

**PUBLIC COPY**

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

**B6**

Identifying information to  
prevent invasion of personal privacy

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



File: EAC 02 096 50786 Office: VERMONT SERVICE CENTER Date: **DEC 05 2003**

IN RE: Petitioner:   
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:

**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 Citizenship and Immigration Services (CIS) 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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 food service manager. 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 additional evidence and argues that the petitioner has established that it has the financial ability to pay the proffered wage.

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) states 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.

Eligibility in this case rests upon 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 March 13, 2001. The beneficiary's salary as stated on the approved labor certification is \$14.22 per hour or \$29,577.60 annually.

The petition was filed on January 28, 2002. As evidence of its ability to pay the proffered wage, the petitioner submitted an incomplete copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000. The portion submitted was page one. It showed that the petitioner had gross receipts or sales of \$5,750,001, officers' compensation of \$53,000, salaries and wages of

\$236,678, and an ordinary income of \$5,154.

On April 9, 2002, the director requested further evidence relevant to the petitioner's ability to pay the proffered wage. Included in its response, the petitioner submitted a complete copy of its 2000 tax return and a copy of its Form 1120S, 2001 corporate tax return. In addition to the information previously noted, the 2000 tax return showed that the petitioner had \$31,493 in net current assets.

The 2001 corporate tax return showed that the petitioner claimed \$6,808,238 in gross receipts or sales, \$51,700 in officers' compensation, \$243,298 in salaries and wages, and an ordinary income of -\$29,439. Schedule L of this tax return showed that the petitioner had -\$1,218 in net current assets

Along with this material, the petitioner submitted a copy of a March 27, 2002 letter that indicated that the petitioner had applied for another employment based petition based on the departure of one of its employees. The petitioner additionally included a copy of a July 1, 2002 letter to CIS in which the petitioner's owner stated that it would use the salaries of two past employees to pay the beneficiary. Copies of the two employees' 2001 W-2s were also submitted showing that they were paid \$25,180.75 and \$26,000, respectively. We note that neither the departure date, job titles or job duties of these employees were described in this letter.

The director denied the petition. He determined that the petitioner had not established its ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. The director noted that the petitioner's 2001 corporate tax return showed a negative taxable income and more liabilities than current assets. Neither figure covers the beneficiary's proposed salary of \$29,577.60.

Although we concur with the director's conclusion that neither the petitioner's 2001 negative ordinary income nor its net current assets was sufficient to meet the beneficiary's offered wage, we disagree with the director's inclusion of depreciation in calculating the petitioner's 2001 available ordinary income as shown on its corporate tax return. In determining 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.

The copy of a July 1, 2002 letter provided by the petitioner is not sufficient, standing alone, to establish its ability to pay as of the visa priority date and continuing until the present. Counsel contends that the W-2s showing the salaries paid to these past employees was sufficient to show that the petitioner had established its ability to pay the beneficiary's proposed wage of \$29,577.60. It is the petitioner's burden to show that the same job opportunity was available to be filled by the beneficiary as of the priority date of March 13, 2001. The petitioner failed to establish that funds were clearly available to pay the beneficiary as a food service manager as a replacement for two specific past employees who were food service managers and who performed the same duties. As noted above, the departure date, job titles and job duties of these employees were not set forth in the petitioner's correspondence.

On appeal, counsel states that he is submitting copies of the beneficiary's 1999 and 2000 individual tax returns in order to show that the beneficiary was paid "off the books." Counsel asserts that this should be considered when determining the petitioner's ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In fact, counsel has submitted the 1999, 2000, and 2001 individual tax returns of another alien, "Olger Garro-Fallas." The beneficiary's name is not mentioned within any of these copies. We also note that the source of the income is not identified as having derived from the petitioner.

Upon review of the evidence contained in the record, we cannot conclude that the petitioner has persuasively established its ability to pay the beneficiary's offered wage as of the visa priority date of March 13, 2001 and continuing until the 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.