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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
Street N.W.
Washington, D.C. 20536

[redacted]

MAR 17 2004

File: EAC 02 054 53940 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 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 a contractor. It seeks to employ the beneficiary permanently in the United States as a mason. 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 it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director erred in his finding that the petitioner failed to demonstrate its ability to pay the beneficiary's offered salary.

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 the Service.

The sole basis of the appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 13, 1998. The beneficiary's salary as stated on the approved labor certification is $48,234.16 annually.

The petitioner initially submitted copies of its 1998 checking account bank statements, a copy of the beneficiary's 1998 W-2, and a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1998 to establish its continuing ability to pay the beneficiary's proposed salary. The

beneficiary's W-2 shows that the petitioner paid $13,436.35 to him in 1998. The petitioner's 1998 corporate tax return indicates that the petitioner declared $1,727 in taxable income before net operating loss deduction (NOL) and special deductions. Schedule L of the 1998 tax return shows that the petitioner had $3,086 in current assets and $3,508 in current liabilities. The difference between these figures reflects that the petitioner's net current assets were -$422.

On January 25, 2002, the director requested additional evidence from the petitioner to support its ability to pay the beneficiary's salary of $48,234.16 from the visa priority date to the present.

The petitioner responded by submitting copies of the beneficiary's 1998, 1999, and 2000 W-2s, copies of its 1999 and 2000 checking account bank statements, a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000, and financial statements for the year 2000 accompanied by a letter dated May 7, 2001 from Raymond W. Peche, a public accountant. Mr. Peche indicates that the financial statements have been reviewed in conformity with generally accepted accounting principles.

The beneficiary's 1999 W-2 reflects that he received $20,460.85 in wages from the petitioner. The beneficiary's 2000 W-2 shows that the petitioner paid him $27,674. The petitioner's 2000 corporate tax return indicates that the petitioner declared $5,331 in taxable income before NOL and special deductions. The corresponding Schedule L shows that the petitioner had $938 in current assets and $2,501 in current liabilities, resulting in net current assets of -$1,563. The reviewed financial statements, covering the period ending December 31, 2000, show that the petitioner had $18,167 in net current assets and a net income of $12,331.

The director denied the petition, determining that the petitioner had not established its ability to pay the proffered wage as of the 1998 priority date of the visa petition. The director considered the 1998 wages paid to the beneficiary as well as the balance sheet figures shown on Schedule L of the 1998 corporate tax return and concluded that these numbers did not sufficiently demonstrate the petitioner's ability to pay.

In determining the petitioner's ability to pay the proffered wage, CIS 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).

In this case, the difference between the proffered salary of $48,234.16 and the wages paid to the beneficiary in 1998, 1999, and 2000 resulted in shortfalls of $34,797.81, $27,773.31, and

$20,560.16, respectively. As noted above, neither the petitioner's net income of $1,727 or net current assets of -$422 as shown in its tax returns for 1998 could cover the $34,797.81 difference between the proffered salary and the actual wages paid to the beneficiary. Similarly, the $20,560.16 necessary to meet the proffered salary in the year 2000 could not be found in either the net income of $5,331 or net current assets of -$1,563 as shown on the petitioner's 2000 corporate tax return. Finally, the reviewed financial statements fail to support the petitioner's ability to pay the proffered wage in 2000. Both its net income figure of $12,331 and its net current assets of $18,167 are short of the $20,560.16 needed to meet the shortfall for that year.

On appeal, counsel resubmits copies of the petitioner's 1998 monthly bank statements in support of her assertion that the petitioner has sufficient cash flow available to pay the beneficiary's offered wage. Counsel further contends that reliance on bank statements is supported by a 1992 AAO decision. There is no indication that this decision is a designated precedent pursuant to the provisions of 8 C.F.R. § 103.3(c), and as such, is not considered binding. It is also noted that 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered in appropriate cases, such documentation generally cannot substitute for the evidentiary requirements. It is noted that the petitioner did not submit tax returns, annual reports or audited financial statements for the year 1999. The tax returns and reviewed financial statements that were submitted failed to establish, at least as to 1998 and 2000, that the petitioner had the ability to pay the beneficiary's offered salary of $48,234.16. The record contains no evidence sufficient to demonstrate that the funds reported on the petitioner's bank statements for those years somehow indicate additional available funds that were not reflected on the tax returns or the reviewed financial statements.

Based on the evidence contained in the record and after consideration of the financial information and argument presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered salary as of the priority date of the petition and continuing until the present.

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.