PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B6

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 148 51326 Office: CALIFORNIA SERVICE CENTER Date: JAN 14 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: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the appeal form, the person submitting the appeal indicated that he represents the beneficiary. Pursuant to 8 C.F.R. 103.3(a)(1)(iii) and 8 C.F.R. 103.3(a)(2)(v), the beneficiary is not an interested party and has no right to appeal in this proceeding. The person who submitted that form, however, indicated on the accompanying G-28 and elsewhere in the record that he is the petitioner's owner. The petitioner is permitted to appeal from the decision of denial. The appeal shall be construed as an appeal filed by the petitioner in its own right.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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, the petitioner submits a statement and additional evidence.

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:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization

> which establishes the prospective employer's ability to pay the proffered wage. 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 Service.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 9, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year.

With the petition the petitioner submitted no evidence of its ability to pay the proffered wage. Although the petition does state that the petitioner employs 100 workers, the petitioner provided no evidence of that assertion and did not provide a statement from a financial officer of the company averring that it has the ability to pay the proffered wage. Therefore, on May 21, 2002, the California Service Center requested that the petitioner demonstrate, with copies of annual reports, federal tax returns, or audited financial statements, its continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested the beneficiary's Form W-2 Wage and Tax Statements for each year since 1998.

Finally, the Service Center requested that the petitioner, "Submit IRS issued copies of filed tax returns or the filed tax return information as provided by the IRS such as IRS computer generated printouts." The request leaves unclear whether the Service Center was requesting copies of the petitioner's returns or copies of the beneficiary's returns.

The Service Center also noted that,

> If the petitioner's company has one hundred or more workers (then rather than submitting copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay) the petitioner may . . . provide a statement from a financial officer of the organization that establishes the prospective employer's ability to pay the proffered wage.

In response, the petitioner submitted copies of the first pages of 1999, 2000, and 2001 Form 1065 U.S. Returns of Partnership Income. The petitioner identified itself on the petition as Salt Creek Grille of Pacific Coast Highway, Dana Point, California. The taxpayer identified on those partnership returns is Salt

Creek, Ltd., of Bushard Street, in Fountain Valley, California. The petitioner provided no evidence that the petitioner and the taxpayer are the same identical entity or, if not, of the relationship between those entities. Absent such evidence, this office cannot assume that the petitioner and that taxpayer are identical.

Counsel also provided unaudited 2000 and 2001 profit and loss statements for the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the preferred evidence to demonstrate a petitioner's ability to pay a proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In an apparent attempt to comply with the Service Center's ambiguous request for tax returns, the petitioner provided copies of the beneficiary's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns.

Further still, the petitioner submitted copies of the beneficiary's W-2 forms for the years 1996 through 2001, including those issued to him by the petitioner. Those W-2 forms show that the petitioner paid the beneficiary $13,440.87 during 1996, $20,103.98 during 1997, $30,112.41 during 1998, and $13,538.48 during 1999. In addition, the petitioner submitted W-2 forms showing that the beneficiary earned $39,000.04 during 2000 and $1,413.46 during 2001 working for the Salt Creek Grille on Town Center Drive in Valencia, California. The petitioner provided no evidence that the Valencia establishment is part of the petitioning entity. This office cannot, therefore, assume that wages paid by the Valencia business are wages paid by the petitioner.

With its response, the petitioner did not submit any evidence that it employs 100 or more employees. The petitioner also did not provide a statement from any financial officer declaring that the petitioner has the ability to pay the proffered wage.

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 July 29, 2002, denied the petition.

On appeal, the petitioner's owner submits a letter dated August 14, 2002. That letter states that the petitioner paid the beneficiary a salary of $25,000 per year during 1996, $37,000 per year during 1997, $35,000 per year during 1998, and $38,000 per

year during 1999. The letter also states that the beneficiary's current salary, at the time of that letter, was $55,000 per year.

Counsel also provided (1) a copy of the petitioner's wage and tax register for the fourth quarter of 2001, (2) copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the last quarter of 2001 and the second quarter of 2002, (3) a payroll summary for the two-week pay period ending August 11, 2002, (4) the 2000 Form 1065 U.S. Return of Partnership Income of Salt Creek - Valencia, L.L.C., and (5) a 2001 W-2 form showing that the petitioner paid the beneficiary $51,654.34 in wages during that year.

The 2000 return of Salt Creek - Valencia, L.L.C. shows the same address as the 2000 return of Salt Creek, Ltd., described above. In addition to the name difference, however, each line item is different from one return to the other, although they are both 2000 returns. Those two different tax returns make clear that the two businesses are distinct from each other. The petitioner provided no evidence that either is related to the petitioner. The petitioner has not demonstrated the relevance of those returns to the instant case and they shall not be further considered.

