

B6

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

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

[REDACTED]

AUG 12 2003

File: LIN 01 228 51673 Office: NEBRASKA SERVICE CENTER Date:

[REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON BEHALF OF PETITIONER:

[REDACTED]

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 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, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a Middle-Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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.

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). The petition's priority date in this instance is September 10, 1998. The beneficiary's salary as stated on the labor certification is \$11 per hour or \$22,880 per year.

The director issued a Request for Evidence (RFE), dated August 20,

2001. The director denied the petition in a decision, dated November 20, 2001, because the petitioner's Forms 1120, U.S. Corporation Income Tax Returns, for 1998-2000 showed losses for taxable income on line 30. The petitioner tendered its unaudited income and balance sheet for eight (8) months, ending August 30 [sic] 2001. The director considered that the statement had no weight, that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

On appeal, counsel referenced line 28 of the federal tax return, the taxable income before net operating loss deduction and special deductions. It reflected, for 1998-2000, (\$6,978), a loss and less than the proffered wage, and \$35,895 and \$31,372, each equal to, or greater than, the proffered wage. Counsel contended, on appeal that the AAO must combine depreciation with income or loss and, thereby, find that the "cash flow" justifies the ability to pay the proffered wage at the priority date.

The AAO concluded that taxable income from line 28 of the 1998 federal tax return, a loss of \$(6,978), did not establish the ability to pay the proffered wage at the priority date. The AAO dismissed the appeal in a decision dated June 28, 2002.

Counsel's appeal and this motion make three (3) points, but none is persuasive. In the first, counsel proposes to combine net income and depreciation to state "cash flow" but offers no rationale.

In determining the petitioner's ability to pay the proffered wage, the Bureau (formerly the Service or INS) 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. Tex. 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 that the Bureau 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. 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.

Second, counsel challenges, but without authority, that:

One has to wonder about the wisdom and rational [sic] of [Bureau] regulations [at] 8 C.F.R. [§] 204.5(g)(2). You have to ask yourself why is it important that the Petitioner has enough income from the time he files the [Form ETA 750] until the alien's status is adjusted... The alien will not be hired in 1998, nor in 1999, 2000 and 2001. He will be paid some time in 2002 if and when his I-140 is approved...

The petitioner's tax return reported a loss of \$(6,978) on line 28 at the priority date, 1998. Schedule L, the balance sheet does not support "cash flow." It stated current assets, \$1,319 (including cash of \$49), minus current liabilities, \$1,703. The difference, net current assets available to pay the proffered wage, amounted to a deficit of (\$384), less than the proffered wage.

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 and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Third, counsel insists that the director does not strictly observe these regulations in numerous instances, and that the AAO may use its judgment in such a matter of discretion. On the contrary, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel infers that many instances support the use of discretion in regard to the principle of *Katigbak*, but gives no published citation. While 8 C.F.R. § 103.3(c) provides that the Bureau's precedent decisions are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the federal tax returns for 1998-2001 and of the points of counsel's briefs, it is concluded that the motion does not establish any mistake of fact or error of law to redeem the failure to demonstrate the ability to pay the proffered wage at 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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.