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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

B6

File: EAC-02-082-50611 Office: Vermont Service Center Date: MAR 11 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a maintenance repairer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined that the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage, and submits 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulations at 8 C.F.R. § 204.5(g)(2) state 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered 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. The petition's priority date in this instance is January 19, 2001. The beneficiary's salary as stated on the labor certification is $15.00 per hour or $31,200 per year.

With its initial petition, counsel submitted copies of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 2000 is before the priority date of January 19,

2001 has limited probative value in determining the petitioner's ability to pay the proffered wage.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 11, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The petitioner was also requested to submit Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary if the beneficiary was employed by the petitioner.

Counsel submitted a copy of the petitioner's Form w-3 Transmittal of Wage and Tax Statements for the year 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner has demonstrated adequate revenues to pay the proffered wage. Counsel further states that "Mr. Petuck," owner of the petitioner, could have taken half of his salary during 2000 freeing up the necessary funds to pay the beneficiary. Counsel states that the petitioner chose to take a larger salary, claiming it on Form 1040 U.S. Individual Tax Return rather than paying the higher corporate rate. Counsel further cites ways the petitioner could have altered its expenditures to make available sufficient funds to pay the proffered wage.

Counsel submits an unaudited letter from the petitioner's accountant, who states that, in his opinion, the petitioner has sufficient funds to pay the proffered wage.

Counsel submits copies of the petitioner's 1999 through 2001 Form 1120 U.S. Corporation Income Tax Return. The tax returns for 1999 as well as the return for 2000 is of limited probative value in establishing the petitioner's ability to pay the proffered wage as of January 19, 2001 priority date and will not be discussed further.

The tax return for 2001 reflected gross receipts of $223,499; gross profit of $125,949; compensation of officers of $24,926; salaries and wages paid of $28,591; and a taxable income before net operating loss deduction and special deductions of - $7,087.

Counsel's assertion that the petitioner could have somehow altered its business practices to free up funds to pay the beneficiary is not persuasive. Further, counsel's assertion cites circumstances in 1999 and 2000, which are not germane to determining the petitioner's ability to pay the proffered wage since January 19, 2001.

The accountant's report submitted is a compilation report, not an audited report. The accountant indicates that he had compiled information submitted by the petitioner and presented it in the form of a financial summary. As such, the unaudited report merely restates the petitioner's representations of events that occurred prior to the priority date, and is not evidence of their veracity. Additionally, the regulations clearly require audited financial statements; thus, unaudited compilations are not competent evidence as described by 8 C.F.R. § 204.5(g)(2).

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, not gross receipts, 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 CIS, then the Immigration and Naturalization Service, 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 CIS should have considered income before expenses were paid rather than net income.

The 2001 tax returns submitted in this matter appear to indicate that the petitioner was unable to pay the proffered wage. The petitioner's Form 1120 for calendar year 2001 shows an ordinary income of - $7,087, assets of $4,597, liabilities of $5,789, and total assets of - $1,192. The petitioner could not pay a proffered salary of $31,200 out of this figure. Additionally, the petitioner's current liabilities outweigh its current assets in 2001, so the proffered wage could not be paid from its net curent assets.

After a review of the evidence, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.