U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

[redacted]

FEB 02 2004

File: WAC 02 117 50411 Office: CALIFORNIA SERVICE CENTER Date:

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 Citizenship and Immigration Services (CIS) 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.

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 sustained.

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, the 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.

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 proffered wage beginning on the priority date. The priority date is the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on January 9, 1998. The proffered wage as stated on the Form ETA 750 is $11.89 per hour, which equals $24,731.20 per year.

With the petition counsel submitted a copy of the petitioner's 2000 Form 1065 U.S. Return of Partnership Income. The return shows that the petitioner declared ordinary income during that year of $1,975. The corresponding Schedule L shows that at the

end of that 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 April 2, 2002, requested additional evidence pertinent to that ability.

The Service Center requested that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date and emphasized that the evidence must include copies of annual reports, federal tax returns, or audited financial statements. In addition, the Service Center specifically requested copies of the petitioner's signed 1998 through 2001 tax returns.

In response, counsel submitted a letter, dated June 21, 2002, in which he stated that he was providing copies of the petitioner's 1998, 1999, and 2000 income tax returns. Counsel stated that he was providing a copy of an Application for Automatic Extension of Time to file the 2001 return.

With the appeal, counsel provided copies of the petitioner's 1998 and 2000 Form 1065 U.S. Return of Partnership Income. The petitioner's 1999 federal tax return was not included.

Page one of the 1998 Form 1065 is missing, but a tax summary attached to that return shows that during that year, the petitioner declared ordinary income of $8,650. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 Form 1065 shows that the petitioner declared ordinary income of $1,975 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided copies of the 1998, 1999, and 2000 Form 1040 U.S. Individual Tax Returns of one of the petitioner's partner/owners.

Page one of the 1998 Form 1040 was photocopied with the partner/owner's Form W-2 Wage and Tax Statement covering a portion of the page. As a result, the petitioner's adjusted gross income does not appear on that photocopied page. However, a tax summary appended to that return shows that the partner/owner declared an adjusted gross income of $36,347 during that year. The partner/owner claimed one dependent during that year.

The 1999 Form 1040 shows that the partner/owner declared an

adjusted gross income of $34,700 and claimed one dependent during that year.

The 2000 Form 1040 shows that the partner/owner declared an adjusted gross income of $45,407 during that year and had one dependent.

In addition, counsel submitted a copy of a 2001 Form 4868 Application for Automatic Extension of Time to File U.S. Individual Income Tax Return showing that the partner/owner whose tax returns were provided filed for an extension of time during which to file her personal tax return. That form does not demonstrate that the petitioner requested such an extension.

Subsequently, counsel submitted a partial copy of the petitioner's 1999 Form 1065 U.S. Return of Partnership Income. That return shows that the petitioner declared an ordinary income of $5,158 during that year. Because the corresponding Schedule L did not accompany that partial return, the Service has no information pertinent to the petitioner's net current assets at the end of that year.

On July 18, 2002, the Director, California Service Center, issued a Notice of Intent to Deny in this matter. The notice noted the various missing portions of the income tax returns and the occluded parts of those pages submitted. The notice requested that the petitioner submit complete signed copies of its tax returns.

Counsel responded by providing the petitioner's 1998, 1999, 2000, and 2001 tax returns as requested. Counsel also provided complete copies of the Form 1040 returns of the same partner/owner for whom incomplete returns had previously been provided. In a letter dated August 9, 2002 that accompanied those returns, counsel noted that the petitioner's gross receipts exceed the amount of the proffered wage. Counsel also observed that the petitioner's business might grow after it hires the beneficiary.

The 1999 Form 1065 U.S. Return of Partnership Income provided indicated that the petitioner declared an ordinary income of $5,158 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 Form 1065 U.S. Return of Partnership Income provided indicated that the petitioner declared an ordinary income of $13,509 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 Form 1040 indicates that the partner/owner declared an

adjusted gross income of $57,475 during that year and had one dependent.

The remaining tax returns submitted in response to the Notice of Intent to Deny corroborated the information previously recited above.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on October 23, 2002, denied the petition.

On appeal, counsel submitted monthly statements of the petitioner's bank accounts and argues that they demonstrate the petitioner's ability to pay the proffered wage.

Counsel also argued that the petitioner's gross receipts and gross profits, together with the adjusted gross income of the partner/owner for whom individual tax returns were provided, demonstrate the petitioner's ability to pay the proffered wage. In that argument, counsel makes no reference to the petitioner's ordinary income.

