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U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536*

File: WAC 02 095 52254 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 08 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: SELF-REPRESENTED

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 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 appears to have retained representation. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the ostensible representative is an attorney. Further, that ostensible representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's ostensible representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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, the petitioner's owner 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 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 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 proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on January 22, 2001. The proffered wage as stated on the Form ETA 750 is \$13.87 per hour, which equals \$28,849.60 per year.

With the petition the petitioner submitted no evidence of its ability to pay the proffered wage. Therefore, on April 28, 2002, the California Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the Service Center stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner's owner submitted copies of his 2000 and 2001 Form 1040 personal income tax return with the corresponding Schedules C. The 2000 Schedule C shows that the petitioner returned a net profit of \$9,977 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of \$9,272, including the petitioner's entire profit offset by deductions.

The 2001 Schedule C shows that the petitioner returned a net profit of \$12,787 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of \$11,884 during that year, including petitioner's entire profit offset by deductions.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 30, 2002, denied the petition.

On appeal, the petitioner's owner states that the petitioner began operations in August of 2000, and that the petitioner's profits during 2000 were therefore low. This office notes that the priority date is during 2001, and that the figures on the petitioner's 2000 tax returns are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The petitioner's owner also submits copies of the petitioner's sales tax returns for the months from January 2001 to July 2002. The petitioner's owner stated that the petitioner's gross income for July was \$79,747, which shows a dramatic increase in business.

In fact, the July 2001 sales tax return shows that the petitioner's gross receipts were \$8,215 during that month and the

July 2002 return shows \$15,786 in gross sales. The origin of the statistic cited by the petitioner's owner is unknown to this office. In any event, the petitioner's gross receipts are not an appropriate index of its ability to pay the proffered wage.

Because the petitioner is a sole proprietorship, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own income and assets. Therefore, the income and assets of the owner are an appropriate consideration in determining the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's owner's adjusted 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 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 INS, now CIS, 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 INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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 priority date is January 22, 2001. The proffered wage is \$28,849.60 per year. During 2001, the petitioner's first full year of operation, the petitioner returned a profit of \$12,787, which was part of the petitioner's owner's adjusted gross income of \$11,884 for that year. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.