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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 02 086 53457 Office: Vermont Service Center Date: APR 09 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Ellen E Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a legal advisor-patents. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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 or seasonal nature, for which qualified workers are not available in the United States.

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 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 continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on August 23, 2000. The proffered salary as stated on the labor certification is $40,000 per year.

With the petition, counsel submitted Form 1120 corporate income tax

return for the 2000 calendar year. That return showed that the petitioner had $3,775 in taxable income during that year.

Because the petitioner submitted insufficient evidence of its ability to pay the proffered wage during the salient period, the Vermont Service Center issued a Request for Evidence on February 25, 2002. The petitioner was requested to submit additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In addition, the petitioner was informed that the Service Center would not consider the compensation of officers in the computation of the funds available to pay the proffered wage.

In response, counsel submitted copies of the 2000 and 2001 Federal Form W-2 wage and tax statements of a previous employee. In an accompanying letter, a partner of the petitioning corporation stated that the proffered position includes many of the duties of that previous employee. The partner noted that, during 2000, the company claimed depreciation of $10,377 and expended $20,121 for outside services which would have been obviated by hiring the beneficiary.

The partner stated that, during 2000, the amount of that former employee's salary ($68,045), plus the amount of the depreciation deduction ($10,377), plus the amount expended for outside services ($20,121), equalled $92,543, which amount the partner stated was available to pay the proffered wage. Although the partner's arithmetic was flawed, the underlying reasoning has merit and shall be addressed below.

On July 1, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not establish the continuing ability of the petitioner to pay the proffered wage. The director considered the petitioner's taxable income and depreciation deduction, but declined to consider the compensation paid to officers as funds available to pay the proffered wage. The director found that the ex-employee and the outside contractors hired during 2000 would not have been replaced by the beneficiary. Although the director's reasoning was unclear, he appears to have found that they were not performing the same duties as those of the proffered position.

On appeal, counsel stated that the petitioner's 2000 tax return demonstrates the ability to pay the proffered wage during that year. In addition to the petitioner's profit and depreciation deduction, counsel argued that the $20,121 paid to contractors was available to pay the proffered wage during that year. Counsel also stated that, had the services of the beneficiary been available to

the petitioner, the petitioner would have replaced the previously specified ex-employee with the beneficiary.

In addition, counsel indicated that the $268,250 paid to remunerate the petitioner's officers during 2000 is the profit the petitioner enjoyed during that year, and was also available to pay the proffered wage.

Finally, counsel submitted a copy of the first page of the petitioner's 1999 1120 tax return. Because the priority date of the petition is August 23, 2000, that 1999 return is less salient to this matter than the 2000 return, and it shall not be further discussed.

In determining the petitioner's ability to pay the proffered wage, the Service 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 both Service and 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 the 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 the Service 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." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In the present case, the petitioner is a corporation that had been in business for eight years at the time the labor certification was filed. The petitioner had $1,258,699 in gross receipts and paid out $586,278 in wages and salaries during the year in which the priority date was established. The petitioner's tax returns reflect a consistent increase in the enterprise's gross sales over the years, growing from $1,078,638 in 1999 to $1,258,699 in the year 2000.

Finally, the petitioner indicated on the Form I-140 petition that the proffered position is not a new position, and implied that the

beneficiary would replace a previously hired employee and contract workers who currently do the work described in the labor certification. The validity of the job offer is further strengthened by the beneficiary replacing and assuming the salary of an employee who has left the organization. A review of the record confirms that the job offer is realistic and can be satisfied by the petitioner.

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 met that burden.

ORDER: The appeal is sustained.