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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 02 041 54196 Office: VERMONT SERVICE CENTER Date: APR 26 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 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 or professional. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese food 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 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 in support of the petitioner's ability to pay the proffered wage.

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)(2) also provides 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. . . . 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 [CIS].

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 December 20, 2000. The beneficiary's salary as stated on the labor certification is $18.89 per hour or $39,291.20 per year, based on a 40-hour week. The record indicates that the petitioner was established in 1983 and is organized as a corporation. There is no indication on Part B of the ETA 750 that the petitioner employs the beneficiary.

The petitioner initially submitted an unaudited financial statement for the year 2000 as proof of its ability to pay the proffered wage. On March 11, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit copies of its federal income tax return for the year 2000.

The petitioner, through counsel, submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2000. The petitioner's corporate tax return reflects that the petitioner declared $17,867 in taxable income before the net operation loss (NOL) deduction and special deductions. Schedule L of the tax return shows the petitioner's current assets and current liabilities. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets, as well

as a petitioner's net income, because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, the petitioner had $10,132 in current assets and $6,039 in current liabilities, producing $4,093 in net current assets. Neither the petitioner's taxable income, nor its net current assets were sufficient to cover the beneficiary's wage offer of $39,291.20. The petitioner has not demonstrated its ability to pay the proffered wage.

On appeal, counsel simply asserts that the petitioner has the ability to pay the proffered wage. Counsel resubmits a copy of the petitioner's 2000 tax return and offers a copy of its 1999 tax return, as well as a letter from the petitioner's president, [redacted] The petitioner claims that, as a prospective U.S. employer with a growing business, it projected its need for a cook in making the job offer. The letter goes on to say that had the petitioner "waited until we had a $39,291.20 to offer" then the "business would have failed." The petitioner concludes that the availability of 46% of the proffered wage is sufficient to establish the ability to pay the proffered wage. Neither the petitioner nor counsel cited legal authority for these propositions.

The AAO cannot agree with the petitioner's analysis. The petitioner's financial ability to pay the proffered wage set forth in the approved labor certification measures, in part, whether the job offer is realistic. *Matter of Great Wall,* 16 I&N Dec. 144, 145. (Acting Reg. Comm. 1977). At the outset, it is noted that in reviewing a petitioner's ability to pay the proffered wage, CIS examines 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).

As noted above, the petitioner failed to establish a continuing ability to pay the proffered wage beginning at the visa priority date. As shown by its 2000 federal tax return, neither the petitioner's taxable income of $17,867, nor its net current assets of $4,093, was enough to cover the proffered wage of $39,291.20. Projections that future business profits may enable a petitioner to provide more than 46% of a proposed wage are not sufficient to establish eligibility. It must be established as of the visa priority date. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner cannot not pay the wage as stated in the labor certification. *Matter of Great Wall* at 144.

Following a review of the evidence contained in the record and upon further consideration of the documentation presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

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.