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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 22 2004

IN RE: Petitioner: [redacted]
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: [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.

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 board and care home. It seeks to employ the beneficiary permanently in the United States as a board and care manager. 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 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.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on April 10, 1997. The proffered wage as stated on the Form ETA 750 is $2,002 per month, which equals $24,024 per year.

With the petition, counsel submitted a copy of the petitioner's nominal 1999 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on a fiscal year running from September 1 of the nominal year to August 31, of the following year. The 1999 return shows that during the fiscal year running from September 1, 1999 through August 31, 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of $17,275. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on January 7, 2002, requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center requested that any tax returns submitted be complete and include all associated schedules and tables.

In response, counsel submitted copies of the petitioner's 1997, 1998, and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1997 return, which covers the fiscal year running from September 1, 1997 through August 31, 1998, states that the petitioner declared taxable income before net operating loss deduction and special deductions of $24,039 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had $30,295 in current assets and $4,313 in current liabilities, which equals net current assets of $25,982.

The 1998 return, which covers the fiscal year running from September 1, 1998 through August 31, 1999, states that the petitioner declared a loss of $63,213 as its taxable income before net operating loss deduction and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The 2000 return, which covers the fiscal year running from September 1, 2000 through August 31, 2001, states that the petitioner declared a loss of $8,213 as its taxable income before net operating loss deduction and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

In a cover letter, dated March 5, 2002, which accompanied those returns, counsel emphasized the amounts of the petitioner's gross receipts and wage expense. Counsel stated that the petitioner's wage expense for 1997, 1998, 1999, and 2000 was "inclusive of the wage offered to the beneficiary."

Because the evidence did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Acting Director, California Service Center, on April 11, 2002, issued a Notice of Intent to Deny in this matter. In that Notice, the Acting Director observed that the petitioner did not demonstrate the ability to pay the proffered wage during each of the salient years.

The Acting Director also noted that counsel had claimed that the petitioner's wage expense during 1997, 1998, 1999, and 2000 included $24,024 in wages paid to the beneficiary. The Acting Director asked the petitioner to provide a copy of the Form W-2 Wage and Tax Statements showing the wages paid to the beneficiary.

In response, counsel submitted 1998, 1999, and 2000 W-2 forms showing that the petitioner paid the beneficiary $12,650, $13,435, and $2,300 during those years, respectively. Counsel also submitted 2000 and 2001 W-2 forms showing that Progressive Management, Inc. of Simi Valley, California paid $12,976 and $14,575 to the beneficiary during those years.

Counsel also provided the petitioner's unaudited profit and loss statement covering actual profit and loss for fiscal years 1999 and 2000, and anticipated profit and loss for fiscal year 2001.

With that evidence, counsel submitted a letter, dated May 1, 2002 from the petitioner's administrator. In that letter, the administrator urged that the evidence previously submitted amply demonstrates the petitioner's ability to pay the proffered wage. The administrator also stated that the petitioner has decided to decrease its expenses and anticipates, therefore, an increase in net profits. The administrator stated that "it has been conclusively determined . . . (that the petitioner) will have more than enough operating income . . . to absorb new employees."

Counsel provided one page of a payroll summary of Progressive Management, which apparently manages the petitioner's payroll. The petitioner's administrator states that this page shows the petitioner's payroll

expenses during the two-week period ending on January 15, 2002. The administrator further states that the payments made to six named employees demonstrate that the proffered position is bona fide and is assigned the minimum annual salary of $24,024.

The payroll summary shows that three of those named employees were paid $925.14, $934.16, and $977.56. The administrator states that their gross pay reflects absences. The other three named employees were paid $1,130.85, $1,126.61, and $1,627.83 during that period. The administrator stated that they worked to cover for absent managers. The administrator reiterated that all six are paid in excess of the proffered wage.

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 August 20, 2002, denied the petition.

On appeal, counsel reiterated that the petitioner anticipates lowering its expenses and increasing its net profits. Counsel argues that the evidence previously submitted demonstrates the petitioner's ability to pay the proffered wage.

Counsel also provides copies of earnings statements showing that the beneficiary now earns gross wages of $747.94 every two weeks, which wage, if paid over the course of an entire year, would equal $19,446.44. Counsel argues that the cash value of the beneficiary's medical, dental, and vision health plans, her paid vacation, and meals should be added to her salary. By counsel's calculations, those benefits raise the effective amount of the beneficiary's salary to roughly $22,000. Counsel characterizes the difference between that amount and the proffered wage of $24,024 as insignificant. Counsel stated, but provided no evidence to support, that the petitioner's previous losses were "mainly due to the expenses [it] incurred in putting up new facilities . . . ."

