

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

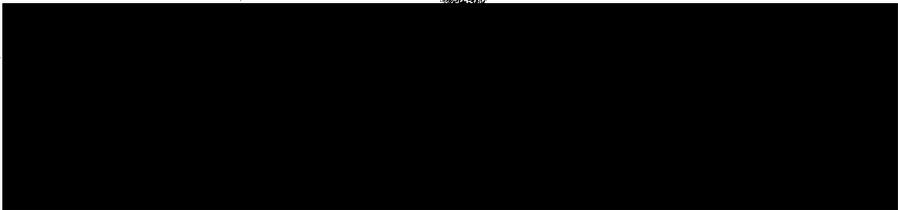
U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

BO



FILE:



Office: NEBRASKA 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.

RPW
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 on appeal. The appeal will be dismissed.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler/assistant manager. 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 that it had not established that the proffered position qualifies as a position for a skilled worker. The director denied the petition accordingly.

On appeal, counsel submits 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment 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 petitioner must also demonstrate that the position satisfies the statutory requirements. Here, the Form ETA 750 was accepted on May 5, 1999. The proffered wage as stated on the Form ETA 750 is \$43,721.60 per year. The Form ETA 750 states that the position requires one year of experience and does not require a college degree. The Form ETA 750, Part B does not indicate that the beneficiary has ever worked for the petitioner.

The Form I-140 states that it is a petition for a skilled worker or a professional. With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage.

On March 12, 2003, the Nebraska Service Center requested evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested copies of annual reports, federal tax returns, or audited financial statements sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted the first pages of the petitioner's nominal 1998 and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner reports taxes based on a fiscal year running from April 1 of the nominal year to March 31 of the following year.

The fiscal year 1998 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$50,299 during that year. Because the corresponding Schedule L was not included, the petitioner's year-end net current assets cannot be calculated. The last day of the petitioner's fiscal year 1998, however, was March 31, 1999. Because the priority date of the petition is May 5, 1999 the petitioner's financial condition during its fiscal year 1998 is not directly relevant to its ability to pay the proffered wage beginning on the priority date.

The fiscal year 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$40,222 during that year. Because the corresponding Schedule L was not included, the petitioner's year-end net current assets cannot be calculated.

The director denied the petition on June 26, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director also noted that, because the Form ETA 750 states that the proffered position requires only one year of experience, the proffered position does not qualify as a position for a skilled worker.

On appeal, counsel states, "This shall act as a motion to reconsider. We provided the income tax returns for the fiscal years 1999 and 2001 as requested. We will re-categorize this position to that of "Any Other Worker" (Part 2, Item G on Form I-140). Thank you." With the appeal, counsel provides copies of the same tax returns' first pages that were previously provided. No further information, argument, or documentation has been submitted to supplement that appeal.

On the Form I-140, Part 2, Item E was checked, indicating that the petition is for a skilled worker or a professional. Because the position does not require a college degree it is not a professional position. Because it does not require two or more years of training or experience it is not a skilled worker position.

As to counsel's offer to change the classification sought, neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish eligibility for the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, no provision in the statutes or regulations permits the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification.

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 employed and paid 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); *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*, 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 petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$43,721.60 per year. The priority date is May 5, 1999. That date falls within the petitioner's fiscal year 1999, which runs from April 1, 1999 through March 31, 2000. Counsel submitted no evidence pertinent to that fiscal year and gave no reason for that omission. Counsel failed, therefore, to demonstrate the petitioner's ability to pay the proffered wage during the petitioner's fiscal year 1999.

The petitioner's fiscal year 2000 runs from April 1, 2000 through March 31, 2001. Counsel submitted the first page of the petitioner's Form 1120 U.S. Corporation Income Tax Return for that fiscal year, which indicates that the petitioner declared taxable income before net operating loss deduction and special deductions of \$40,222.¹ That amount is insufficient to pay the proffered wage. Because the corresponding Schedule L was not submitted, this office is unable to calculate the petitioner's net current assets.² Therefore, the petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets. Counsel submitted no evidence that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its fiscal year 2000.

The request for evidence was issued during March of 2003. The tax return pertinent to the petitioner's 2001 fiscal year should then have been available. Counsel did not provide that return or any other evidence pertinent to the petitioner's finances during that fiscal year and gave no reason for that omission. The petitioner has not demonstrated its ability to pay the proffered wage during its 2001 fiscal year.

The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage during its 1999, 2000, or 2001 fiscal years. Therefore, the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. Further, the evidence indicates that the proffered position does not qualify as a position for a skilled worker. For both of those reasons, the petition may not be approved.

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.

¹ The fiscal year 2000 return indicates that the petitioner declared net operating loss deductions of \$43,347 during that year. Such a net operating loss deductions appears to indicate that, had the petitioner chosen to submit its tax return from the previous year, it would have shown a loss, and would not have demonstrated the petitioner's ability to pay the proffered wage during that year out of its income.

² The need to calculate a petitioner's net current assets is among the reasons petitioners are encouraged to submit complete tax returns, with all schedules and attachments, rather than selected portions of tax returns.