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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
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: LIN 02 139 52286 Office: NEBRASKA SERVICE CENTER Date: MAR 22 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stone mason. 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.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage 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. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $29.38 per hour, which equals $61,110.40 per year.

With the petition counsel submitted copies of the petitioner's 1997, 1998, 1999, and 2000 Form 1120S U.S. Income Tax Returns for an S Corporation. This office notes that, because the priority date is January 14, 1998, information on the 1997 return is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The 1998 return shows that the petitioner declared a loss of $10,863 as its ordinary income (loss) during that year. The corresponding Schedule L states that at the end of that year the petitioner had no assets and no liabilities, which indicates that the petitioner had net current assets of $0.

The 1999 return shows that the petitioner declared a loss of $5,190 as its ordinary income (loss) during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which equates to net current assets of $0.

The 2000 return shows that the petitioner declared ordinary income of $12,638 during that year. Because no Schedule L was submitted with that return, this office is unable to calculate the petitioner's year-end

net current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on May 23, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center stated that the evidence must include copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of $0 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $9,729 and no current liabilities, which equals net current assets of $9,729.

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 September 4, 2002, denied the petition.

On appeal, counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F2d 898 (C.A.D.C. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should have been considered. Counsel also argues that the petitioner's gross receipts indicate the ability to pay the proffered wage. Counsel stated, further, that bank records showing the ability to pay the proffered wage would be submitted within 30 days. Although a year has passed, no further information, argument, or documentation has been submitted by the petitioner or by counsel.

Counsel's reliance on *Masonry Masters, Inc. v. Thornburgh*, Supra., is misplaced. A portion of that decision urges that the ability of the beneficiary in that case to generate income for the petitioner should be considered. That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, while that decision urges the Service to consider the income that the beneficiary would generate, it does not urge the Service to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence the Service will make no such assumption.

Counsel's reliance on the petitioner's gross receipts is similarly misplaced. Showing that the petitioner's gross receipts exceeded 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 ordinary income.

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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.

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 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 the INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS (now CIS) should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is January 14, 1998. The proffered wage is $61,110.40 per year. During 1998, the petitioner declared a loss and declared no year-end net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income or assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner declared a loss and declared no year-end net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income or assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner declared ordinary income of $12,638, an insufficient amount with which to pay the proffered wage. The petitioner submitted no evidence of its year-end net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its income or assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared ordinary income of $0. At the end of that year, the petitioner had net current assets of $9,729, an insufficient amount with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its income or assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, or 2001. 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.