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U.S. Department of Homeland Security

Bureau of Citizenship Services and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536

[redacted]

File: WAC 01 262 63865 Office: California Service Center Date: MAY 28 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]

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 fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 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 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 May 19, 1997. The proffered salary as stated on the labor certification is $12.64 per hour which equals $26,291.20 annually.

With the petition, counsel submitted an uncertified, unsigned, copy of the petitioner's 1999 Form 1120 U.S. corporation income tax return. The return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $32,677 during that year.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on December 31, 2001, requested additional evidence pertinent to that ability.

Specifically, the Service Center requested certified corporate income tax returns and audited financial statements for the entire period since the priority date. The Service Center also requested copies of the petitioner's Form DE-6 quarterly wage reports for the previous four quarters and a description of each employee's duties.

In response, counsel submitted unaudited financial statements for December 2001 and uncertified copies of the petitioner's 1997, 1998, and 2000 Form 1120 U.S. corporation income tax returns. The 1997 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of ($60,485). The accompanying Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

The 1998 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of $136,492.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of ($2,864). The accompanying Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

Counsel also submitted the petitioner's Form DE-6 quarterly wage reports for all four quarters of 2001 and a description of the job duties of the listed employees.

Counsel included a letter with those submissions. In that letter, counsel noted that 8 C.F.R. § 204.5(g)(2) specifies that federal income tax returns are acceptable as proof of the petitioner's ability to pay the proffered wage and that the director had requested certified copies of the petitioner's annual income tax returns. Counsel argues, however, that, because 8 C.F.R. § 204.5(g)(2) does not specify any particular type of federal tax

return, e.g. Federal Unemployment Tax Returns, Annual Income Tax Returns, Quarterly Federal Tax Returns, Federal Withholding Forms, the petitioner is free to submit some type of return other than the income tax returns which the director specifically requested. Counsel stated, further, that the IRS takes more than six months to issue certified tax returns.

Counsel also noted that audited financial statements are expensive, and that the petitioner declined to provide them. Counsel asserted that the petitioner expends over $20,000 in fees which will be obviated by hiring the petitioner, but submitted no evidence of that asserted fact.

Finally, counsel argued that the petitioner's depreciation deductions are not actual expenses, but paper deductions, and that the amount of the petitioner's depreciation deduction during each year should be added back into the petitioner's income to calculate the petitioner's ability to pay the proffered wage.

On May 20, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel submits bank account statements and argues that the balances evince the petitioner's ability to pay the proffered wage. Counsel further argues that the petitioner's total assets and gross receipts should be considered evidence of the petitioner's ability to pay the proffered wage. Expanding upon that argument, counsel argued that the petitioner might pay the proffered wage out of gross receipts "and adjust other expenditures as needed." Finally, counsel argued that the petitioner anticipates greater profits as a result of hiring the petitioner.

Counsel did submit copies of the petitioner's income tax returns for 1997, 1998, 1999, and 2000, notwithstanding that they are not certified. In view of those submissions, we need not reach counsel's argument that the petitioner was not obliged to provide them.

The unaudited financial statement submitted is not among the types of evidence which 8 C.F.R. § 204.5(g)(2) deems competent proof of the petitioner's ability to pay the proffered wage, and is the only evidence submitted pertinent to 2001. In support of the contention that evidence not listed in 8 C.F.R. § 204.5(g)(2) may be acceptable as evidence of the petitioner's ability to pay the proffered wage, counsel cites an unpublished decision of this office. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the

administration of the Act, unpublished decisions are not similarly binding and have no precedential value. The unaudited financial statement shall not, therefore, be considered as proof of the petitioner's ability to pay the proffered wage.

Counsel's assertion that the petitioner will save over $20,000 in fees paid annually to outside contractors by hiring the petitioner is not supported by any evidence in the record. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's assertion plays no part in the calculation of the petitioner's ability to pay the proffered wage.

A depreciation deduction, while not a cash expenditure in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages. In addition, no precedent allows the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

Counsel asserts that the petitioner's bank balances should be considered in the calculation of the ability to pay the proffered wage. As the petitioner's balances were sufficient during the months submitted, counsel asserts that the petitioner should be considered, on the strength of those balances, to have been able to pay the wage during those months.

Bank balances are not among the types of evidence enumerated in 8 C.F.R. § 204.5(g)(2). Further, counsel's argument implicitly assumes that the beneficiary's wage might be paid out of a bank balance without diminishing the next months balance. In any event, no evidence was submitted to demonstrate that the funds reflected on the petitioner's bank statements somehow reflect additional available funds that were not reported on the tax return.

Counsel contended that the petitioner could pay the proffered wage out of gross receipts and adjust other expenses as necessary. As evidence that the petitioner's expenses are so fluid, counsel noted that they vary from year to year. Counsel offered no evidence, however, that those expenses fluctuate according to the petitioner's whim, rather than based on some other factors.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first 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 Bureau 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 that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

Finally, that the petitioner's profits would increase as a result of hiring the petitioner is speculative. No part of the anticipated increase in profits will be included in the calculation of the funds available to pay the proffered wage.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1997 and 2000. No competent evidence was submitted pertinent to 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.