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



U.S. Citizenship  
and Immigration  
Services



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:



NOV 29 2004

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:



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identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a health care facility. It seeks to employ the beneficiary permanently in the United States as a caretaker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 13, 2001. The proffered wage as stated on the Form ETA 750 is \$7.33 per hour, which equals \$15,246.40 per year.

On the petition, the petitioner stated that it was established during 1991 and that it employs 21 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Bellflower, California.

In support of the petition, counsel submitted the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return. The corresponding Schedule C submitted with that return shows that the petitioner is held as a sole proprietorship and that during 2001 it returned a net profit of \$2,062. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$2,340 during that year, including the petitioner's profit.

Counsel also submitted Statements of Deposits and Filings for the second quarter of 2000 and the first and second quarters of 2001. Those statements, produced by the petitioner's tax service, show wages paid during those quarters, as well as amounts pertinent to Federal withholding.

Finally, counsel submitted a Small Commercial Income Property Appraisal of the petitioner's business property. That appraisal states an estimate of the property's value but does not state whether, or to what extent, the property is encumbered.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 25, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's 2002 income tax return, copies of the petitioner's California Form DE-6 Quarterly Wage Reports from 2001 forward, and a list of the job titles and duties of each of the employees named on those reports.

Finally, the Service Center noted that the petitioner had stated, on the Form I-140, that the proffered position is a new position. The Service Center asked for an explanation of how the duties had been previously accomplished, and why the duties now require a full-time employee to perform them.

In response, counsel submitted the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return. The corresponding Schedule C submitted with that return states that the petitioner returned a loss of \$360 during that year, which was subsumed into the petitioner's owner's adjusted gross income. The Form 1040 shows that the petitioner's owner declared a loss of \$71 as her adjusted gross income during that year.

Counsel submitted the monthly statements of various bank accounts belonging to the petitioner and the petitioner's owner and the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2002. Those reports show that the petitioner had 15 to 16 people on its payroll during those quarters. The beneficiary's name does not appear on those wage reports. Counsel submitted a list of job titles and job descriptions of the people on the petitioner's payroll. Counsel submitted a Statement of Deposits and Filings for the first and second quarters of 2002.

Counsel also submitted a letter, dated July 3, 2003, stating that the fact that the petitioner's net income during 2001 and 2002 was less than the proffered wage is no indication that the petitioner is unable to pay the proffered wage. Counsel notes that 8 C.F.R. § 204.5(g)(2) states that, in appropriate circumstances, bank statements may be submitted as evidence of a petitioner's ability to pay the proffered wage. Counsel stated that use of the petitioner's income tax returns as the sole index of the petitioner's ability to pay the proffered wage is inappropriate. Counsel tabulates the amounts shown on the bank statements submitted and notes that the total in all the statements for each month exceeds the monthly amount of the proffered wage. Counsel concludes that the petitioner's bank statements demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Counsel implies, but does not state, that the beneficiary has been working for the petitioner in duties approximating the proffered position during recent years, but has not been placed on the permanent payroll because of his lack of work authorization. Counsel states that the petitioner has always needed an employee to perform the duties of the proffered position, as do all similar facilities.

Counsel also submits a letter, dated June 19, 2003, from the petitioner's owner/administrator. That letter states that the beneficiary is working for the petitioner performing the duties of the proffered position, but does not state what wage the beneficiary is being paid or provide any evidence of payment. That letter also states that the petitioner has always needed an employee to perform the duties of the proffered position.

On August 20, 2003 the Director, California Service Center issued a Notice of Intent to Deny in this matter. The director stated that the evidence submitted does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and noted that the petitioner had filed another petition during the same year.

In response counsel submitted a brief, dated August 26, 2003. Counsel again noted that the petitioner's bank balances, added together, exceeded the monthly amount of the proffered wage during every salient month. Counsel argues that, therefore, the petitioner has demonstrated its ability to pay the proffered wage. In support of that proposition, counsel cites a non-precedent decision of this office.

Pertinent to the other alien worker petition, counsel stated, "The petitioner . . . submits that the circumstances of this particular Immigrant Petition are comparably dissimilar from the other." Counsel does not otherwise address the ability of the petitioner to pay the proffered wage of that other beneficiary, in addition to the proffered wage of the instant beneficiary. Counsel's argument is unclear to this office.

In support of the response, counsel submitted additional bank statements

On October 2, 2003 the Director, California Service Center, issued a decision in this matter. The director noted that the petitioner returned a low profit during 2001 and suffered a slight loss during 2002. The director also noted that the petitioner's bank balances, taken together, often dipped below the annual amount of the proffered wage. Finally, the director noted that the petitioner has a recently approved petition for an alien worker and must pay the proffered wage of the beneficiary of that petition. 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 denied the petition.

On appeal, counsel stated that the decision of denial asserted that the petitioner did not have the ability to pay the proffered wage. The burden is not on the director to demonstrate that the petitioner does not have the ability to pay the proffered wage. The burden is on the petitioner to demonstrate that it does have the continuing ability to pay the proffered wage beginning on the priority date.

In the brief, counsel characterized the non-precedent decision previously submitted as a published decision of this office. Counsel cited that decision as authority for the proposition that bank statements are "a primary and acceptable form of evidence in establishing 'ability to pay.'" Counsel also asserted that denial of the petition would result in hardship to the petitioner.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>1</sup> Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Previously, in response to the request for evidence, counsel asserted that the petitioner's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

Counsel urges that the petitioner's tax returns, taken alone, are poor indices of the petitioner's cash position. That argument is inapposite. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 paid any amount to the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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);

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<sup>1</sup> In the decision of denial the director implied that, had the bank statements each shown a balance equal to the annual amount of the proffered wage, they would have shown the ability to pay the proffered wage. In the opinion of this office, that approach is too generous. In that event, the bank statements would show the ability to pay the proffered wage for one year, but not for the following year. The petitioner must demonstrate the continuing ability to pay the wage. Bank balances might conceivably show the ability to pay the proffered wage, if they increased each month by an increment equal to the monthly amount of the proffered wage. That issue is not currently before this office, however, and this office does not purport to decide it.

*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).

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 the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The proffered wage is \$15,246.40 per year. The priority date is February 13, 2001.

During 2001 the petitioner's owner declared an adjusted gross income of \$2,340, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared a loss of \$71 as her adjusted gross income, including the loss suffered by the petitioner. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during that year out of its profits or its owner's income. The petitioner has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel implies that, notwithstanding that the petitioner has failed to demonstrate the ability to pay the proffered wage, the petition should be approved because to deny it would result in hardship to the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) contains no hardship exception.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.