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U.S. Department of Justice
Immigration and Naturalization Service

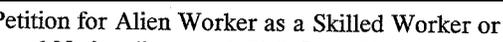
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:  Office: Texas Service Center

Date: SEP 30 2007

IN RE: Petitioner: 
Beneficiary: 

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Peruvian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

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 petition'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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is July 22, 1996. The beneficiary's salary as stated on the labor certification is \$10.63 per hour or \$22,110.40 per annum.

Counsel submitted copies of the petitioner's 1994 through 1997 Form 1120, U.S. Corporation Income Tax Return. The petitioner initially submitted tax returns that reflected that the petitioner had not paid any salaries or compensation of officers during the critical period. After the director questioned this evidence, the petitioner submitted amended tax returns. The amended tax return for 1996 reflected gross receipts of \$448,336; gross profit of \$201,170; compensation of officers of \$85,897; salaries and wages paid of \$2,670; and a taxable income before net operating loss deduction and special deductions of -\$13,511. The amended tax return for 1997 reflected gross receipts of \$898,712; gross profit of \$300,091; compensation of officers of \$60,000; salaries and wages paid of \$69,278; and a taxable income before net operating loss deduction and special deductions of \$8,615.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel provides an analysis of the 1996 and 1997 tax returns. Counsel states:

Enclosed is a statement from the corporation's accountant which dissects point by point the 1996 and 1997 income tax return and clearly demonstrates that in both tax years, 1996 and 1997, the company clearly had enough funds to pay the salary of \$22,110.

Counsel asserts that depreciation, loans from relatives, loans from stockholders, and subcontractor payments should be considered in determining the petitioner's ability to pay the proffered wage.

Counsel's assertions are not persuasive. First, as reflected on the Form 1120 Schedule L balance sheets, the petitioner's loans from stockholders and relatives are classified as liabilities. Loans are debts owed by the petitioner, and as such, will not be considered as funds available to pay the proffered salary. Second, the wages paid to the petitioner's cook will not be considered in calculating the petitioner's ability to pay as these funds have been expended and are no longer available for payment of salaries. Although the petitioner implies that the beneficiary will replace the petitioner's cook, the petitioner has not submitted evidence to establish the duties of the prior employee or to establish that the cook's position is or will be available. It is also noted that in response to the director's request for evidence, the petitioner claimed that the beneficiary was already employed as a subcontractor. This claim conflicts with the implied assertion that the beneficiary will replace the restaurant's cook. Although

the petitioner's payment of wages to the beneficiary could establish the firm's ability to pay the wage, no evidence was submitted to establish the beneficiary's claimed prior employment. Simply going on record with out supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, in determining the petitioner's ability to pay the proffered wage, the Service will 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.III. 1982), aff'd, 703 F.2nd 571 (7th Cir. 1983). In K.C.P. Food Co., Inc. v. Sava, the court held the Service 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. 623 F.Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, 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 petitioner's amended Form 1120 for the calendar year 1996 shows a taxable income of -\$13,511. The petitioner could not pay a proffered salary of \$22,110.40 a year out of this income. Additionally, the 1997 tax return continues to show an inability to pay the wage offered.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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.