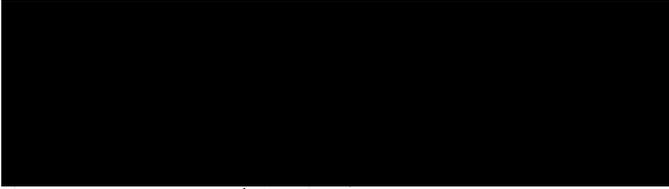


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



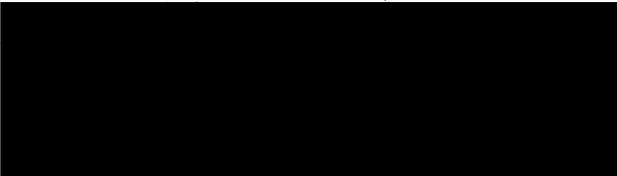
BL

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAY 27 2004**
LIN-01 206 53475

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

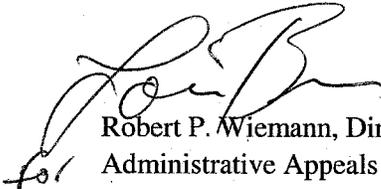
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to §
203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty shop. It seeks to employ the beneficiary permanently in the United States as a beauty shop manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on January 14, 1998, and approved by the Department of Labor on April 16, 2001. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel has submitted a memorandum and attachments that purport to establish that the petitioner had the ability to pay the proffered wage. Among the documents submitted are a copies of the Form 1040 tax returns for for tax years 1998 through 2000, relating to Carmen Martinez Prado, the owner of La Donacella, a letter from her explaining the fluctuations in income in the company's business account, and a copy of a settlement statement pertaining to California real estate purchased in 2000.

Section 203(b)(3)(A)(iii) 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 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility 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. *See* 8 C.F.R. § 204.5(d). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$10 per hour, or \$20,800 per year.

The petition was accompanied by the Form I-140 and the ETA 750. Because the evidence submitted was insufficient to demonstrate either the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the Service Center, on August 14, 2001, requested additional evidence pertinent to those issues. Specifically, the Service Center requested proof of the beneficiary's education, training and experience. The Request for Additional Evidence (RFE), noted that evidence of education must be in the form of an official record showing dates of attendance, area of concentration of

study, and date of degree award if any. The RFE specified that “[e]vidence of training and experience must be in the form of letter(s) from the alien’s employer and a description of the training received or the experience of the alien, including dates of the training or employment and specific duties.”

On the issue of ability to pay, the Service Center noted that among the evidence which could be submitted would be audited profit/loss statements, bank account records, and/or personnel records.

Evidence Submitted in Response to the RFE

On or about October 25, 2001, the petitioner submitted various records relating to each area of inquiry by the Service Center. On the issue of the beneficiary’s experience and training the petitioner submitted a copy of various documents with translations which included a copy of a diploma issued to the beneficiary in Mexico on June 15, 1993, for the successful completion of a cosmetology program, a transcript related to cosmetology courses taken by her, and a letter from the cosmetology center indicating that the beneficiary had successfully completed the cosmetology coursework. In addition, a “Certification of Licensure” issued by the State of Washington Department of Licensing indicating that the beneficiary possessed a current license as of October 16, 2001.

On the issue of ability to pay the proffered wage, the petitioner submitted copies of various financial records, including Form 1040 U.S. Individual Tax Return for the 2000 tax year relating to Carmen Martinez Prado. The petitioner also submitted copies of the petitioner’s personal and business bank account statements from 1998 to 2001.

The director, apparently satisfied as to the evidence supporting the beneficiary’s training and experience, addressed only the ability to pay the proffered wage in his decision. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on November 30, 2001, denied the petition. Specifically, the director determined that a review of the documents offered demonstrated that the financial evidence only demonstrated sporadic ability to pay the proffered wage, and as such, it did not appear that the petitioner’s income was reliable enough to support the proffered wage.

