



U.S. Citizenship
and Immigration
Services

B4



FILE: LIN 01 113 54237 Office: NEBRASKA SERVICE CENTER Date: SEP 09 2004

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

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

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

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The AAO concurred with the director's decision on appeal.

On motion, counsel provides a statement.

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

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on November 13, 1997. The proffered salary as stated on the labor certification is \$8.50 per hour or \$17,680 per year.

On motion, counsel states:

. . . Because of the retirement of the bookkeeper who prepared the financial documents for the restaurant in calendar years 1997, 1998, and a portion of 1999, the petitioner was unable to produce a copy of the income tax return for calendar year 1997, which would have shown clearly payment of wages sufficient to demonstrate the ability to pay the offered wage. The only document that we were able to provide for calendar year 1997 was a withholding tax payment

record for Wisconsin State withholding tax. By extrapolating the amount withheld, we attempted to demonstrate the wages that were paid out for that period.

There apparently no longer exists any issue as to the ability to pay on the part of the employer for calendar years 1998, 1999, 2000 and even 2001, based upon receipt of quarterly Federal withholding tax returns applicable to those periods. The petitioner has now contacted the Wisconsin Department of Revenue to obtain archived records of the employment tax reports submitted for calendar year 1997. Unfortunately, it will take the Department of Revenue at least several weeks to produce those records, and in the meantime, it is necessary for us to file our Motion to Reopen. Although this Motion to Reopen could be filed as late as September 21, 2002, I personally will be out of the country until that weekend, and, therefore I am submitting the Motion to Reopen now with the proviso that I will be supplementing this Motion with the requested financial documents upon my return into the country on September 23, 2002.

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 provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage from 1997 through 2001.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the

petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

Counsel's statement that there no longer exists any issue as to the ability to pay on the part of the employer for calendar years 1998, 1999, 2000, and 2001 is incorrect. The mere fact that the petitioner has paid wages is not sufficient evidence of its ability to pay the proffered wage from the priority date and continuing to the present. The Forms 941, Employer's Quarterly Federal Tax Return, previously submitted do not show who the wages were paid to and they are not the preferred forms of evidence as required by the regulations at 8 C.F.R. § 204.5(g)(2). The same is true of Wisconsin state taxes.

In summary, the petitioner has not provided **federal tax returns, annual reports, or audited financial statements**. In addition, the petitioner has not provided acceptable alternative evidence such as Forms W-2, Wage and Tax Statements. Therefore, the petitioner has not established the ability to pay the proffered wage from the priority date of November 13, 1997 and continuing to the present.

Counsel stated that additional evidence would be submitted upon his return. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R §§ 103.5(a)(2) and (3).

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of August 22, 2002 is affirmed. The petition is denied.