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U.S. Citizenship and Immigration Services

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: SRC 02 277 52915 Office: TEXAS SERVICE CENTER Date: FEB 12 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]

PUBLIC COPY

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification (Form ETA 750) 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 asserts that the petitioner has the ability to pay the proffered wage.

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 12, 2001. The beneficiary's salary as stated on the labor certification is $10.70 per hour or $22,360 per year.

With its initial petition, the petitioner submitted copies of its 1999 through 2001 Form 1120 U.S. Corporation Income Tax returns. The tax return for 1999 reflected gross receipts of $287,807; gross profit of $138,518; compensation of officers of $29,640; salaries and wages paid of $24,225; and a taxable income before net operating loss deduction and special deductions of $2,519. The tax return for 2000 reflected gross receipts of $311,928; gross profit of $152,030; compensation of officers of $30,780; salaries and wages paid of $32,042; and a taxable income before net operating loss deduction and special deductions of $4,115. It must be noted that since the priority date is March 12, 2001, the tax returns for 1999 and 2000 are of limited probative value.

The tax return for 2001 reflected gross receipts of $303,023; gross profit of $160,622; compensation of officers of $21,660; salaries and wages paid of $30,930; and a taxable income before net operating loss deduction and special deductions of $2,586.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated January 10, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's bank statements from April 2001 to the "present."

In response, the petitioner submitted copies of its bank statements from April 1, 2001 through November 30, 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because neither its tax returns or bank statements reflected sufficient funds to pay the proffered wage and denied the petition.

On appeal, counsel states that the "paper deductions" for depreciation used in determining the petitioner's ability to pay should be added back in, and that CIS should consider a "totality" approach in determining the petitioner's ability to pay. Counsel states that the bank balances, previously submitted, reflect that the petitioner has the ability to pay the proffered wage and that additionally the major shareholder of the petitioner owns a second restaurant, which further indicates the petitioner's ability to pay the proffered wage. Counsel submits the petitioner's 2002 Form 941 Quarterly Tax Returns and Form W-2 Wage and Tax Statements for the years 2001 and 2002.

There is no evidence that the petitioner's bank statements demonstrate that the funds reported on its bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel suggests that the petitioner may demonstrate its ability to pay with other evidence to supplement the evidence on its income tax returns. Counsel states that the petitioner's income from a second restaurant demonstrates the ability of the petitioner to pay the proffered wage. Further, counsel states that the depreciation deduction which the petitioner claimed on his returns was not an actual expense, but only a paper loss. Counsel asserts that those amounts must be added to the petitioner's income to calculate the petitioner's ability to pay the proffered wage.

Counsel's assertion on appeal that a depreciation deduction does not correspond to a real expense is incorrect. A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as a result of building and equipment deterioration. The depreciation deduction represents the expense of those buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over a number of years or concentrated in a few years. The depreciation deduction represents an accumulation of funds necessary to replace perishable equipment and buildings, and the amount of that expense is not available to pay wages. No precedent exists that would allow the petitioner to include the amount of its depreciation deduction in the calculation of its ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989).

In determining the petitioner's ability to pay the proffered wage, 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. *See Chi-Feng Chang v. Thornburgh, supra at 537; Elatos Restaurant Corp. v. Sava, 532 F.Supp., supra, at 1054* (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also, 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 *KC.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's tax returns show that during 2001 its taxable income before net operating loss deduction and special deductions were $2,586. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $4,012, and current liabilities of $2,089, yielding net current assets of $1,923. Therefore,

during 2001, the petitioner was unable to pay the proffered wage of $22,360 out of either its net current assets or its taxable income.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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. The petition is denied.