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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FEB 11 2004

File: LIN 02 235 50415 Office: NEBRASKA 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]

PUBLIC COPY

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. 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.

The petitioner must demonstrate its 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 for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $1,001.68 per week, which equals $52,087.36 per year.

With the petition counsel submitted a copy of the first page of the petitioner's 2001 Form 1065 U.S. Return of Partnership Income, which shows that the petitioner declared ordinary income of $5,266 during that year.

Counsel also submitted copies of the first pages of the petitioner's checking account statements for January, February, March, April, and May of 2002.

Finally, counsel submitted a letter, dated June 16, 2002, from the petitioner's vice president. The letter states that the petitioner has been in business for over eight years, employs six workers, is financially stable, and has the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on October 14, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's most recent annual report, tax return, or audited financial statements. The Service Center also requested that the petitioner provide additional evidence, such as profit/loss statements, bank account records, or personnel records. Finally, the Service Center noted that if the petitioner wished to rely on bank account balances, it must provide statements covering the entire period since April 2001.

In response, counsel submitted a copy of the petitioner's 2001 Form 1065 U.S. Return of Partnership Income. In a letter dated December 27, 2002, counsel noted that the petitioner's return shows Schedule A, Line 4, Cost of Labor of $259,868. Counsel also provided copies of 2001 Form 1099 Miscellaneous Income statements showing individuals to whom a portion of that amount was dispersed. Counsel stated that the petitioner's labor expense shows its ability to pay the proffered wage.

Counsel further stated that the 1099 forms show "the amount salaries [sic] paid to employees [sic] which when totaled will be close to the amount of salary to be paid to a prospective full time [sic] employee such as [the beneficiary]." In fact, those 1099 forms appear to document dispersal of $178,252 in non-employee compensation. One of the 1099 forms, however, shows that $75,300 of that amount was paid to one of the petitioner's owners.

The director found 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 February 10, 2003, denied the petition.

On appeal, counsel argues that the petitioner's bank balances and its labor expense show the ability to pay the proffered wage. Counsel also provides bank statements for February 2002 through July 2003. Counsel notes that the bank statements provided do not cover the entire period since the priority date but states that they are "certainly representative of the Petitioner's

financial status from February 2001 to present."

Counsel did not state the evidence from which he determined that the balances shown on those bank statements are representative of the balances during the entire period since the priority date. Further, counsel did not provide any evidence that would permit this office to concur with that conclusion. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel correctly notes that the petitioner's Schedule A, Line 4 Cost of Labor during 2001 was $259,868. Counsel states that the 1099 forms show that the petitioner paid $177,252[1] in wages. Counsel states that the difference, $82,616, is available to pay the proffered wage.

This office notes that 1099 forms are never used to show wages paid to employees. The amount shown on those 1099 forms was apparently paid to independent contractors for services rendered. In any event, whatever the nature of those expenses, counsel has not alleged that they are available to pay the proffered wage.

Counsel implies that the balance of the petitioner's Cost of Labor, other than the amounts shown on those 1099 forms, was also paid for contract labor. Counsel further implies that the beneficiary will replace additional contract labor, or some unspecified portion of it, if the petition is approved.

Counsel did not demonstrate, however, that the balance of the petitioner's Cost of Labor was paid to finish carpenters whom the beneficiary could replace. Counsel did not demonstrate what portion of that expense the beneficiary could obviate by working full-time for the petitioner. In short, counsel has alleged that the balance of the petitioner's Cost of Labor is available to pay the proffered wage, but has not demonstrated the accuracy of that assertion. Counsel has not demonstrated that any portion of the petitioner's Cost of Labor is available to pay the proffered wage.

Counsel submitted a letter, dated April 6, 2003, from one of the petitioner's owners. The letter states that the petitioner's management intends to replace as much of the petitioner's contract labor as possible with the beneficiary's work and believes this will lower costs. That letter does not state any basis for the belief that hiring the beneficiary will result in saving an amount in excess of the proffered wage. It doesn't state what amount, if any, of the petitioner's Cost of Labor was

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[1] This office notes that counsel's arithmetic is incorrect. The miscalculation, however, does not affect this office's ability to address the argument.

paid to finish carpenters or the number of man-hours of work, if any, that finish carpenter contractors performed for the company. As such, this office is unable to determine whether the opinion of the petitioner's management, that hiring the beneficiary will result in a net saving, is reasonable. Further, the petitioner has not demonstrated that any portion of its Cost of Labor was available to pay the proffered wage.

Counsel's reliance on the bank statements in this case 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 its 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 primary 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 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 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.

The priority date is April 27, 2001. The proffered wage is $52,087.36 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 116 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 249 days. The proffered wage multiplied by 249/365th equals $35,533.67, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared ordinary income of $5,266. That amount is insufficient to pay the proffered wage. The

petitioner has not demonstrated that any other funds were available to pay the proffered wage during that year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.