

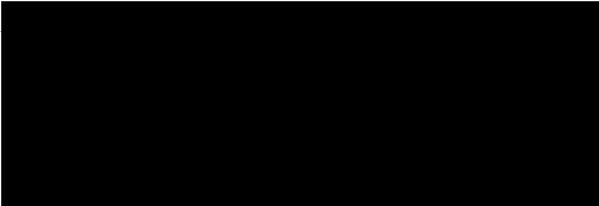
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FILE: LIN-03-007-53025 Office: NEBRASKA SERVICE CENTER Date: MAY 26 2004

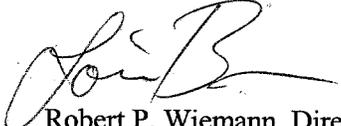
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien 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.

  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape and stonework design company. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$36.47 per hour or \$75,857.60 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated October 25, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the time of adjustment. The RFE specified the petitioner's 2001 federal income tax return and evidence of wage payments to the beneficiary for 2001, if any.

In response to the RFE, counsel submitted the petitioner's 2001 Form 1040, U.S. Individual Income Tax Return. The federal tax return for 2001 reflected adjusted gross income of -\$7,793 after a \$39,457 deduction for net operating loss carryover. Schedule C of the return reflected gross receipts of \$548,747; gross profits of \$315,418; wages of \$189,768; total expenses of \$264,860; and a net profit of \$36,544. The petitioner also submitted evidence that the beneficiary's year to date wages as of December 21, 2001 were \$32,051.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director also noted that the petitioner had filed a total of six immigrant petitions and could not show the ability to pay all six workers.

On appeal, counsel resubmits the petitioner's 2001 tax return. Counsel also submits an unaudited compiled financial report and several letters reflecting prospective business for the petitioner.

The financial report is accompanied by a letter from [REDACTED] accountant, who states that "A compilation is limited to presenting in the form of financial statements information that is the representation of the owner. I have not audited or reviewed the accompanying financial statements, and, accordingly, do not express an opinion or any other form of assurance on them."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

The unaudited financial report, submitted on appeal, is clearly the expressed opinion of the petitioner and as such is of little probative value in determining the petitioner's ability to pay the proffered wage. The federal tax return for 2001 reflected adjusted gross income of -\$7,793. Even adding back in the carryover losses from previous years, the adjusted gross income would be \$31,664 for the sole proprietor. Schedule C of the return reflected a net profit of \$36,544. The petitioner could not pay the proffered wage of \$75,857 from these amounts or the difference between the proffered wage and the wages actually paid in 2001. Moreover, the record contains no evidence regarding the sole proprietor's personal expenses that would need to be paid from adjusted gross income.

After a review of the evidence it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and 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.