PUBLIC COPY

U.S. Department of Homeland Security

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

Citizenship and Immigration Services

B6

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

[redacted]

FEB 03 2004

File: EAC 02 126 54145 Office: VERMONT 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]

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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 February 5, 1999. The proffered wage as stated on the Form ETA 750 is $18.89 per hour, which equals $39,291.20 per year.

With the petition, counsel submitted a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The

return shows that the petitioner declared $25,615 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. This office notes that, because the priority date is February 5, 1999, financial information pertinent to the 1998 calendar year is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 30, 2002, requested additional evidence pertinent to that ability. The Service Center also requested that the petitioner submit a copy of the 1999 W-2 form showing the wages paid to the beneficiary, if it employed the beneficiary during 1999.

In response, counsel submitted a copy of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation. The return shows that during that year the petitioner declared ordinary income of $6,344. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 October 16, 2002, denied the petition.

On appeal, counsel argues that,

> 1. Beneficairy (sic) has the requirements established by the Labor Certificate.
>
> 2. Petitioner had the ability to pay the proffered wage at the time of filing.
>
> 3. Petitioner is submitting additional supporting evidence that shows the ability to pya (sic) the proffered wage.

With the appeal, counsel submitted a letter, dated November 13, 2002, from the petitioner's president. The letter notes the amounts of the petitioner's 1999 gross receipts, net income, depreciation and payroll expense. The letter states that the petitioner offered the proffered position to the beneficiary based on the anticipated departure of two part-time cooks. The letter names those cooks and states that one received his last check on November 26, 1999 and the other on January 7, 2000. The letter further states that the wages of those two part-time cooks, added together, exceed the amount of the proffered wage.

With the appeal, counsel submitted the petitioner's Form 940, showing the petitioner's wage expense for 1999. Counsel also submitted the 1999 W-2 forms of the two former cooks. The amounts on those W-2 forms, $18,200 and $32,100, total $50,300, an amount greater than the proffered wage.

The petitioner does not allege, however, that the two cooks whom the beneficiary would allegedly replace would have been willing to leave earlier in order to facilitate hiring the beneficiary. The petitioner is not excused from demonstrating that it was able to pay the proffered wage during the portion of 1999 after the priority date.

The petitioner's reliance on the amount of the petitioner's gross receipts and depreciation deduction is misplaced. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, Supra at 537. *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 Immigration and Naturalization Service, now CIS, 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 INS, now CIS, should have considered income before expenses were paid rather than net income.

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 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.

The priority date is February 5, 1999. The proffered wage is $39,291.20 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1999, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 35 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 330 days. The proffered wage multiplied by 330/365th equals $35,523,55, which is the amount the petitioner must show the ability to pay during 1999.

During 1999, the petitioner declared ordinary income of $6,344. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999 and has not, therefore, 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.

---

[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.

[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.