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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 031 57059 Office: California Service Center Date: MAR 18 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.

Helen E Crawford for

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 on appeal. The appeal will be dismissed.

The petitioner is a transportation company. It seeks to employ the beneficiary permanently in the United States as a financial management analyst. 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 argues that the director incorrectly considered the petitioner's financial data.

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.

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.

The petitioner must demonstrate eligibility 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the request for labor certification was accepted for processing on January 14, 1998.

The proffered salary as stated on the labor certification is $4,563.87 per month, which equals $54,766.44 annually.

With the petition, counsel submitted an unaudited balance sheet for April 30, 2001 and an unaudited income and retained earnings statement for the fiscal year from May 1, 2000 to April 30, 2001.

The evidence submitted to demonstrate the petitioner's continuing ability to pay the proffered wage did not correspond to the requirements of 8 C.F.R. § 204.5(g)(2). Therefore, on February 20, 2002, the California Service Center requested additional evidence pertinent to that ability. Specifically, the Service Center requested complete copies of the petitioner's 1998, 1999, and 2000 tax returns and copies of the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters. In response, counsel submitted the requested documents.

The petitioner's nominal 1998 Form 1120 U.S. corporation income tax return covers the fiscal year from May 1, 1998 to April 30, 1999 and indicates that the petitioner declared a taxable income before net operating loss deduction and special deductions of $14,586 during that fiscal year. The corresponding Schedule L indicates that, at the end of that fiscal year, the petitioner had $68,663 in current assets and $25,835 in current liabilities, which yields net current assets of $42,828.

The petitioner's nominal 1999 Form 1120 covers the fiscal year from May 1, 1999 to April 30, 2000 and shows taxable income before net operating loss deduction and special deductions of $6,303. The corresponding Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that fiscal year.

The petitioner's nominal 2000 Form 1120 covers the fiscal year from May 1, 2000 to April 30, 2001 and shows taxable income before net operating loss deduction and special deductions of $24,316. The corresponding Schedule L shows $138,381 in current assets and $78,422 in current liabilities, yielding $59,959 in net current assets at the end of that fiscal year.

The petitioner's quarterly wage reports for all four quarters of 2001 indicate that the petitioner paid the beneficiary $30,900 during that period. The amounts paid during the first, second, third and fourth quarters of that calendar year were $4,500, $8,400, $9,000, and $9,000, respectively.

On June 6, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel argued that the director should have considered the petitioner's gross income and the amount it paid in salaries and labor costs, rather than merely its taxable income.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

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 the INS, now CIS, 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. *K.C.P. Food Co., Inc.* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income.

The petitioner also submitted unaudited financial statements for

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

its 2000 fiscal year. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are insufficient to demonstrate the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are preferred evidence of the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

The petitioner submitted no data pertinent to its ability to pay the proffered wage from the priority date, January 14, 1998, to April 30, 1998.

The petitioner's 1998 Form 1120 tax return covers the period from May 1, 1998 to April 30, 1999. During that fiscal year, the petitioner declared taxable income before net operating loss deduction and special deductions of $14,586. That amount was insufficient to pay the proffered wage. The petitioner's year-end net current assets were $42,828. That amount is also insufficient to pay the proffered wage. The petitioner did not demonstrate that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

The petitioner's 1999 Form 1120 tax return covers the period from May 1, 1999 to April 30, 2000. During that fiscal year, the petitioner declared taxable income before net operating loss deduction and special deductions of $6,303. That amount was insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner did not demonstrate the ability to pay the proffered wage out of either its income or its assets during its 1999 fiscal year. The petitioner did not demonstrate that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

The petitioner's 2000 Form 1120 tax return covers the period from May 1, 2000 to April 30, 2001 and indicates that the petitioner's taxable income before net operating loss deduction and special deductions was $24,316, an amount insufficient to pay the proffered wage. The petitioner's year-end net current assets, however, equaled $59,959. The petitioner's net current assets were sufficient to pay the proffered wage. The petitioner demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

The petitioner submitted 2001 Form DE-6 quarterly reports showing amounts it paid the beneficiary during that calendar year. The entire amount paid during the first quarter and approximately one-third of the amount paid during the second quarter should correctly be included in the calculation of the petitioner's ability to pay the proffered wage during its 2000 fiscal year. The ability of the petitioner to pay the proffered wage during that year, however, is established.

The remainder of the amounts shown on those quarterly reports should correctly be included in the calculation of the petitioner's ability to pay the proffered wage during its 2001 fiscal year. The decision below did not inquire into the petitioner's ability to pay the proffered wage during its 2001 fiscal year, and neither shall this office.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage from the priority date until the beginning of its 1998 fiscal year, nor during its 1998 and 1999 fiscal years. Therefore, the petitioner has not established that it 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.