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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

PUBLIC COPY



APR 09 2003

File: WAC 02 032 52439 Office: California Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Bureau of Citizenship and Immigration Services (Bureau) 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

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 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 specialty cook. 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 beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on April 20, 2001. The proffered salary as stated on the labor certification is \$2,000 per month which equals \$24,000 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1040 U.S. individual income tax return, including Schedule C, profit or loss from a business (sole proprietorship). The Schedule C shows that the petitioner's restaurant paid the petitioner a net profit of \$16,756 during that year. The Form 1040 shows that the petitioner's adjusted gross income, including that from the restaurant, was \$16,911.

Counsel also submitted the petitioner's personal bank account statements for May, June, July, and September of 2001. Those statements show balances of \$2,987.29, \$1,800.06, \$2,183.78, and \$1,951.48, respectively.

Because the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage, the California Service Center, on February 19, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 1999 tax return, the petitioner's Quarterly Wage Reports for the most recent four quarters, and the beneficiary's Form W-2 wage and tax statements for 1999 and 2000.

In response, counsel submitted the requested 1999 tax return and DE-6 forms. Counsel also submitted Form W-2 wage and tax statements showing that, during 1999 and again in 2000, [REDACTED] paid \$12,144 in wages to the beneficiary. An accountant's letter, dated May 13, 2002, accompanied those forms. In that letter, the accountant stated that [REDACTED] Inc., a California corporation, conducts business [REDACTED]

In a cover letter, dated May 10, 2002, which accompanied those submissions, counsel argued that the petitioner's gross sales and positive net income evince a reasonable expectation of a future increase in business. Counsel further argued that various deductions which the petitioner took on the tax returns, including depreciation, are paper deductions only, not actual expenses, and should be added to the petitioner's income to calculate the petitioner's ability to pay the proffered wage.

On June 19, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel noted that the petitioner's average ending balance of \$2,109.54 since the priority date exceeds the proffered salary of \$2,000 per month, and demonstrates the ability to pay the proffered wage. Counsel also argued that the figure to be used in calculating the petitioner's ability to pay the proffered wage is

the Schedule C net profit, rather than the petitioner's income. With the appeal, counsel submitted a statement of the value of an investment account held by the petitioner. That statement valued the petitioner's investment account, as of June 30, 2002, at \$8,363,48.

In addition to the bank statements previously submitted, counsel submitted statements for August, October, November, and December of 2001, and January, February, March, April, May, and June of 2002. Those statements show balances of \$993.26, \$1,332.53, \$1,462.68, \$3,562.91, \$1,265.70, \$2,799.40, \$2,351.74, \$2,244.60, \$2,406.75, and \$2,191.18, respectively.

The priority date of the instant petition is April 20, 2001. The petitioner is obliged to demonstrate the ability to pay the proffered wage from that date forward. As such, the documentation which the Service Center requested pertinent to 1999 is of questionable relevance and shall not be further addressed.

Because the petitioner's business is a sole proprietorship, the petitioner is obliged to pay the debts and obligations of the business out of his own funds. Therefore, the petitioner's own funds may be considered in determining the ability to pay the proffered wage.

Counsel's argument that the petitioner's monthly bank balances of approximately \$2,000 are, in themselves, indicative of the ability to pay the proffered wage is spurious. The argument assumes that \$2,000 might be removed from the account each month without reducing the following month's balance. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on his tax return and Schedule C.

Counsel's assertion that the petitioner's business, and presumably its profits, are likely to increase is speculative. That speculative projection has no place in the calculation of the petitioner's ability to pay the proffered wage, especially as the petitioner is obliged to demonstrate the ability to pay the proffered since the priority date, rather than merely in the future.

Counsel argued that various deductions the petitioner claimed on his income tax return are paper deductions, with no corresponding cash expense. Counsel specified that the depreciation deduction was one of those paper deductions.

A depreciation deduction, while not a cash expenditure in the year

claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages.

Counsel did not specify which other deductions were paper deductions rather than actual expenditures, or the amounts of those deductions. Those deductions, whatever their amounts, will not be considered in calculating the petitioner's ability to pay the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was required to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue, through counsel, that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

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 both Service and 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 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." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The petitioner's adjusted gross income during 2001, as stated on his Form 1040, was \$16,911. The petitioner submitted a statement from his investment broker valuing his investment account, on June 30, 2002, at \$8,363.48, but the petitioner submitted no evidence to suggest that he had that same amount at his disposal during 2001.

The evidence, therefore, does not demonstrate that the petitioner could have paid the proffered wage during 2001. Therefore, the petitioner has not established that it 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.