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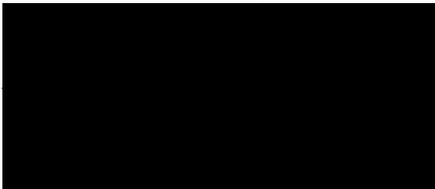
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U.S. Citizenship  
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Services

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

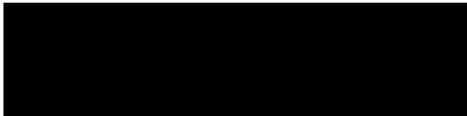
Date:

SEP 03 2004

IN RE:

Petitioner:

Beneficiary:



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:



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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**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 construction company. It seeks to employ the beneficiary permanently in the United States as a plasterer. 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 statement and additional evidence.

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 granting 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.

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 September 23, 1997. The proffered wage as stated on the Form ETA 750 is \$19.82 per hour, which equals \$41,225.60 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from November 1992 through August 14, 1997, the date the form was filed.

On the petition, the petitioner stated that it was established on October 1, 1978 and that it employs two workers.

In support of the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on January 27, 2002, requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence consist of copies of annual reports, federal tax returns, or audited financial statements and demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted copies of the petitioner's 1997, 1998, 1999, and 2000 Schedules C, Profit or Loss from Business. Those forms show that the petitioner returned net profit of \$21,726, \$22,009, \$22,493, and \$52,527 during those years, respectively.

On March 21, 2002, the California Service Center issued another request for evidence. The Service Center, noting that the Form ETA 750, Part B stated that the petitioner had employed the beneficiary, requested that the petitioner provide Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during the previous three years. The Service Center further requested that the petitioner provide copies of its California Form DE-6, Quarterly Wage Reports for the past four quarters and a description of the duties of each of the employees shown on that form. Finally, the Service Center requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show its continuing ability to pay the proffered wage since the priority date.

The Service Center stipulated that, if the evidence was in the form of tax returns, the returns should be complete, including all schedules and attachments, and should be signed and stamped. As an alternative to signed and stamped tax returns, the Service Center noted that it would accept IRS computer generated printouts of the returns.

In response, counsel submitted a letter, dated May 7, 2002. In that letter, counsel stated that the petitioner ceased to employ the beneficiary during December of 1997, and that during his employment the petitioner paid him in cash. Counsel further stated that the petitioner had no current employees and had, therefore, no Form DE-6 Quarterly Wage Reports.

Counsel submitted copies of the 1997, 1998, 1999, and 2000 Form 1040 joint individual income tax returns of the petitioner's owner and owner's spouse. The 2001 return was not then provided. The returns submitted were neither signed nor stamped.

The 1997 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$42,964 during that year, including the petitioner's net profit of \$21,726.

The 1998 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$36,448 during that year, including the petitioner's net profit of \$22,009.

The 1999 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$45,978 during that year, including the petitioner's net profit of \$22,493.

The 2000 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$116,574 during that year, including the petitioner's net profit of \$52,527.

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 August 26, 2002, denied the petition. In that decision, the director emphasized that the petitioner failed to provide signed, stamped tax returns as requested.

On appeal, counsel notes that, if CIS wishes to confirm that the tax returns submitted were filed with IRS, it may obtain verification from IRS with a signed authorization, which counsel states the petitioner would provide. Counsel did not, however, submit either that authorization or IRS verification on appeal.

Counsel also provided a copy of the petitioner's owner and owner's spouse's joint 2001 Form 1040 U.S. Individual Tax Return. The 2001 return shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$82,072 during that year, including the petitioner's net profit of \$22,792 shown on the corresponding Schedule C.

Counsel is reminded that the preferred response to a request for evidence is to provide the requested evidence. Ordinarily, advising CIS of alternative methods that CIS might pursue to support counsel's case for him is insufficient. In this case, though, whether the requirement that any tax returns provided be signed and stamped was proper is open to question. However, this office need not reach that question, because, even if the lack of signatures and stamps is overlooked, the evidence submitted does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, as is detailed below.

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 stated that it employed and paid the beneficiary during 1997, but provided no evidence in support of that assertion. The petitioner did not, therefore, establish that it employed and paid the beneficiary during 1997. Further, the petitioner does not claim to have employed the beneficiary during 1998, 1999, 2000, or 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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); *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. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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. 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, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The proffered wage is \$41,225.60. The priority date is September 23, 1997. During 1997, the petitioner made a net profit of \$21,726. That amount is insufficient to pay the proffered wage. The petitioner, however, is a sole proprietorship. The owner of a sole proprietorship is obliged to pay the debts and obligations of the business out of his own income and assets as necessary. The income and assets of the owner, therefore, are funds available to pay the proffered wage.

The petitioner's owner had an adjusted gross income, including the petitioner's profit, of \$42,964 during that year. Although that amount exceeds the proffered wage, to expect that the petitioner's owner could have supported his family of four during that year on the balance of \$1,738.40 is manifestly unreasonable. The petitioner provided no evidence that any other funds were available to the petitioner or the petitioner's owner with which to support the petitioner's owner's family or to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998, the petitioner had a net profit of \$22,009. That amount is insufficient to pay the proffered wage. The petitioner's owner declared an adjusted gross income of \$36,448 during that year; including the petitioner's net profit. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were available during 1998 with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner had a net profit of \$22,493. That amount is insufficient to pay the proffered wage. The petitioner's owner declared an adjusted gross income of \$45,978 during that year; including the petitioner's net profit. Although that amount exceeds the proffered wage, to expect that the petitioner's owner could have supported his family of four during that year on the balance of \$4,752.40 is manifestly unreasonable. The petitioner provided no evidence that any other funds were available to the petitioner or the petitioner's owner with which to support the petitioner's owner's family or to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared an adjusted gross income of \$52,527, and the petitioner's owner declared an adjusted gross income of \$116,574. That amount was sufficient to pay the proffered wage and leave the petitioner's owner an amount with which he could support his family. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner's owner declared an adjusted gross income of \$82,072; including the petitioner's net profit of \$22,792. The petitioner's net profit was insufficient to pay the proffered wage. If the petitioner's owner had paid the proffered wage out of his adjusted gross income, he would have been left with the difference of \$40,846.40, an amount likely sufficient to support his family of four, although the record lacks evidence of the owner's monthly expenses.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, and 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.