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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 01 293 55358 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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.

The petitioner appears to have retained representation. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's putative representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

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 previously 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 written statement.

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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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. Here, the Form ETA 750 was accepted on June 11, 1999. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year.

The petitioner filed a previous immigrant visa petition for this beneficiary based on its approved Form ETA 750 filed in June 1999. The first petition was denied as abandoned, pursuant to 8 C.F.R. § 103.2(b)(13), after the petitioner failed to respond during the allotted time to a request for additional evidence issued January 5, 2001. In the decision of denial, the petitioner was informed that decisions based on abandonment cannot be appealed. The petitioner was informed that it might submit a motion to reopen if it had evidence that it had, in fact, timely responded to the request for evidence. The petitioner was also advised that it might submit a new petition.

The petitioner chose to submit a second petition. With the second petition the petitioner did not submit a new Form ETA 750, but the same Form ETA 750 that had been submitted with the denied petition.

With the second petition, the petitioner submitted an unaudited profit and loss statement covering October 2000 and the ten-month period ending October 31, 2000. Although the accountant's report did not accompany that financial statement, the financial statement indicates on its face that it was prepared pursuant to a compilation, rather than an audit. As such, the figures on that report are the representations of management compiled into standard form. 8 C.F.R. § 204.5(g)(2) makes clear that only copies of annual reports, federal tax returns, or **audited** financial statements are competent evidence of a petitioner's ability to pay the proffered wage. The unaudited financial statement will not be considered.

The petitioner also provided a copy of its 1999 Form 1120-A U.S. Corporation Short-Form Income Tax Return and a copy of its 2000 Form 1120 U.S. Corporation Income Tax Return. The 1999 return shows that the petitioner declared a loss of $23,816 as its taxable income before net operating loss deduction and special deductions during that year. Part III of that 1120-A shows that at the end of that year the petitioner had current assets of $32,345 and current liabilities of $12,430, which yields net current assets of $19,915.

The 2000 return shows that the petitioner declared a loss of $21,713 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had $24,235 in current

assets and $13,728 in current liabilities, which yields $10,507 in net current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 30, 2002, requested additional evidence pertinent to that ability. The Service Center specified that the evidence should be copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters and copies of all Form W-2 Wage and Tax Statements showing wages paid to the beneficiary.

In response, one of the petitioner's owners submitted a letter dated June 28, 2002 stating that he had already submitted the requested information on April 30, 2002. The record contains no evidence to confirm that assertion. With that letter the petitioner's part owner submitted a copy of the evidence it claims to have provided previously. As such, whether or not that information was previously provided, the petitioner's case has not been prejudiced.

The petitioner's part owner submitted copies of the 1999 Form 1120-A and 2000 Form 1120 U.S. Corporation Income Tax Returns previously submitted. The petitioner further submitted its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of $6,341 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $18,654 and current liabilities of $8,413, which yields net current assets of $10,241.

The petitioner's part-owner submitted a letter, dated April 30, 2002, in which he stated that the beneficiary received no W-2 form during 2001. The letter appeared to imply that the petitioner employed the beneficiary, but submitted no evidence of any wages paid to the beneficiary. The petitioner submitted its Form DE-6 reports for all four quarters of 2001. The beneficiary is not listed on those reports as an employee of the petitioner. The record contains no evidence of any wages the petitioner paid to the beneficiary during any of the salient years.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 25, 2002, denied the petition. The director noted that the petitioner's taxable income before net operating loss deduction and special deductions during 1999, 2000, and 2001 was insufficient to pay the proffered wage and that the petitioner had submitted no evidence that it had paid

wages to the beneficiary.

On appeal, the petitioner noted that its losses have steadily decreased. The petitioner cited its gross receipts as evidence of its ability to pay the proffered wage. The petitioner also stated that it earned a profit during the first quarter of 2002 and that a financial statement confirming that assertion would be submitted after the petitioner's accountant had prepared it. The petitioner never submitted that financial statement. Neither the petitioner nor anyone acting on its behalf submitted any further information, argument, or documentation.

The petitioner's reliance on its gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise have increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions. Further, that the petitioner's losses have decreased is insufficient to show the ability to pay the proffered 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. 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 the 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

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

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 June 11, 1999. The proffered wage is $24,024 per year. During 1999, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 161 days of that 364-day year had already elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 203 days. The proffered wage multiplied by 203/364th is $15,180, which is the amount the petitioner must show the ability to pay.

During 1999 the petitioner declared a loss. At the end of that year, however, the petitioner had net current assets of $19,915. The petitioner could have paid the proffered wage out of its net current assets. The petitioner has demonstrated the ability to pay the proffered wage during the salient portion of 1999.

During 2000 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During 2000, the petitioner again declared a loss. The petitioner finished the year with $10,507 in net current assets. The petitioner has not demonstrated that it could pay the proffered wage out of its income or its assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner again declared a loss. The petitioner's year-end net current assets were $10,241. The petitioner has not demonstrated that it could pay the proffered wage out of its income or its assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that it had the ability to pay the proffered wage during 2000 and 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.