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U.S. Department of Homeland Security

Citizenship and Immigration Services

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[redacted]

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

File: EAC 02 143 51706 Office: Vermont Service Center Date: MAR 11 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 bakery. It seeks to employ the beneficiary permanently in the United States as an area manager. 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 states that since it took four years for the decision to be made in this case, CIS should look at the petitioner's average income to determine the ability to pay the proffered wage continuously throughout the four-year period.

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 18, 1998. The beneficiary's salary as stated

on the labor certification is $70,250 per year.

With the petition, counsel submitted a copy of the petitioner's 1998 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The 1998 tax return reflects ordinary income or loss from trade or business activities of $40,746, less than the proffered wage. The 2001 tax return reflects ordinary income or loss from trade or business activities of $62,309, again less than the proffered wage. Counsel also submitted copies of the petitioner's 2001 quarterly tax reports, and copies of monthly bank statements for December 1997 through February 1998, and October 2001 through January 2002.

In a request for evidence (RFE) dated June 21, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of the filing date of the labor certification and continuing until the present. In response, counsel submitted copies of the petitioner's 1999 and 2000 tax returns and a letter from the petitioner stating that its cash flow, which includes depreciation and amortization, was more than sufficient to pay 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 from the priority date of the visa petition.

On appeal, counsel asserts that the date of the proffered wage is August 19, 2000 as opposed to January 14, 1998 as indicated by the director. He submits a copy of a letter from DOL that advises the petitioner that the wage offered is below the prevailing wage. The petitioner is advised that the ETA 750 must be amended to offer the prevailing wage or the application would be denied. The petitioner was also advised that if the application were resubmitted, a new filing date would be assigned. August 19, 2000 appears to be the date of the case manager's review and letter to the petitioner. The petitioner chose to amend the petition, and initiated and dated the change on September 14, 2000. The amendment was approved by DOL and the filing date of the application remained the same. Thus, the priority date remains January 14, 1998.

Counsel also asserts on appeal that the ability to pay the proffered wage should be based on the petitioner's average cash flow during the relevant time frames and should include depreciation and amortization. He also asserts that the tax returns and financial statements contain some non-recurrent expenses that will not affect the petitioner's ability to pay the proffered wage.

With the appeal, counsel submitted a letter from the petitioner's accountant stating that cash flow tells more about the success of a business than the income statement, and is more widely used to evaluate a business. He includes a statement of consolidated cash flows from all of the petitioner's various enterprises, and concludes that the petitioner has enough to pay the proffered wage and expand the business. Counsel also included a statement from another CPA who arrives at the same conclusion after, according to the accountant, he reviewed and analyzed the petitioner's income tax returns and accounting records.

Counsel states no legal precedent for "averaging" the petitioner's ability to pay the proffered wage over the period from the date of filing the labor certification to the date of approval of the I-140. The regulations are clear that the petitioner's ability to pay the proffered wage must be continuous and not "an average" ability to pay. In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 also held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses rather than gross income. Finally, there is no precedent that would allow the petitioner to add back to net cash depreciation and amortization expense. *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Additionally, there is no evidence that the "outside" accountant conducted an audit of the petitioner's financial records. Unaudited financial statements are of little evidentiary value as they are based solely on representations of management. The regulation at 8 C.F.R. § 204(g)(2) provides that the petitioner's ability to pay shall be established by annual reports, federal tax returns, or <u>audited</u> financial statements (emphasis added). The petitioner's unaudited financial statements are therefore of

little probative value.

The petitioner's Schedule L for 1998 shows net current assets of negative $46,671, less than the proffered wage. The petitioner's 1999 federal tax return reflects ordinary income or loss from trade or business activities of $52,379, also less than the proffered wage. The petitioner did not include a Schedule L for the 1999 tax year. The petitioner's 2000 tax return reflects ordinary income or loss from trade or business activities of $28,273, less than the proffered wage, and net current assets of negative $28,995. Both are less than the proffered wage. The 2001 Schedule L shows net current assets of negative $10,456 and an ordinary income or less from trade or business activities of $62,309, both also less than the proffered wage.

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.