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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 02 241 51141 Office: CALIFORNIA SERVICE CENTER Date: MAR 05 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other Worker pursuant to § 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 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 is a fast food 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 and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 20, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year. The Form ETA 750, Part B stated that the petitioner had employed the beneficiary since 1991.

With the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage

beginning on the priority date. Therefore, the California Service Center, on October 11, 2001, requested evidence pertinent to that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence should include copies of annual reports, federal tax returns, or audited financial statements, and that the evidence must show the ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested the petitioner's 1998, 1999, 2000, and 2001 tax returns and copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters. The Service Center stipulated that the returns submitted should be certified, and include all schedules, attachments, and tables.

In addition, the Service Center requested that the petitioner provide copies of the 1998, 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing the wages the petitioner paid the beneficiary during those years.

In response, counsel submitted uncertified copies of the petitioner's owner's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns including the associated Schedules C, Profit or Loss from Business (Sole Proprietorship). Counsel stated that the petitioner issued no W-2 forms to the beneficiary because the beneficiary has no social security number.

The 1998 Schedule C shows that the petitioner made a net profit of $15,040 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,394 during that year. Line 12 of the Form 1040 shows that the petitioner's owner had a business income of $14,527 during that year, rather than $15,040 as stated on the petitioner's Schedule C. This appears to indicate that another Schedule C or a Schedule C-EZ was submitted with that tax return, declaring a loss of $513. If that is so, then the petitioner's owner did not submit a complete tax return to CIS, with all of the associated schedules, tables, and attachments, as the Service Center requested on October 11, 2001.

The 1999 Schedule C shows that the petitioner made a net profit of $5,022 during that year. The 1999 Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,850 during that year, including the petitioner's profits. A second Schedule C attached to that return indicates that the petitioner's owner also owned a gift shop during that year. The Schedule C for that business may have been the Schedule C missing from the petitioner's 1998 return.

The 2000 Schedule C shows that the petitioner suffered a loss of $1,224 during that year. The 2000 Form 1040 shows that the petitioner's owner declared an adjusted gross income of $19,567

during that year, including the petitioner's profits.

The 2001 Schedule C shows that the petitioner suffered a loss of $1,296 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,604 during that year, including the petitioner's profits.

Counsel submitted copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2001 and the first three quarters of 2002. Those wage reports do not indicate that the petitioner employed the beneficiary during those quarters.

Finally, counsel submitted earnings summaries for three employees for the first quarter of 2002. Those summaries do not indicate that the petitioner employed the beneficiary during that quarter.

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 January 16, 2003, denied the petition. The director cited the petitioner's adjusted gross income, which is less than the proffered wage for each relevant year, and lack of W-2s or other proof of actually paying the beneficiary any wages.

On appeal, counsel submits a copy of the petitioner's owner's 2002 Form 1040 income tax return including the corresponding Schedule C. The Schedule C shows that the petitioner made a profit of $16,521 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $30,496, including the petitioner's profits, during that year.

Counsel also submits a copy of a monthly loan statement in the petitioner's owner's name. That statement indicates that the petitioner's owner pays $806.69 per month to amortize a principal balance of $96,406.70 secured by a property in Culver City, California. Further still, counsel submits a California Certificate of Title for a 1995 Acura.

Counsel asserts that the petitioner's owner's property in Culver City is a condominium worth $227,000. Counsel further asserts that the petitioner's Acura is valued at $14,000. Counsel does not state how he arrived at those values or provide any evidence in support of them. 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). The record contains no evidence to support counsel's assertion of the value of the petitioner's property. Further, they are not the sort of liquid assets readily convertible to cash in order to pay wages and not the sort of asset expected to be converted to cash during the coming year in the ordinary course of business. Their asserted

value will not be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel cites a transcript of a teleconference between the Vermont Service Center and an immigration lawyers' association for the proposition that "(The Service Center) will generally assume that the petitioner can handle the additional salary if, according to its tax return, it has a favorable enough ratio of total current assets to total current liabilities. Although this office is not bound by the policies of the Vermont Service Center, it may consider whether the reasoning behind those policies is sound. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd.* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the salient statistic, rather than the ratio.

Further, the petitioner is not a corporation, but a sole proprietorship. It does not file a Schedule L and does not declare end-of-year current assets and end-of-year current liabilities. Those terms have no direct relevance to a sole proprietorship.

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 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 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. *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 priority date is January 20, 1998. The proffered wage is $24,024 per year. During 1998, the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $13,394. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $13,850. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $19,567. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $13,604. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income, including the petitioner's profit, of $30,496. That amount is $6,472 greater than the proffered wage. The Service Center requested no evidence pertinent to the petitioner's monthly expenses. Counsel, however, provided the mortgage statement, described above, which shows that the petitioner's owner has a monthly mortgage expense of $806.69 per month, or $9,680.28 annually. Whatever the petitioner's owner other expenses were, she was unable to meet her monthly expenses and still contribute a sufficient amount of her adjusted gross income to pay the proffered wage. The petitioner has not demonstrated

that any other funds were available to it with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and 2002. 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.