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U.S. Citizenship
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Services

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[redacted]

FEB 24 2004

FILE: EAC 02 056 51703 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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 Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican food cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on April 30, 2001, approved by the Department of Labor August 30, 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 a brief statement in support of the appeal, and additional evidence in the form of the 2001 U.S. Corporation Income Tax Return for Salvatierra, Inc.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $23,000 per year.[1]

With the petition, counsel submitted the employer's corporate tax return for 2000. 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 5, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 1999 federal income tax returns with schedules and attachments. The Service Center also requested any W-2 Wage and Tax Statements relating to beneficiary if, in fact, the beneficiary was employed by the petitioner. In addition, the Service Center requested information on why the petitioner needed three additional chefs.

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[1] The Form I-140, submitted after the ETA 750 reflects proposed wages of $16,000 per year as opposed to the $23,000 approved by the Department of Labor. We assume that this amount is in error as subsequent filings confirm the $23,000 figure for the beneficiary's proposed salary.

In response, on May 23, 2002, counsel submitted a letter noting that the 1999 federal income tax returns did not exist because the business only came into existence in the latter part of 2000 and thus had not filed a 1999 tax return. Counsel alternatively enclosed the 2000 tax returns, including schedules. Counsel indicated that no W-2 Wage and Tax Statements were available for beneficiary. In response to the request for information as to why three additional chefs were needed, counsel indicated that the restaurant was in a rapidly growing area and that sales at the restaurant had dramatically increased, requiring additional staff. Counsel also noted that the restaurant planned to expand its hours of operation, and that such additional operating hours in addition to staff turnover, required the additional staffing.

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 5, 2002, denied the petition.

On appeal, counsel asserts that the updated tax information clearly supports the petitioner's ability to pay the wage. Counsel asserts that the 2001 tax return demonstrates that Salva Tierra, Inc. made $213,084 in 2001 and the restaurant paid $84,313 in wages. Counsel also asserts that the 2001 tax return contains clear evidence of petitioner's ability to pay the wage, and notes that the company expects to do even better in 2002, but that for the company to flourish it needs to be able to hire additional chefs.

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 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 figure contained in the 2001 Form 1120 Corporate Tax Return does not further petitioner's case. The petitioner's net income figure shows a loss of $12,167. Even an alternative method of comparing current assets to current liabilities, as opposed to examining net income, does not establish petitioner's ability to pay. When the current liabilities are compared to the current assets as reflected in Schedule L, the net current assets are ($18,269). Although counsel contends that the business has demonstrated substantial growth, there is no evidence to support this contention other than counsel's assertions. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, although counsel asserts and the tax records reflect that the petitioner has paid over $84,000 in salaries and wages during the 2001 tax year, no evidence was submitted that demonstrates that this figure includes wages paid to the beneficiary that are equivalent to the offered wage. Moreover, the salaries paid have presumably been paid to a number of workers, whether or not the beneficiary is included.

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.