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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
[illegible]ve Street N.W.
W[illegible]hington, D.C. 20536

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 06 2004

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 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.

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

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

The petitioner is an import/export company. It seeks to employ the beneficiary permanently in the United States as its export 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.

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 wage offered beginning on the priority date, the day 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 on January 13, 1998. The proffered salary as stated on the labor certification is $26.30 per hour, which equals $54,704 per year.

With the petition, counsel submitted a copy of the petitioner's 1998 Form 1120, U.S. corporation income tax return. The return indicates that the petitioner declared a taxable income before

net operating loss deduction and special deductions of $22,954 during that year. The corresponding Schedule L shows that at the end of the year the petitioner had current assets of $33,198 and current liabilities of $9,556, which yields $23,642 in net current assets.

Because the evidence submitted did not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on December 10, 2001, requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the Service Center requested copies of the petitioner's 1999 and 2000 tax returns, Form W-2 wage and tax statements for each of the petitioner's employees, and copies of the petitioner's Form 941 employer's quarterly federal tax returns for all four quarters of 2001.

In response, counsel submitted 1998 W-2 forms for four employees, 1999 W-2 forms for three employees, 2000 W-2 forms for one employee, 2001 W-2 forms for two employees, and a 2001 Form 1099 miscellaneous income form apparently showing income paid to a contractor. Those forms indicate that the petitioner did not employ the beneficiary during those years.

Counsel also submitted copies of the petitioner's 1999 and 2000 Form 1120 corporate income tax returns. Although counsel's cover letter, dated March 1, 2002, states that she was enclosing the requested quarterly tax returns for all four quarters of 2001, counsel did not provide those requested Form 941 quarterly returns.

The petitioner's 1999 tax return shows that the petitioner declared a loss of $23,521 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L indicates that at the end of that year the petitioner had current assets of $41,903 and current liabilities of $39,599, which yields net current assets of $2,304.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deductions and special deductions of $31,790. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities.

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 June 10, 2002, denied the petition.

On appeal, counsel argues that a significant decline in the

petitioner's income during 2000 was due to a restructuring in the control of the corporation. Counsel stated that the original petitioner, Guzal, Inc., was acquired by Guzal Cargo Express and that the petitioner emerged from its fiscal decline by 2001.

In support of that position, counsel submitted a copy of the petitioner's 2001 Form 1120 tax return. The return shows that during that year the petitioner declared a taxable income before net operating loss deductions and special deductions of $64,635. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $63,609 and current liabilities of $17,450, which yields net current assets of $46,159.

Counsel also provided copies of the petitioner's Form 941 employer's quarterly federal tax return and Florida Form ATX-1 for the first quarter of 2002. Those documents show that the petitioner employed four employees during that quarter but did not employ the beneficiary.

In determining the petitioner's ability to pay the proffered wage, CIS 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 CIS 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 INS, now CIS, 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 INS, now 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 proffered wage is $54,704 per year. During 1998, the petitioner declared a taxable income before net operating loss deduction and special deductions of $22,954 ending the year with $23,642 in net current assets. Those amounts are insufficient to pay the proffered wage.

During 1999 the petitioner declared a loss of $23,521 as its

taxable income before net operating loss deduction and special deductions and ended the year with net current assets of $2,304. The petitioner was unable to pay the proffered wage out of those amounts.

During 2000, the petitioner declared a taxable income before net operating loss deductions and special deductions of $31,790 and ended the year with no net current assets. The petitioner was unable to pay the proffered wage out of that amount.

During 2001, the petitioner declared a taxable income before net operating loss deductions and special deductions of $64,635 and ended the year with net current assets of $46,159. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

Counsel is correct that if the petitioner's losses during some years and low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, however, the petitioner had had only one year during which its profits and net current assets were sufficient to pay the proffered wage. The petitioner was apparently unable to pay that wage even during the year when it filed the petition.

Counsel states that the petitioner's fiscal woes ended when its current owners purchased it. Although counsel has posited a feasible possibility, the only evidence of counsel's assertion is a single year's income tax return on which the petitioner posted a substantial profit. The profitable year appears to be uncharacteristic, rather than the unprofitable years.

The petitioner failed to submit sufficient evidence that it had the ability to pay the proffered wage during 1998, 1999, or 2000. 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.