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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, D.C. 20536

[redacted]

FEB 26 2004

File: WAC 02 127 50075 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]

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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an air parcel and overseas remittance firm. It seeks to employ the beneficiary permanently in the United States as an executive secretary. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that (1) it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and that, (2) the beneficiary possessed the requisite employment experience for the offered position.

On appeal, the petitioner[1] submits additional information and asserts that the petitioner's continuing financial ability to pay the proffered wage has been established.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The issues raised on appeal are whether the petitioner has established its ability to pay the beneficiary's offered wage and whether the petitioner has established that the beneficiary possesses sufficient work experience to satisfy the terms of the labor certification. Eligibility for the benefit sought must be established as of the petition's priority date, which is the date the request for labor certification 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 petition's priority date is August 3, 1998. The beneficiary's salary as stated on the approved labor certification is $12.44 per hour or $25,875.20 annually.

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[1] The petitioner filed the appeal. As no withdrawal of representation appears in the record, a copy of this decision will be provided to the petitioner's counsel.

The petitioner initially submitted insufficient evidence to establish either its ability to pay the proffered wage or that the beneficiary had obtained the requisite two years of work experience as an executive secretary required by the terms of the labor certification, as described in Item 14 of the Department of Labor Form ETA-750.

On April 10, 2002, the director requested additional evidence of the petitioner's ability to pay, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). The director advised the petitioner that if it employed 100 or more workers, a current statement from a financial officer would suffice to establish that the petitioner had the ability to pay the proffered wage. We note that the petitioner represented that it had 129 employees on the visa petition. Nevertheless, the petitioner responded by submitting partial copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1998 through 2000.

The 1998 corporate tax return shows that the petitioner declared ordinary income of $2,088,062 and net current assets of -$2,147,742. Its ability to pay the proffered wage was demonstrated by its ordinary income figure.

The petitioner's 1999 corporate tax return indicates that the petitioner had $1,631,545 in ordinary income. Schedule L reflects that the petitioner had $2,456,346 in net current assets. Either figure covers the beneficiary's offered salary.

The petitioner's 2000 corporate tax return shows that the petitioner declared -$574,643 as ordinary income and -$781,777 as net current assets for this period. Neither figure is sufficient to demonstrate the petitioner's ability to pay the proposed salary out of either its ordinary income or net current assets.

The petitioner also submitted a document titled "Verification of Past Employment" which indicated that the beneficiary had been employed as an executive secretary from June 1995 until September 1996 with a firm in Mexico.

The director issued another request for additional evidence on June 20, 2002. He noted that the 1999 federal tax return had not been signed, and instructed the petitioner to submit additional information. The director also requested that the petitioner submit additional documentation showing that the beneficiary had two years of experience as an executive secretary.

In response, the petitioner submitted an "Employment Certification," dated July 25, 2002, from a former employer in the United States, affirming that the beneficiary had worked as an executive secretary from July 1997 until July 2002. The petitioner also submitted audited financial statements which the director noted showed that the petitioner had over two million dollars as net income as of September 30, 1999.

In his denial, the director concluded that the petitioner's corporate income tax returns failed to demonstrate the petitioner's continuing ability to pay the offered wage. The director also determined that the petitioner's employment verification documents had not established that she had accrued two years of experience before the priority date of August 3, 1998.

On appeal, what appear to be slightly altered verification employment letters are submitted to establish the beneficiary's experience. The same U.S. employer submits an identical letter, dated July 25, 2002, verifying that the beneficiary was employed at the company, except that the dates of employment have changed to "July 1997 to July 1998." The second letter appears to be a duplicate original of the document submitted by the beneficiary's former employer in Mexico, dated the same day, except that the letterhead is completely different. This document is typed in English. Both employment documents appear to be typed by the same person and written in the same text, raising questions as to their authorship. Although not cited by the director, for this reason, we cannot conclude that these employment verification documents should be accorded much evidentiary weight.[2]

On appeal, the petitioner also submits signed copies of the corporate federal income tax returns, including a copy of the petitioner's 2001 corporate tax return. It shows that the petitioner declared $981,284 as ordinary income, which substantially exceeded the proffered wage. As noted by the director, in determining the petitioner's ability to pay the proffered wage, CIS (formerly INS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

As previously discussed, the petitioner must show that its ability to pay the proffered wage is established as of the priority date and continuing until the present. In view of the negative figures set forth on the petitioner's 2000 corporate tax returns for its ordinary income and net current assets, it cannot be concluded that the petitioner successfully carried its burden to establish its continuing ability to pay the beneficiary's proposed salary.

Based on the evidence contained in the record and after consideration of the financial data and employment verification documents additionally presented on appeal, we cannot conclude that the director erred in denying the petition. The evidence fails to establish that the petitioner has demonstrated a continuing ability to pay the offered salary or that the beneficiary possesses the requisite two years of relevant employment experience.

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.

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[2] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

ORDER: The appeal is dismissed.