Petitioner’s Ability to Pay the Proffered Wage

The petitioner is now represented by counsel who asserts that the director erred in determining that the petitioner did not demonstrate the ability to pay the wage. Counsel asserts that the petitioner’s business is increasingly profitable and has documented its ability to pay the wages through the evidence submitted. Counsel notes, in particular, that the Schedules C indicate that the petitioner had “gross revenues of \$41,637 in 1998...\$41,143...in 1999, and \$68,732...in 2000.” Counsel further notes that the net profits during the period were \$14,389, \$18,660, and \$21,691 respectively. He goes on to explain that the evidence offered by the petitioner on appeal demonstrates that the reason for the fluctuations in the bank balances during the 1998

to 2000 period was attributable to the owner's use of the funds in the business bank account to pay for personal expenses, including the California real estate.¹

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first 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 *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now 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. *Id.* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The AAO concludes that the evidence does not support the granting of the petition. Although counsel points to the gross and net income figures for the 1998 through 2000 tax years, the AAO concludes that these figures do not further the petitioner's case. The tax records reflect the following: for 1998 the adjusted gross income was \$14,426; for 1999 the adjusted gross income was \$17,341; for 2000 the adjusted gross income was \$14,555. All of these amounts are below the amount of the proffered wage. The AAO therefore, agrees with the director's decision as to petitioner's inability to pay the proffered wage during these years.

Moreover, the beneficiary is a beauty shop operating as a sole proprietorship. As a sole proprietor, the petitioner's household expenses must be considered in determining the ability to pay the proffered wage. See *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982). We note that with respect to the years for which tax records were submitted, the net income amounts are clearly insufficient to cover the proffered wage. Presumably, the net income would need to be used by the petitioner to cover household expenses before even being considered as funds available to pay the beneficiary's proffered wage. Although no tax returns were submitted for the 2001 tax year, the AAO finds that the amount of net income would have to be substantially above the proffered wage in order to be sufficient to cover the proffered wage and the petitioner's household expenses.

Counsel seeks to rely upon the petitioner's bank balances, noting that for 2001 they clearly established the ability to pay, and explaining that for previous years, the bank accounts were accessed to pay for various expenses incurred by the petitioner. As it appears that the petitioner has needed to access business accounts for her personal needs, it is not clear that the petitioner's financial situation is sufficiently stable that it can

¹ Counsel states in his brief that the director concluded that the petitioner's bank balances in 2001 demonstrated its ability to pay the wage in that year. More accurately, the director's decision noted that there had been a significant infusion of funds into the business account during 2001 resulting in dramatically higher balances during that year.

clearly pay the proffered wage. Also, CIS will not consider current assets, such as cash balances, without balancing them against current liabilities. Accordingly, we find counsel's contentions to be without merit.

Evidence Regarding the Beneficiary's Experience

Beyond the director's decision, it is noted that the record does not adequately establish the beneficiary's training and experience. This decision has previously discussed the evidence presented by the petitioner regarding the educational and licensing requirements met by the beneficiary. However, a review of the ETA 750 discloses that the petitioner required two years of experience in the job offered, rather than any particular educational requirements. The ETA 750 indicates that the beneficiary had previously been employed as the manager of the petitioner beauty shop from 1994 to the date of filing, or January 13, 1998. Furthermore, the ETA 750 also notes that the beneficiary had been employed as a beauty shop manager from 1991 to 1994, prior to working for the petitioner.² The record does not contain a letter from either one of the employers.³

The petitioner failed to submit evidence sufficient to demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date. Furthermore, the record contains insufficient evidence of the beneficiary's qualifications for the position.

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.

² It is noted that no specific employer or location was identified as to this position.

³ Although the beneficiary apparently worked as a manager for the petitioner in the very position to be filled, the record contains no evidence in the form of W-2 Wage and Tax records pertaining to such employment, or other evidence which would indicate how much the petitioner had been paying the beneficiary in that position. Such information could have served as additional evidence on the issue of the petitioner's ability to pay the proffered wage. The beneficiary's employment by the petitioner as a manager is inconsistent, however, with the information in the I-140 in Part 6 indicating that the petitioner was seeking to fill a new position.