Counsel stated that the petitioner could pay the proffered wage out of its gross profits, which counsel referred to as "total income" and "adjust other expenditures as needed." Counsel further stated that "the petitioner may choose to spend less on many of its non-essential expenditures and apply that money to the proffered wage.

Curiously, counsel also states that the petitioner's net current assets were $256,495 during 1999, $295,272 during 2000, and $305,350 during 2001. Were this so, it would dispose of the issue of the petitioner's ability to pay the proffered wage during those years. Reference to the petitioner's tax returns, however, indicates that the petitioner had negative net current assets at the end of all three of those years. Further reference to those tax returns indicates that the figures cited by counsel were actually the petitioner's Schedule L Line 14 Total Assets during those years.

Net current assets are the petitioner's current assets, those due to be received within a year, minus the petitioner's current liabilities, amounts owed and due to be paid within a year. That amount can be used as an indication of the petitioner's ability to pay the proffered wage. The figures cited by counsel are not current assets. Counsel also failed to subtract the petitioner's current liabilities from that figure. As such, those figures are not net assets. The figures cited are not, as stated by counsel, the petitioner's net current assets, nor are they an indication of the petitioner's ability to pay the proffered wage.

Finally, counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg.

Comm. 1967), for the proposition that this office may overlook years during which the petitioner's tax returns do not show the ability to pay the proffered wage.

Counsel's reliance on bank statements in this case is inapposite. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax returns. Third, bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), that the regulation requires as evidence of a petitioner's ability to pay a proffered wage.

Counsel's reliance on the petitioner's gross receipts and gross profits as an indicator of the petitioner's ability to pay the proffered wage is similarly unconvincing. Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner's gross profits exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1], 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.

Counsel also stated that the petitioner was able to "adjust other expenses as needed" to pay the proffered wage. If counsel means to imply that some of the petitioner's deducted expenses were unnecessary, then counsel's position appears to be contradicted by the petitioner's having claimed them. 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. - Trade or business expenses, states that only necessary expenses may be deducted from income. In any event, counsel provided no information from which this office may determine which of the petitioner's expenses during various years were optional, which were mandatory, and which may be shifted from year to year.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the ordinary 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

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[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.

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 (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 CIS should have considered 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 of the petition is January 9, 1998. The proffered wage is $24,731.20 per year. During 1998, the petitioner declared ordinary income of $8,650, which is $16,081.20 short of the amount it must show the ability to pay. The petitioner had negative net current assets at the end of that year. The petitioner has not demonstrated the ability to pay the proffered wage out of either its own income or its assets.

Partner/owners of general partnerships, however, are required to pay the debts and obligations of the partnership out of their own funds. Therefore, the income and assets of the partners may be considered in determining the ability of the petitioner to pay the proffered wage. In this case, the evidence includes the personal income tax returns of one of the partner/owners. During 1998, that partner/owner declared an adjusted gross income of $36,347. If the partner/owner had paid the $16,081.20 balance of the proffered wage, she would have been left with $20,265.80.

During 1999 and the remaining salient years, the petitioner is obliged to show the ability to pay the entire proffered wage of $24,731.20. During 1999, the petitioner declared ordinary income of $5,158 and finished the year with negative net current assets. The petitioner has not demonstrated the ability to pay the remaining $19,573.20 of the proffered wage out of its income or its assets. The adjusted gross income of the partner/owner during that year was $34,700. If $19,573.20 is subtracted from that amount, $15,126.80 remains which may very well be enough to support a family of two. The poverty line for a family of two during 1999 was 11,060. The partner/owner would have been left with considerably more than that amount if forced to pay the balance of the proffered wage out of her own income. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared ordinary income of $1,975 and finished the year with negative net current assets. The petitioner has not demonstrated the ability to pay the $22,756.20 balance of the proffered wage out of either income or assets. During 2000, the partner/owner declared adjusted gross income of $45,407. The balance of the proffered wage subtracted from the petitioner's adjusted gross income leaves a difference of $22,650, which would seem enough for a family of two during that year. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared ordinary income of $13,509 and finished the year with negative net current assets. The balance of the proffered wage is $11,222.20. During that year, the partner/owner declared an adjusted gross income of $57,475. When the balance of the proffered wage is subtracted, a difference of $46,252.80 remains, which is clearly sufficient to support a family of two. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner demonstrated the ability to pay the proffered wage during all salient years. Given that finding, this office need not address the balance of counsel's arguments.

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.