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U.S. Citizenship and Immigration Services

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[redacted]

MAR 22 2004

FILE: WAC 01 150 51858 Office: CALIFORNIA 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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese style chef. 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 continued financial ability to pay the beneficiary's proffered wage as of the visa priority date.

On appeal, counsel submits additional evidence and argues that the depreciation deduction should be added back to the petitioner's income.

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 August 21, 2000. The beneficiary's salary as stated on the labor certification is $23,420.80 per year. The record indicates that the petitioner is organized as a corporation. The immigrant worker petition (I-140) reflects that the petitioner employs 10 people and was established in 1998.

As evidence of the petitioner's ability to pay the beneficiary's proposed salary of $23, 420.80, counsel submitted a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the year 1999. This tax return reflects that the petitioner files its returns based on a fiscal year running from September 1, 1999 to August 31st of the following year. The 1999 return indicates that the petitioner declared taxable income before the net operating loss (NOL) deduction and special deductions of $36,088. This figure represents sufficient funds to pay the beneficiary's proffered wage of $23,420.80 during this period.

In a request dated July 11, 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 specified either annual reports, federal tax returns, or audited financial statements reflecting the petitioner's ability to pay the beneficiary's proposed wage offer of $23,420.80 for the years 2000 and 2001. The director also advised the petitioner to submit all related schedules and attachments.

In response, counsel submitted a copy of the petitioner's corporate tax return for the fiscal year 2000, covering the period from September 1, 2000 to August 31, 2001. This tax return reflects that the petitioner had -$72,568 in taxable income before the NOL and other special deductions. As indicated on Schedule L, the petitioner declared -$20,861 in current assets and $41,903 in current liabilities, combined to produce net current assets of -$62,764.

Counsel also submitted an unaudited financial statement for the eight-month period ending April 30, 2002. This statement shows that the petitioner sustained a $17,771.97 net loss and had $19,751.20 in current assets and $45,525.32 in current liabilities.

The director reviewed the petitioner's reported net income and net current assets as shown on the corporate tax returns and concluded that the petitioner had not established its ability to pay the beneficiary's proposed salary. We concur and would further note that the beneficiary's proffered salary of $23,420.80 could not be paid out of either the petitioner's taxable income or its net current assets during the 2000 fiscal year.

On appeal, counsel submits a copy of the petitioner's 2001 corporate tax return along with a letter from the petitioner's president, [redacted] and another copy of the petitioner's 2000 corporate tax return. The 2001 tax return indicates that the petitioner declared $11,286 in taxable income before the NOL and other special deductions. Schedule L of this tax return reveals that the petitioner had $42,115 in current assets and $41,245 in current liabilities, resulting in -$870 in net current assets. As in the petitioner's 2000 tax return, neither the petitioner's taxable income of $11,286, nor its net current assets of -$870 could cover the beneficiary's proposed wage of $23,420.80.

Mr [redacted] letter asserts that it costs too much to hire a local Chinese style cook. He argues that the beneficiary could improve revenue by introducing new dishes from China. He states that the restaurant opened on June 19, 1999, and "just when our business shows a return on investment, September 11, 2001 occurred." It is noted that the visa immigrant petition indicates that the petitioner was established in 1998. No clarification has been offered to explain this discrepancy in facts. It is also noted that both the 2000 and 2001 tax returns reflect an inability to pay the proffered salary out of either the petitioner's taxable income or net current assets. The period covered by these returns begins a year before the September 11, 2001 tragedy. Mr. [redacted] also offers no details as to how the Sept. 11th tragedy occurring in New York City affected his restaurant operating in California. He also offers no basis upon which to calculate a speculative increase that the beneficiary's services might provide. As stated in *Matter of Great Wall,* 16 I&N Dec. 143, 144-145:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel contends that the petitioner's 2000 tax return actually showed positive assets of $309,296. Counsel refers to the petitioner's total assets (including long-term assets) reflected on Schedule L. This contention does not include a consideration of total liabilities and does not represent readily available funds that could be used to meet the beneficiary's salary. CIS will consider a petitioner's net current assets as a source to pay a beneficiary's proffered salary because unlike long term assets, it identifies the amount of liquidity that a petitioner has as of the filing date and represents the amount of cash or cash equivalents that would be available to pay the proffered salary

during the year covered by the Schedule L balance sheet. Net current assets are the difference between the petitioner's current assets and current liabilities. As discussed above, the petitioner's net current assets as set forth on its 2000 and 2001 corporate tax returns reflect balances below the proffered wage and do not provide a reasonable resource out of which to pay the salary.

Counsel also urges that the petitioner's depreciation be added back to its taxable income. In examining 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. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate continuing financial ability to pay the proffered salary. In this case, two out of the relevant three years of financial data presented within the petitioner's tax returns do not support its ability to pay. Neither the taxable income, nor the net current assets for 2000 and 2001 support the petitioner's ability to pay the beneficiary's wage offer of $23,420.80.

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.