The petitioner's wage and tax register for the fourth quarter of 2001 indicates that the petitioner employed 183 people during that quarter, including the beneficiary. That form further indicates that the petitioner paid the beneficiary $15,230.78 during that quarter.

The petitioner's Form DE-6 for the same quarter confirms the amount the petitioner paid to the beneficiary, but states that the petitioner employed 115 workers during that quarter.

The Form DE-6 for the second quarter of 2002 indicates that the petitioner employed 107 workers during that quarter, including the petitioner. That form indicates that the petitioner paid the beneficiary $12,869.24 during that quarter.

The payroll summary for the two-week pay period ending August 11, 2002 states that the petitioner employed eight people during that pay period including the beneficiary, to whom it paid $1,961.54 for 80 hours of work.

This office notes that the payroll summary for the pay period ending August 11, 2002 is almost perfectly contemporaneous with the August 14, 2002 letter from the petitioner's owner. The payroll summary makes clear that the beneficiary is paid $24.52 per hour, whereas the letter states that the petitioner is paid a salary of $55,000 annually, which equates to $26.44 per hour. This apparent discrepancy might be resolved if the petitioner raised the beneficiary's salary between August 11, 2002 and

August 14, 2002. The petitioner provided no other explanation for this apparent discrepancy.

The petitioner claimed on the petition to employ 100 workers. The quarterly returns provided indicated that the petitioner employed 115 workers during the last quarter of 2001 and 107 workers during the second quarter of 2002. The wage and tax register submitted, also for last quarter of 2001, indicates that the petitioner employed 183 workers during that quarter, an apparent contradiction of the information on the Form DE-6 for the same quarter. The petitioner provided no explanation of this apparent contradiction.

Further still, the payroll summary for the pay period ending August 11, 2002 indicates that the petitioner paid wages to only eight people during that two-week pay period. The petitioner did not attempt to reconcile that evidence with the evidence indicating that the petitioner employs 100, 107, 115, or 183 workers.

Finally, a letter from the petitioner's owner stated that the beneficiary was paid a salary of $37,000 during 1997, a salary of $35,000 during 1998, and a salary of $38,000 during 1999. The letter did not state whether the beneficiary received any wages from the petitioner during 2000 or 2001. The letter, dated August 14, 2002, stated that, at on that date, the beneficiary's salary was $55,000.

The petitioner's W-2 forms, however, state that the petitioner paid the beneficiary $20,103.98 during 1997, $30,112.41 during 1998, and $13,538.48 during 1999. The petitioner did not reconcile the statement in the August 14, 2002 letter with the figures on the W-2 forms.

This office observes that various apparent discrepancies between the petition and the supporting evidence adversely affect the petitioner's credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

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 INS, now CIS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that 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*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is February 9, 1998. The proffered wage is $24,024 per year. In the determination of the ability to pay the proffered wage, this office will not consider tax returns that have not been shown to be the petitioner's own tax returns. The earnings of companies that may or may not be identical to, or related to, the petitioner shall not be considered without evidence of the relationship. The petitioner has submitted various tax returns from various similarly named companies, but has not demonstrated that they are its own returns. No tax returns shall be considered in the determination of the petitioner' ability to pay the proffered wage.

In addition, this office will consider only W-2 forms shown to be issued by the petitioner. Of the various W-2 forms in the record, only three appear to have been issued to the beneficiary by the petitioner, the Salt Creek Grille on Pacific Coast Highway in Dana Point, California. Those three are a 1998 form showing payment of $30,112.41, a 1999 form showing payment of $13,358.48, and a 2001 form showing a payment of $51,654.34.

During 1998, the petitioner paid the beneficiary $30,112.41, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

The 1999 W-2 Form which the petitioner issued to the beneficiary indicates that it paid the beneficiary $13,538.48 during that year. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage during that year. The petitioner has not demonstrated that ability to pay the proffered wage during 1999.

The petitioner submitted neither a tax return nor any other competent evidence for the year 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The 2001 W-2 form submitted shows that during that year the petitioner paid the beneficiary $51,654.34 during that year, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As an alternative to showing that funds were historically available to pay the proffered wage, the petitioner might have demonstrated that it employs 100 or more workers and submitted the statement of a financial officer of the company stating that it has the ability to pay the proffered wage. The evidence of the number of employees the petitioner employs, however, is inconsistent. Further, the record contains no statement from any officer of the petitioning company indicating that the petitioner is able to pay the proffered wage.

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.