The assertion that the petitioner intends to increase its net profit by decreasing its expenses does not demonstrate the ability to pay the proffered wage during any period, past or future. The assertion that the petitioner is currently paying six other employees a minimum of $24,024 each for performing the duties of the proffered position also does not demonstrate the ability to pay the proffered wage, absent evidence that the beneficiary will replace one of those employees.

Upon approval of the I-140 petition, the petitioner would be obliged to pay the beneficiary the proffered wage, not the equivalent of the proffered wage when the value of health plans, vacations, and meals are added in. During the pendency of the petition, the petitioner is obliged to show the ability to pay the entire proffered wage. The ostensible value of vacations and fringe benefits is not a part of the determination of the ability to pay the proffered wage.

Counsel's reliance on the amount of the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net

[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS will 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 in assessing 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS (then INS) 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 CIS should consider 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 v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is April 10, 1997. The proffered wage is $24,024 per year. The determination of the petitioner's ability to pay the proffered wage during each of the salient years is complicated by the petitioner's reporting taxes based on a fiscal year, rather than a calendar year, but reporting wages based on the calendar year.

Counsel submitted W-2 forms showing that the petitioner paid wages to the beneficiary during 1998, 1999, and 2000. The amounts paid to the beneficiary show the petitioner's ability to pay the proffered wage, at least in part, and are properly part of the determination of that ability.

Counsel also submitted W-2 forms showing that Progressive Management paid wages to the beneficiary during 2000 and 2001. The slogan "Payrolls by Paychex" on those W-2 forms indicates that Progressive Management is a payroll service. The entry of the petitioner's name and one of its addresses on those W-2 forms indicates that Progressive Management drew the checks to pay for the beneficiary's employment by the petitioner. This office finds that counsel demonstrated that the funds shown on the W-2 forms paid by Progressive were the petitioner's funds and are correctly part of the determination of the petitioner's ability to pay the proffered wage.

The petitioner produced no evidence pertinent to its ability to pay the proffered wage during the period between April 10, 1997, the priority date, and September 1, 1997, the beginning of its 1997 fiscal year. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during that period.

During its 1997 fiscal year, which ran from September 1, 1997 through August 31, 1998, the petitioner declared taxable income before net operating loss deduction and special deductions of $24,039 during that fiscal year. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 1997 fiscal year.

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[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

During its 1998 fiscal year, which ran from September 1, 1998 through August 31, 1999, the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that fiscal year. At the end of the year, the petitioner had negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year.

The 1998 W-2 form shows that the petitioner paid the beneficiary $12,650 during that year. Because the petitioner's fiscal year begins in September, four months of that income, or $3,162.50, is attributable to the petitioner's 1998 fiscal year. The 1999 W-2 form shows that the petitioner paid the beneficiary $13,435 during that year. Eight months of that wage, or $10,076, is attributable to the petitioner's 1998 fiscal year. The total wages attributable to the petitioner's 1998 fiscal year, from both the 1998 and 1999 W-2 forms, is $13,238.50. That amount is less than the proffered wage. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 1998 fiscal year.

During its 1999 fiscal year, which ran from September 1, 1999 to August 30, 2000, the petitioner declared income of $17,725. That amount is less than the proffered wage. Because the petitioner ended that fiscal year with negative net current assets, the petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. Of the amount shown on the 1999 W-2 form, one-quarter, or $3,358.75, is attributable to its 1999 fiscal year. Of the $2,300 shown on the 2000 W-2 form, three-quarters, or $1,725, is attributable to the petitioner's 1999 fiscal year. The total attributable to the petitioner's 1999 fiscal year, from both the 1999 and 2000 W-2 forms, is $5,083.75. That amount, plus the petitioner's net income of $17,725, equals $22,808.75, an amount less than the proffered wage. The petitioner has not demonstrated that it had any other funds available with which to pay the proffered wage during its 1999 fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

During its 2000 fiscal year, which covers the period from September 1, 2000 through August 31, 2001, the petitioner declared a loss. The petitioner has not demonstrated, therefore, that it was able to pay any portion of the proffered wage out of its income. The petitioner ended that fiscal year with negative net current assets. The petitioner has not demonstrated the ability, therefore, to pay any portion of the proffered wage out of its net current assets. Of the amount shown on the 2000 W-2 form, one-quarter, or $575, is attributable to the petitioner's 2000 fiscal year. Of the $12,976 shown on the 2001 W-2 form, three-quarters, or $9,732 is attributable to that fiscal year. The total wages attributable to the petitioner's 2000 fiscal year, from both the 2000 and 2001 W-2 forms, is $10,307. That amount is less than the proffered wage. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage during its 2000 fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the period from the priority date to the beginning of its 1997 fiscal year. The petitioner also failed to submit evidence sufficient to show that it had that ability during its 1998, 1999, and 2000 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.