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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 054 52183 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 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]

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, California Service Center, and is now before the Administrative Appeals Office 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 specialty chef. As required by statute, the petition is accompanied by an individual labor certification 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 submits a brief 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 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 February 5, 2001. The beneficiary's salary as stated on the labor certification is $600.00 per week which equates to $31,200.00 per annum.

With its initial petition, the petitioner did not provide any evidence of its ability to pay the proffered wages. In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments and a wage summary, the petitioner submitted an unaudited balance sheet covering the period January 1, 2001 through September 30, 2001 and W-2 statements for employees, none of whom are the beneficiary.[1]

In response to a Notice of Intent to Deny in which the petitioner was requested to provide complete tax returns, counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Schedule C, Profit or Loss from Business for 2000 and 2001.[2] Schedule C for 2001 reflected a net profit of $24,449.

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[1] The request for evidence also requested evidence of the beneficiary's qualifications. The petitioner provided an experience verification letter from the beneficiary's prior employer. The director did not base his decision to deny the petition upon the beneficiary's qualifications and thus the issue will not be discussed within the scope of this decision.

[2] Because the priority date is February 5, 2001, the petitioner only needs to establish its ability to pay the proffered wages in the year 2001. Thus, the petitioner's financial situation will not be assessed for the year 2000.

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 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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's net profit was less than the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the petitioner's employees' IRS Forms W-2 for 2000 and 2001, copies of the petitioner's IRS Form W-3 for 2000 and 2001, and a copy of an unaudited Balance Sheet for the period ending September 30, 2001 and asserts that the petitioner "at all times has been able and has paid its employees salary [sic] and wages, and has the ability to pay the alien his salary if certified [sic] an analysis or balance sheet was not requested by [sic] its provided to illustrate and demonstrates the employer's ability to do so."

The unaudited balance sheet which was submitted as proof of the petitioner's ability to pay the proffered wage is in the record. However, it has little evidentiary value as it is based solely on the representations of management. The regulation at 8 C.F.R. § 204.5(g)(2), already quoted above in part, states that: "Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner (emphasis added)."

This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Thus, the petitioner's unaudited financial statements are not probative and competent evidence of the ability to pay the proffered wage and will not be considered.

The petitioner's Forms W-2 and W-3 do not evidence actual payments made to the beneficiary and thus provide little evidentiary value to the petitioner's ability to pay the proffered wage to the beneficiary.

The petitioner's Schedule C for calendar year 2001 shows a net profit of $24,449. The petitioner could not pay a proffered wage of $31,200.00 a year out of this income.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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.