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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 235 56347 Office: VERMONT SERVICE CENTER Date: APR 19 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 of the Administrative Appeals Office 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.

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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a Form I-290B with additional comments.

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 petition'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. Here, the petition's priority date is March 25, 1997. The beneficiary's salary as stated on the labor certification is $17.43 per hour for a forty-hour workweek, which equates to $36,254.00 per annum.

With its initial petition, the petitioner submitted a copy of its 1997 tax return.[1] The director determined that the evidence contained therein was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date, and therefore issued a request for evidence on May 15, 2002. The request for evidence required the petitioner to submit regularly sanctioned evidence, such as tax returns, annual reports, and/or audited financial statements to demonstrate that the petitioner had the ability to pay the beneficiary's salary at the time the priority date was established. In addition, the director requested copies of the beneficiary's W-2 forms for 1997 if he was employed by the petitioner during that time.

In response to the request for evidence, the petitioner, through counsel, submitted two affidavits from the petitioner and a letter signed by the alleged director of the petitioning entity. These documents were offered to attest to the fact that the financial documents of the company from 1997 were no longer available. In addition,

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[1] The petitioner also submitted evidence of the beneficiary's qualifications, including a letter verifying his experience and an English translation thereof. Since the director did not base his decision to deny the petition upon the beneficiary's qualifications, this issue will not be discussed within the scope of this decision.

one of the affidavits stated that the beneficiary was employed by the petitioner on a part-time basis since 2000. No additional evidence was provided.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing thereafter because the petitioner's net income was less than the proffered wage. Consequently, the director denied the petition.

On appeal, counsel submits a Form I-290B with a brief statement contesting the director's findings. No additional documentary evidence is included in support of counsel's assertions.

The AAO will first review the evidence in the record to determine whether the director's findings were accurate. The record contains a copy of the petitioner's federal tax return for the year 1997, which displays a negative net income of ($13,682.00). A review of Schedule L reveals that the petitioner had $965.00 in net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. In this case, however, both the petitioner's net income and net current assets are less than the proffered wage of $36,254.00.

Noting this deficiency, the director requested additional evidence that would support the petitioner's ability to pay the proffered wage. In response to this request, the petitioner provided sworn affidavits and a letter, both alleging that since the petitioner's accountant for the 1997 tax year had passed away, no additional financial records were available from that time period. The petitioner further alleged that it only had financial records from the year 2000 to the present.

While this situation is unfortunate for the petitioner, the AAO finds it implausible that an incorporated entity regularly engaging in business since 1994 does not maintain financial records either internally or externally through an accountant. The petitioner is not exempt from satisfying the regulatory requirements simply because it has failed to retain its financial records for the years in question. The fact remains that prior to adjudication, the petitioner failed to provide any additional financial evidence to establish its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). Consequently, the AAO concurs with the director's denial of the petition.

On appeal, counsel submits Form I-290B with the following statement:

> It is unfair to use the base year of the year of filing (1997) when the offer of employment is not expected to be realized until several years later.

> The Service should take JUDICIAL NOTICE that the income of a business varies depending on the economic conditions. This, then, does not preclude the financial ability of the Petitioner at the present time.
>
> Therefore, the Petition should be remanded to the Service for adjudication.

Counsel's arguments are not persuasive. The regulation at 8 C.F.R. § 204.5(g)(2) compels the petitioner to establish its ability to pay the proffered wage as of the priority date of the petition, which in this case is March 25, 1997. In addition, it requires that the petitioner demonstrate a continuing financial ability to pay the wage until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). The petitioner has not provided any evidence that establishes its ability to pay the proffered wage either at the establishment of the priority date or continuing thereafter.

Regardless of its intention to pay the proffered wage at the time the beneficiary becomes a permanent resident, the petitioner is required by regulation to first demonstrate its ability to pay the proffered wage *at the time the priority date was established*. If the petitioner cannot show that it had the ability to pay the proffered wage at the priority date, then an analysis of the petitioner's ability to pay the wage in the future is unnecessary. The figures contained on the 1997 tax return are insufficient to establish the petitioner's ability to pay the proposed salary of $36,254.00, since the return shows negative net income and insufficient net assets. Although the petitioner was afforded the opportunity to provide additional evidence to establish its ability to pay, the petitioner failed to provide such evidence.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing thereafter.

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.