B6

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 01 283 55949 Office: CALIFORNIA SERVICE CENTER Date: MAR 26 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as A Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

UBLIC COPY

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.

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a reinforcing metal worker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

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 ability to pay the wage offered as of 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is September 12, 2000. The beneficiary's salary, as stated on the labor certification, was $9.92 per hour or $20,633.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On February 22, 2002, the director issued a notice of intent to deny the petition, as the petitioner's loss of ($7,160) in 2000 failed to establish that the petitioner had the ability to pay the proffered wage at the priority date of the petition.

In response, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return, 2001 bank statements, four (4) recent contracts, and five (5) bid proposals for other projects. The director determined that the federal tax return for 2000 was pertinent to the priority date, that it did not demonstrate the ability to pay the proffered wage at such time, and that the petition must be denied.

Counsel states on appeal,

> The INS takes the simplistic view that an operating loss disqualifies a petitioner due to inability to pay the offered wage. However, the figures on a tax return must be considered in light of tax law which includes depreciation and other "paper losses". [sic] And a successful business such [redacted] may have cash flow variations due to the timing of projects and timing of payments, and should not be penalized because payments were received in one year and not in another. OMD Builders' gross income has been: 1998 $359,363; 1999 $233,756; 2000 $185,940; 2001 $138,604.

Counsel's argument is not persuasive. Gross income declined over 60% in the designated period. Counsel cites no authority to consider gross income, "recent contracts," and even bid proposals without reference to the liabilities and expenses incurred to generate that income. Similarly, counsel states that depreciation must be added back into the cash available.

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

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau 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. 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.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow reflect additional funds that the tax returns and financial statements do not.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, bank statements, and contractual documents, 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.

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.