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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: EAC 02 126 51736 Office: Vermont Service Center Date: MAR 08 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 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant assistant. 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 from the time of filing the labor certification.

On appeal, counsel asserts that the director's decision is contrary to the law and facts, and that the petitioner has operated at a profit and continues to have sufficient funds to pay the proffered wage.

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 petitioner'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. The petitioner's priority date in this

instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $551 per week or $28,652 per year.

With the petition, counsel submitted a copy of the petitioner's 1997 Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax year is July 1 to June 30; its 1997 tax return covers the period July 1, 1997 to June 30 1998 and reflects taxable income before net operating loss deduction and special deductions of $11,487, less than the proffered wage. Counsel also submitted a copy of a 2000 federal income tax summary prepared for the petitioner by its accountant.

In a request for evidence (RFE) dated May 30, 2002, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtained permanent residence. In response, counsel submitted a copy of the petitioner's 1998 tax return. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of $20,726, less than the proffered wage.

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 states that the petitioner maintained a monthly checking account balance with sufficient funds to pay the proffered wage. Counsel includes a copy of an AAO decision that sustained an appeal in which the petitioner was found to have the ability to pay even though it operated at a loss where the corporate checking account indicated an ending balance sufficient to pay the wage. With the appeal, counsel submitted the petitioner's monthly bank statements for the period January 1998 through September 2002. The statements show balances as high as $103,000 and as low as $10,000.

Counsel does not provide a published citation in which AAO accepted the use of average monthly balances to determine a petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has not provided essential and probative evidence of its ability to pay the proffered wage, namely annual reports,

federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). CIS may rely on such evidence. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp 1049 (S.D.N.Y. 1986); *KCP Food Co., Inc. v Sava*, 623 F. Supp 1080 (S.D.N.Y. 1985)..

There is no proof that the petitioner's bank statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay, as they do not identify funds that are already obligated for other purposes. Furthermore, the court held in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), that CIS could rely on income tax returns as a basis for determining the petitioner's ability to pay the proffered wage.

The petitioner's tax return for 1997 shows taxable income before net operating loss deduction and special deductions of $11,487. The petitioner could not have paid the proffered wage from taxable income. The return also shows current assets of $53,980 and current liabilities of $127,276. The petitioner could not have paid the proffered wage from negative net current assets. The petitioner's tax return for 1998 reflects taxable income before net operating loss deduction and special deductions of $20,726. The return also reflects current assets of $15,686 and current liabilities of $97,096. The petitioner could not have paid the proffered wage from negative net current assets.

Counsel also asserts that the beneficiary was "substituted" for another employee. The record does not reflect, however, what position the other employee held, the person's wages, or evidence of any substitution. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary as of the priority date.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage in 1998 and continuing until present. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.