an *ongoing* ability to pay the proffered wage.

Although the director should have requested the petitioning owner to provide a summary of his living expenses, it is noted that even without considering any annual living expenses, the beneficiary's wage offer of $19,635.20 is approximately 65% of the sole proprietor's adjusted gross income in 1998; approximately 50% of the sole proprietor's adjusted gross income in 1999; and approximately 47% of the sole proprietor's adjusted gross income in 2000. It is unlikely that the sole proprietor could continuously support himself, his spouse and three dependents plus cover the beneficiary's proffered wage during these years. In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), aff'd., 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income

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[3] The beneficiary's proposed salary of $19,635.20 is equal to nearly two-thirds of the petitioner's adjusted gross income for 1997.

of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or about 30% of the petitioner's gross income. In this case, the petitioner is asserting that it could support a family of five when the proffered wage is more than half of the total adjusted gross income for the years 1998, 1999 and 2000. The AAO finds this assertion unreasonable.

Accordingly, after a review of the record, it is concluded that although the petitioner did have the ability to pay the proffered wage as of the priority date, the petitioner has not established that it had sufficient available funds to pay the salary offered continuing until the beneficiary obtains lawful permanent residence.

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.