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U.S. Citizenship and Immigration Services

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[redacted]

MAR 17 2004

FILE: LIN 02 198 50580 Office: NEBRASKA SERVICE CENTER Date:

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Turkish style cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish that it had the continuing financial ability to pay the beneficiary's proffered wage.

On appeal, counsel offers additional evidence for consideration and argues that the director erred in failing to properly consider the petitioner's depreciation tax deduction.

Section 203(b)(3)(A)(i) of 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) also provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 25, 2001. The beneficiary's salary as stated on the labor certification is $29,120 annually. The visa petition indicates that the petitioner was established in 2000 and employs six people.

Along with the original approved labor certification, past employment verification, and the petitioner's offer of employment to the beneficiary, the petitioner's owner elected to send a copy of his Form 1040, U.S. Individual Income Tax Return for 2001 as proof of the petitioner's ability to pay the beneficiary's wage offer of $29,120 per year. This tax return reveals that the petitioner's owner declared -$5,267 as adjusted gross income. Schedule C of the tax return reflects that the petitioner is a limited liability company and had $1,236 in net profit in 2001. This net profit figure is included in the petitioner's owner's declaration of adjusted income on page 1 of the tax return.

In a letter accompanying the visa petition, counsel summarizes the documents offered and contends that the petitioner's Schedule C figure of $66,267 as a tax calculation of depreciation should be added back to the

petitioner's net profit in order to properly determine its ability to pay. Counsel asserts that when reviewed in this fashion, the petitioner's financial soundness is demonstrated and is more than adequate to establish the petitioner's continuing ability to pay the beneficiary's proffered salary of $29,120. Counsel also submits a copy of an unaudited profit and loss and balance sheet for the first quarter of 2002, which he argues also supports the petitioner's ability to pay the beneficiary's proposed salary.

In a request dated August 12, 2002, the director required additional evidence to establish the petitioner's continuing ability to pay the proffered wage as of the priority date. The director noted that the evidence indicated that petitioner was a sole proprietorship or had an individual employer, and requested evidence of the sole proprietor's recurring monthly household expenses.

In a response dated October 25, 2002, the petitioner's sole proprietor responded with a narrative of his household expenses and explained that his personal cash accounts were required to remain in his business account because his business was structured as a Limited Liability Company (LLC). The petitioner's owner stated that the checking account had a balance of $13,323.54 as of October 15, 2002. The owner also stated that he has employed the beneficiary since "December 6, 2000 when the restaurant was opened" and had always been able " to pay [the beneficiary's] wages."

The director reviewed the petitioner's net profit of $1,236 as shown on Schedule C of the 2001 tax return and found that that it was inadequate to support payment of the beneficiary's annual proposed salary of $29,120. The director also noted that the petitioner's owner's level of household expenses failed to support a conclusion that the petitioner's sole proprietor's income could support the proffered wage. The director observed that the ETA-750 did not indicate that the petitioner employed the beneficiary, and the petitioner had not provided any primary documentation of finances or checking/savings accounts. We concur and would note that the ETA-750, Part B, Statement of Qualification of Alien, signed April 24, 2001, by the beneficiary, specifically omitted mention of the beneficiary's employment with the petitioner. The director had no reason to request any evidence regarding the payment of such wages and the petitioner failed to provide proof of such payment.

As set forth above, the regulations require that the ability to pay the proffered salary must be established beginning as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In this case, the tax return indicates that the sole proprietor's gross income of -$5,267 in 2001, even without considering the owner's recurring household expenses, was clearly inadequate to support the beneficiary's wage offer of $29,120. Nor was the petitioner's net income of $1,236, considered alone, sufficient to meet the beneficiary's proffered salary.

On appeal, counsel contends that the petitioner's owner's financial records are irrelevant because, although the petitioner filed its tax return as a sole proprietorship on Schedule C, it is a separate legal entity as a limited liability company. It was only using that filing method to comply with Internal Revenue Service (IRS) rules that require an LLC with a single owner to file as a sole proprietorship. Even accepting counsel's argument, it remains that the petitioner's 2001 net income of $1,236 fell well short of the beneficiary's proposed salary of $29,120.

Counsel reasserts on appeal that the petitioner's depreciation deduction should be added back to the petitioner's net income in calculating the petitioner's ability to pay the proffered salary. Counsel includes a letter from Eileen K. Carman, a public accountant, in support of this argument. Ms. Carman also states that the petitioner has been paying the beneficiary as well as other employees since the business began in 2000.

In determining the petitioner's ability to pay the proffered wage, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). There is no precedent 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.

It is further noted, that although the wages actually paid to the beneficiary could be considered in reviewing the petitioner's ability to pay the proposed salary as set forth by the approved labor certification, no evidence of such wages has actually been submitted to the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* I&N Dec. 190 (Reg. Comm. 1972).

Counsel also submits a letter from the petitioner's landlord attesting to the petitioner's ability to pay its rent, photographs of the petitioning business with positive reviews, a letter from the petitioner's owner in support of the petitioner's ability to pay the beneficiary's salary, and profit/loss and "fixed asset" statements covering the period ending December 2002. Like the previous financial statements submitted to the record, these are not audited or even reviewed, and as such, are of little evidentiary value because they are based solely on the representations of management. The regulation at 8 C.F.R. §204.5(g)(2) neither states nor implies that "unaudited" financial statements may be substituted for federal tax returns, annual reports, or audited financial statements.

Although the petitioner's owner may project a continued increase in business, the regulation requires that the petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability to be continuing until the beneficiary obtains lawful permanent residence. *See also Matter of Great Wall,* 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Based on a review of the evidence contained in the record, it is concluded that the petitioner has not established that it had the continuing financial ability to pay the salary offered as of the priority date of the petition.

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.