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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 127 50338 Office: CALIFORNIA SERVICE CENTER Date: JUL 27 2004

IN RE: Petitioner: [redacted]
Beneficiary

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:

[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
for Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental assistant. 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.

On appeal, counsel submits a brief.

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 March 24, 1998. The proffered salary as stated on the labor certification is $1,625 per month or $19,500 per year.

With the petition, counsel failed to submit any evidence of the petitioner's ability to pay the proffered wage or of the beneficiary's experience. On April 12, 2002, the director requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, signed federal tax returns, or audited financial statements. The petitioner was informed that in lieu of signed and certified tax returns, the petitioner could submit Internal Revenue Service (IRS) Computer Tax Records, date stamped by the IRS. The director specifically requested copies of the petitioner's Form DE-6, Employment Development Department Quarterly Wage Reports, for the last three quarters that were accepted by the State of California. The director also requested evidence to establish that the beneficiary possesses the experience listed on the labor certification to be in letterform on the previous employer's letterhead showing the name and title of the person verifying this information.

In response, counsel submitted a letter from *Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado* stating that the beneficiary worked there from February 1992 to the present. The letter is dated May 26, 1994. Counsel also submitted copies of the first two pages of the sole proprietor's 1998, 1999, 2000, and 2001 Forms 1040, U.S. Individual Income Tax Return, and copies of the petitioner's Forms DE-6 for the quarters ending September 30, 2001, December 31, 2001, and March 31, 2002. The beneficiary did not work for the petitioner during those quarters.

On June 19, 2002, the director, again, requested evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The director noted that the tax returns submitted did not contain [redacted]r Loss from Business, and that the evidence of the beneficiary's experience did not include the beneficiary's title, duties, beginning and ending dates of employment, and the average number of hours worked per week.

In response, counsel submitted another letter from the beneficiary's prior employer stating that the beneficiary provided services as a dentist and that she worked from February 26, 1992 through May of 1994. Gabriel [redacted]1-02-14-04-00 DEL ISSSTE, signed the letter. Counsel also provided complete copies of the petitioner's 1998, 1999, 2000, and 2001 Forms 1040, U.S. Individual Income Tax Return.

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 February 12, 2003, issued an Intent To Deny informing the petitioner of his reasons and requesting evidence of the petitioner's household living expenses. The petitioner was given thirty days to provide evidence in support of its petition.

On March 11, 2003, counsel submitted a rebuttal to the Intent To Deny by providing copies of the petitioner's Forms DE-6 for the quarters ended December 31, 2001, March 31, 2002, and September 30, 2002. Counsel also submitted two balances due aging reports and a list of the petitioner's household expenses. Those expenses amount to $5,739.97 per month or $68,879.64 per year. The petitioner states:

> In 1998-2001 the household of five is no longer valid, it is now just the two of us. Marco 28, the oldest son is now working in Boston Massachusetts, Yara the oldest daughter 26 ½ is finishing her masters degree in J.F. Kennedy University (Orinda up in San Francisco) and Hepzibah the youngest daughter decided to live with her grand father two years ago. Subsequently, the overall expenses had changed.
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> * * *
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> [redacted] has been able to pay wages to all the employees for long time with many sacrifices but now, it will be just a little more easier, with a second doctor on board. Our company is growing little by little and we are planning to utilized [sic] 100% of what we have right now. We have been using just 50% of our offices capacity since the new

> doctor came to work with us. We are planning to train new employees as long as we found the next right dentist for our community.

The director determined that the documentation was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to present, and, on April 7, 2003, denied the petition.

On appeal, counsel asserts:

> The Service based it's [sic] denial on the basis that it appeared that the employer did not appear to have the ability to pay the proffered wage at the time the priority date in this case was established. The [S]ervice based this denial and decision on the basis that the employer showed insufficient funds after taking into consideration that even through [sic] there are now only two dependents, income would be insufficient to pay the wage after housold [sic] expenses.
>
> It is also believe [sic] that the Service [f]ailed to take into consideration that the employer has two locations and in this respect had two schedule "C" reflecting for both locations.
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> The employer has been in business since 1988 and has ten employees between the two locations. The Service also did not take into consideration the amount of depreciation the employer has which according to a previous INS decision states that this can be used for the purpose of income since depreciation is deducted from the gross, but in effect is money not used for any purpose, but could be used for salaries.
>
> Based on the above the previously furnished documentation including the fact that each tax return contained two schedule "C" and not one, in addition to depreciated [sic] paid should enable the adjudicator to approve the petition.

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 it employed the beneficiary from 1998 through 2001 or that the beneficiary was compensated at a salary equal to or greater than the proffered wage in those years.

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.

The 1998 through 2001 tax returns reflect adjusted gross incomes of $83,682, $52,181, $85,587, and $46,139, respectively.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. Although the petitioner's adjusted gross income for all four years was greater than the proffered wage, the proffered wage and the petitioner's household expenses together were greater then the adjusted gross income in all four years ($88,379.64). Therefore, the petitioner could not pay the proffered wage and his household expenses in any year. No evidence was provided that the petitioner possessed other resources with which to pay the proffered wage. Finally, no evidence was provided to establish that the beneficiary would be replacing another full-time dental assistant.

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.