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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
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 153 52934 Office: CALIFORNIA 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 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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a used car dealer. It seeks to employ the beneficiary permanently in the United States as an automotive mechanic. 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 statement 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage 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. Here, the Form ETA 750 was accepted on December 19, 1997. The proffered wage as stated on the Form ETA 750 is $18.10 per hour, which equals $37,648 per year.

With the petition the petitioner initially submitted an unsigned portion of its 2001 Form 1065 U.S. Return of Partnership Income.

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 June 12, 2002 requested additional evidence pertinent to that ability. The Service Center requested that the petitioner provide proof of its continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center stipulated that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also specifically requested that the petitioner submit IRS issued copies of filed tax returns for 1997 through 2001 or IRS printouts of the information from those returns.

In response, counsel submitted what purport to be unsigned copies of the petitioner's 1997, 1998, 1999, 2000, and 2001 Form 1065 U.S. Return of Partnership Income. The returns submitted were not IRS issued copies of those returns.

The 1997 tax return shows that the petitioner declared ordinary income of $34,489 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities and, therefore, had no net current assets.

The 1998 return shows that the petitioner declared ordinary income of $30,496 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities and had, therefore, no net current assets.

The 1999 return shows that the petitioner declared ordinary income of $36,651 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities and had, therefore, no net current assets.

The 2000 return shows that the petitioner declared ordinary income of $40,337 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities and had, therefore, no net current assets.

The 2001 return shows that the petitioner declared ordinary income of $42,665 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities and had, therefore, no net current assets.

The director determined that the evidence submitted did not

establish that the petitioner had the ability to pay the proffered wage and, on October 17, 2002, denied the petition.

On appeal, counsel submits copies of bank statements for the petitioner's checking account. The dates on those accounts ranged from January 2002 to September 2002.

Counsel provides an income statement for the period from January 1, 2002 to September 30, 2002. Although that statement is on the letterhead of a bookkeeping/accounting service, it is not accompanied by an audit report or any other indication that it was produced pursuant to an audit.

Counsel also provides a copy of the 1999, 2000, and 2001 Form 1040 joint tax returns of one of the petitioner's owners and that owner's spouse. Those returns show that the petitioner's owner and owner's wife had two dependents during each of those years.

This office observes that the petitioner is a partnership, and the owners are, therefore, obliged to pay the petitioner's debts and obligations out of their own income and assets. As such, the income and assets of the partners may be considered in the determination of the petitioner's ability to pay the proffered wage.

The 1999 return shows that the petitioner's part-owner and part-owner's wife declared an adjusted gross income of $37,759. That amount includes $40,630 paid to that partner by the petitioner, offset by deductions.

The 2000 return shows that the petitioner's part-owner and part-owner's wife declared an adjusted gross income of $48,580. That amount includes $52,273 paid to that partner by the petitioner, offset by deductions.

The 2001 return shows that the petitioner's part-owner and part-owner's wife declared an adjusted gross income of $38,263. That amount includes $41,172 paid to that partner by the petitioner, offset by deductions.

Finally, counsel submits a letter, dated November 8, 2002, from the petitioner's bookkeeper/accountant, and a letter, dated November 8, 2002, from the petitioner's part-owner. The bookkeeper/accountant's letter notes that the amount paid to the part-owner who provided his personal tax returns is only half of the total amount paid out. That is; the other partner, who did not submit a personal tax return, received an equal amount. Each of the partnership returns were accompanied by two Schedules K-1 Partner's Share of Income, Credits, Deductions, etc., confirming the bookkeeper/accountant's assertion.

The bookkeeper/accountant stated that the figures from those tax

forms show that the petitioner has the ability to pay the proffered wage. The letter from the petitioner's part-owner also asserts that the tax returns and the other evidence in the record show the ability to pay the proffered wage. The part-owner states that the bookkeeper/accountant has reviewed the tax returns and stated that the business has the ability to pay the proffered wage.

Initially, the AAO notes that although the bookkeeper/accountant identified himself as an accountant in his November 8, 2002 letter, that letter is not a review report and the record contains no evidence that the bookkeeper/accountant performed a review in the technical sense. In any event, absent an accountant's audit, the figures on the tax returns are apparently the unsupported representations of management and nothing more.

Similarly, the income statement for the period from January 1, 2002 to September 30, 2002 is apparently unaudited. 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, or audited financial statements are competent evidence of a petitioner's ability to pay the proffered wage. The unaudited income statement is not competent evidence of that ability and will not be considered.

Further, the reliance of counsel and the petitioner on bank account statements is misplaced. 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 return. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

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 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.

Because the petitioner is a partnership, this office will also consider any amounts the partners have shown they might feasibly have contributed, if necessary, toward payment of the proffered wage.

The priority date is December 19, 1997. The proffered wage is $37,648 per year. During 1997, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due had the petitioner hired the beneficiary on the priority date. On the priority date, 351 days of that 364-day year had elapsed, and 13 days of that year remained. The petitioner must only show the ability to pay the proffered wage during those 13 days of 1997. The proffered wage multiplied by 13/364th equals $1,344.57.

During 1997, the petitioner declared ordinary income of $34,489. The petitioner could have paid the salient portion of the proffered wage out of that ordinary income. The petitioner has demonstrated the ability to pay the proffered wage during the portion of 1997 after the priority date.

During 1998 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1998, the petitioner declared ordinary income of $30,496. That amount is insufficient to pay the proffered wage. The petitioner had no net current assets to use toward payment of the proffered wage.

The record does not contain the 1998 personal income tax return of either of the petitioner's partners. As such, although the 1998 Schedules K-1 submitted with the partnership return show that each partner received $28,705, the record contains no evidence pertinent to the partners' expenses. Without that information, this office is unable to determine what amount, if any, either of the partners might feasibly have contributed toward payment of the proffered wage. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner declared ordinary income of $36,651. That amount is insufficient to pay the proffered wage. At the end of that year, the petitioner had no net current assets to contribute toward payment of the proffered wage. The 1999 personal income tax return of one of the partners is in the record. That return indicates that partner declared an adjusted gross income of $37,759. The record does not contain that partner's budget or any other information pertinent to that partner's personal expenses. As such, the record contains no indication of what part, if any, of his adjusted gross income

that partner might feasibly have contributed toward payment of the proffered wage. The record contains no indication that the partner had any other assets that he could have contributed toward payment of the proffered wage.

The record contains neither the personal income tax return, nor budget information, nor information pertinent to the assets of the other of the petitioner's partners. As such, the record does not contain any indication of the amount, if any, that other partner might feasibly have contributed toward payment of the proffered wage during 1999. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared ordinary income of $40,337. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

Similarly, during 2001, the petitioner declared ordinary income of $42,665. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998 and 1999. 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.