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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: California Service Center Date: MAR 16 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.

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 television station. It seeks to employ the beneficiary permanently in the United States as a reporter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. 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 states the director failed to request all additional evidence provided for in 8 C.F.R. § 204.5 (g)(2) and to allow 12 weeks in which to submit it. Counsel requests 84 days in which to submit a brief and additional evidence to support the petitioner's ability to pay the proffered wage.

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 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 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 petitioner'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 and continuing until the alien is granted

permanent residence. The petitioner's priority date in this instance is July 6, 1999. The beneficiary's salary as stated on the labor certification is $29.50 per hour or $61,360 per year.

With the petition, counsel submitted unsigned copies of the petitioner's 1999 and 2000 Form 1120, U.S. Corporation Income Tax Return, and a copy of the petitioner's financial statement for 2001. The 1999 tax return reflects taxable income before net operating loss and special deductions of $21,060, less than the proffered wage. The tax return for 2000 reflects taxable income before net operating loss deduction and special deductions of $14,725, less than the proffered wage.

Counsel also submitted copies of the beneficiary's 1997 through 2001 Form W-2, Wage and Tax Statement from the petitioner. The W-2s show the petitioner paid the beneficiary $19,794, $18,453 and $20,200 in 1999, 2000 and 2001, respectively.

In a request for evidence (RFE) dated August 16, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage beginning at the time the priority date was established and continuing until the beneficiary obtained permanent residence. The director stated this evidence could be in "the form of copies of annual reports, federal tax returns (with appropriate signature(s)), or audited financial statements."

In response, counsel resubmitted the tax returns, now signed and dated as of September 2002. Counsel also submitted a letter from the petitioner stating that, when depreciation was taken in consideration together with the wages previously paid the beneficiary, the petitioner had the financial ability to pay the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established and continuing until the beneficiary obtains permanent residency.

On appeal, counsel argues that the director should have asked for the additional evidence specified in the regulation. This argument is specious. Section 204.5(g)(2) of 8 C.F.R. clearly states that "[i]n 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]." (emphasis added). Obviously, counsel did not believe this was an appropriate case to submit such documentation, and the director did not abuse his discretion in not doing so. Furthermore, even though more than 84 days have elapsed since the petitioner filed its appeal, no additional evidence or brief has

been received by AAO.

In determining 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.*, 632 F.Supp. 1049 (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.* 623 F.Supp. 1080; *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 also held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses rather than net income.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner's 1999 and 2000 tax returns indicates that the petitioner does not have the ability to pay the proffered wage because its taxable income before net operating loss and special deductions are amounts that are $40,000 less than the proffered wage. Additionally, the amounts paid in salary to the beneficiary in 1999 and 2000, as illustrated through W-2 forms, also indicate that the petitioner does not have the ability to pay the proffered wage because it paid the beneficiary amounts that are $40,000 less than the proffered wage. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.