



U.S. Citizenship
and Immigration
Services

BC

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

SEP 09 2004

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: 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

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prevent clearly unwarranted
invasion of personal privacy

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 transportation and moving company. It seeks to employ the beneficiary permanently in the United States as a truck mechanic. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 21, 2002. The beneficiary's salary as stated on the labor certification is \$39,900 per year.

Counsel initially submitted the petitioner's 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, but it did not relate to the priority dates, and the director, in other respects, also, deemed it insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 5, 2003, the director required additional evidence, such as an audited profit and loss statement, bank account balances, or personnel records. The director further specified defects in the proof of the beneficiary's prior experience in the job offered, such as the petitioner had required in Form ETA 750, Part A, block 14.

The response to the RFE, received April 7, 2003, included the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return. The previous employer's further letter apparently met objections that the director voiced in the RFE. The petitioner's 2001 Form 1120-A and its 2002 Form 1120 reported taxable income before net operating loss deduction and special deductions (net income), and Schedules L, the balance sheets, reported the basis to compute net current assets, or their (deficit), as follows:

	2001	2002
Net income	\$ 7,037	\$11,501
Current assets	\$ 5,481	\$ 8,351
Current liabilities	\$ 16,850	\$ 5,842

Net current assets¹ \$(11,369) \$ 2,509

The director constructed a "net figure" for "financial years," ending December 31, of \$12,550 for 2001 and \$56,840 for 2002, concluded that neither established that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, counsel submits bank statements for periods ending March 29, 2002 to March 31, 2003, Employer's Quarterly Federal Tax Returns (Forms 941) for 2002 quarters, two (2) lists of accounts receivable for 2002 (2002 AR lists), unaudited financial statements for various periods as further described, and a letter, dated May 29, 2003, from a certified public accountant (CPA letter), stating the belief that the petitioner has the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will first examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established no payment of salary or wages to the beneficiary at or after the priority date.

If the petitioner does not establish that it paid the beneficiary wages at least equal the proffered wage for any relevant period, CIS will next examine the petitioner's net income, as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Counsel points out that the "net figure" for 2002, \$56,840, is equal to, or greater than, the proffered wage. The "net figure," however, contradicts two (2) established principles of the ability to pay the proffered wage. First, regulations support the reliance on the net income as reflected on the federal tax returns. See 8 C.F.R. § 204.5(g)(2). Second, judicial authorities do not allow the addition of expenses, such as depreciation, to net income to justify the proffered wage.

In determining the petitioner's ability to pay the proffered wage, 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. Tex. 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).

¹ Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120, 1120S, or 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

In *K.C.P. Food Co., Inc.*, 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

If wages paid to the beneficiary and the petitioner's net income are not at least equal to the proffered wage, CIS will review the petitioner's net current assets. They were, respectively, a deficit (\$11,369) and \$2,509, less than the proffered wage.

The RFE exacted bank account records and personnel data, such as Forms 941. The petitioner withheld them until the appeal, along with 2002 AR lists and an unaudited balance sheet dated September 30, 2002. These documents all were available for the response to the RFE. Consequently, their submission on appeal is untimely, and the AAO will not consider them for any purpose.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Provisions of 8 C.F.R. § 103.2(b) mandate that:

- (13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Pertaining to the time of the appeal, the petitioner generated an unaudited profit and loss statement, for five (5) months ended May 31, 2003, and a balance sheet, as of May 31, 2003 (2003 unaudited statements). The CPA letter did not claim any audit of these 2003 unaudited statements or the 2002 balance sheet. None shows any source except the signature of, presumably, the petitioner's President. The AAO notes that the unaudited report only reflects representations of management. If the petitioner has recourse to financial statements, the regulation plainly and specifically requires audited financial documents. See 8 C.F.R. § 204.5(g)(2). Others are not persuasive evidence of the ability to pay the proffered wage. In any event, the 2003 unaudited statements do not relate to the priority date.

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 financial ability 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). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

After a review of the federal tax returns, 2003 unaudited statements, and the record before the director, 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.