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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass,.Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

MAR 22 2004

File: EAC 02 118 51225 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii)

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 on appeal. The appeal will be dismissed.

The petitioner is an individual. She seeks to employ the beneficiary permanently in the United States as a general housekeeper. 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 submits a statement and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are not available.

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 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on March 1, 2001. The proffered wage as stated on the Form ETA 750 is $13.10 per hour, which equals $27,248 per year.

With the petition, counsel submitted copies of the 1998, 1999, and 2000 Form 1040 income tax returns the petitioner filed jointly with her husband. The 1998 return shows that the petitioner and her husband declared an adjusted gross income of $52,921.98 during that year. The 1999 return shows an adjusted gross income of $31,716, and the 2000 return shows an adjusted gross income of $32,492. Those returns also show that the petitioner and her husband had four dependents during each of those years.

This office notes that because the priority date is March 1, 2001, figures shown on tax returns for previous calendar years are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The petition, however, was filed on February 25, 2002, and the petitioner's 2001 tax return may not have been available on that date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 16, 2002, requested additional evidence pertinent to that ability. In addition, the Service Center specifically requested a copy of the petitioner's 2001 income tax return, an itemized list of all of the petitioner's monthly expenses, and a statement of the petitioner's occupation and income.

In response, counsel submitted IRS printouts of the information from the 1998, 1999, and 2000 returns filed jointly by the petitioner and her spouse, and from the petitioner's 2001 tax return, which she filed separately. The 1998, 1999, and 2000 printouts corroborate the data from the previously submitted 1040 forms. The 2001 printout states that the petitioner had an adjusted gross income of $24,976 during that year. Because child support is not declared as income, that Form 1040 did not reflect any of the child support payments the petitioner claims to receive from her husband.

Counsel also submitted a letter, dated September 3, 2002, from the petitioner. In that letter, the petitioner stated that she was employed as a customer representative at a bank with a salary of $15,000 per year until 1999, when she was made a teller and her salary was lowered. The petitioner did not state her current salary, which the Service Center specifically requested, other than to say that it is lower than $15,000 per year. In another paragraph of that letter, the petitioner stated, "I am currently employed . . . as a Personal Banker. Whether Personal Banker is synonymous with teller or whether the two statements contradict each other is unknown to this office.

That letter gives an itemization of the petitioner's monthly budget. That budget states that the petitioner's expenses are $730 per month. The letter also states that the petitioner separated from her husband during November of 2000 and receives child support of $800 per month pursuant to a verbal agreement.

Counsel also submitted a letter from the petitioner's parents that states that the petitioner and her children live with them rent-free.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 14, 2002, denied the petition. In that decision, the director noted that the petitioner had submitted no evidence of the $800 per month in child support she states she receives.

On appeal, counsel provides a copy of a separation agreement, dated December 12, 2002, in which the petitioner's husband agrees to pay her $800 per month in child support.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the adjusted gross 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 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 on the petitioner's net income figure rather than the petitioner's gross income. 623 F. Supp. at 1084.

The priority date is March 1, 2001. The proffered wage is $27,248 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 59 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 306 days. The proffered wage multiplied by 306/365th equals

$22,843.53, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner declared an adjusted gross income of $24,976. The petitioner has submitted evidence that she also received $800 per month in child support beginning during November of 2000, which would equal $9,600 during 2001 and ensuing years. The petitioner's adjusted gross income plus her child support equals $34,576. The petitioner submitted a budget showing that her monthly expenses are $780 per month, or $9,360 per year. Subtracting that amount from the total above leaves a difference of $25,216. That amount is sufficient to pay the salient portion of the proffered wage during 2001.

The remaining inquiry is the petitioner's ability to pay the proffered wage during ensuing years. During ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During ensuing years, the petitioner projects that she will continue to receive $9,600 per year in child support. The petitioner stated, in her letter of September 3, 2002, that her income from her employment is less than $15,000. Her income and child support, then, equal less than $24,600. Subtracting her annual expenses of $9,360 from that amount leaves a difference of less than $15,240. That amount is insufficient to pay the proffered wage.

The figures the petitioner provided indicate that she would be unable to pay the proffered wage of $27,248 during each year after 2001.[1] Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.

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[1] This office notes that, although the petitioner did not explicitly assert that hiring the beneficiary would obviate her $400 per month child care expense, such a claim may have been intended or implied. This office further notes, however, that an additional $400 per month would be insufficient to enable the petitioner to pay the proffered wage.