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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 02 102 51782 Office: VERMONT SERVICE CENTER Date: FEB 10 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(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 bagel shop. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on September 16, 1999, approved by the Department of Labor August 11, 2001. 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 submitted no brief, but did submit additional evidence in the form of a letter dated November 5, 2002, from [redacted] the sole shareholder of the [redacted] and Mr. [redacted] personal tax return for 1999.

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.

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 September 16, 1999. The proffered wage as stated on the Form ETA 750 is $14.72 per hour which is the equivalent of $30,617 per year.

With the petition, filed on or about February 4, 2002, counsel submitted only an experience letter for the beneficiary relating to his employment as a baker in Mexico. 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 April 15, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 1999, 2000, and 2001 federal income tax returns with schedules and attachments. The Service Center also noted that since the petitioner had indicated that it was not a new position, that it should submit any requested W-2 Wage and Tax Statements relating to any former employee who occupied the position previously, as well as copies of Forms 941 relating to the period in question.

In response, on June 10, 2002, counsel submitted a letter attaching the federal tax returns (Forms 1120S) for tax years 1999, 2000 and 2001. The additional documents requested by the Service Center related to wages paid were not enclosed, and counsel made no reference to the requested documents in the brief cover letter. 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 October 17, denied the petition.

On appeal, counsel provides no argument in support of the appeal but merely attaches the letter from [redacted] the sole stockholder of the Corner Bagelry. Mr [redacted] asserts in his letter that the business is in need of a full time baker, in order to sustain the business and increase profits. The letter also asks that Mr. [redacted] personal federal income tax returns be considered, and notes that the 1999 federal income taxes demonstrate a gross income of $369,535 and that such information clearly supports the petitioner's ability to pay the wage.[1]

Presumably counsel, has submitted the letter from Mr [redacted] in order to advocate that the Form 1040 for Mr. [redacted] should be satisfactory evidence of petitioner's ability to pay the wage. However, counsel has provided no authority in support of such a position. Moreover, authority exists that personal records are not within the scope of documents to be considered. *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass, Sept. 18, 2003). In *Sitar*, the court was faced with a similar argument, wherein petitioner argued that the personal assets of a "director" should be considered in determining the ability to pay the proffered wage. As the court noted,

> Petitioner fails to adequately counter Respondent's main argument on this issue: that nothing in the governing regulation, 8 C.F.R. § 204.5 permits the INS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. Absent a legal obligation by Singh, the INS had no need to determine whether his income was sufficient to pay Avtar's salary...At bottom, Petitioner has not submitted evidence of its own ability to pay the proffered wage. Accordingly, the court cannot say that the INS's decision to restrict itself to an examination of assets under Petitioner's legal control was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Id.

Mr [redacted] while having an interest in the business, is an entity separate and distinct from that business. As such, his personal assets will not be considered on the issue of the ability of the beneficiary corporation, to pay the wage.

We turn now to the petitioner corporation's ability to pay the wage. No additional evidence or legal argument was made pertaining to the financial condition of the petitioner and its ability to pay the wage. A review of the director's decision indicates that it correctly concluded that the petitioner had failed to demonstrate its ability to pay the 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.

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[1] It should be noted that only the 1999 tax return was submitted, although the Service Center had requested tax records, albeit petitioner's, relating to tax years 1999 through 2001.

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 Service 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. *Supra* 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*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The net income figures contained in the 1999, 2000 and 2001 Form 1120S Corporate Tax Return do not further petitioner's case. Moreover, even though the director sought to examine the ability to pay by asking petitioner to produce W-2s for any incumbents in the beneficiary's position, no such evidence was produced causing further doubt as to petitioner's ability to pay the wage.

The petitioner's counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 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.