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

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



File: EAC-02 085 50625 Office: VERMONT SERVICE CENTER

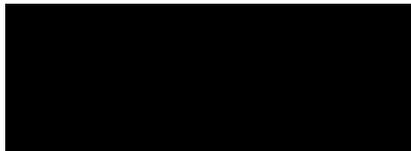
Date: **DEC 08 2003**

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:



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, Vermont 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 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 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 March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour for 35 hours of work per week, which equals \$20,875.40 per year.

With the petition counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Because counsel submitted no evidence of the petitioner's continuing ability to

pay the proffered wage beginning on the priority date, the Vermont Service Center requested additional evidence pertinent to that ability.

This office notes irregularities in the request for evidence. First, the notice is dated March 13, 2001. Because the Form ETA 750 was filed on March 27, 2001 and the petition in this matter was filed during January of 2002, the request for evidence must have been issued after both of those dates. Because counsel's response was dated May 13, 2002 this office concludes that the request for evidence was issued on March 13, 2002. Second, the notice states that the proffered wage is \$23,857.60, which is incorrect.

The request for evidence stated that the petitioner must:

Submit . . . evidence to establish that the employer had the ability to pay the proffered wage . . . beginning on the priority date and continuing to the present.

The request for evidence reiterated that the petitioner was obliged to show that it had the ability to pay the proffered wage beginning on the priority date and continuing until the date of that request.

In response, counsel submitted a letter, dated May 13, 2002, in which he observed that the petitioner has been in business since September 13, 1983 and is not mortgaged. Counsel submitted no evidence that the petitioner possesses any real estate to mortgage.

Counsel did submit copies of the petitioner's bank account statements for each month of 2001, copies of eight 2001 Form W-2 Wage and Tax Statements showing wages paid by the petitioner to its employees, and a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. None of the W-2 forms shows wages paid to the beneficiary.

The 2000 tax return states that the petitioner declared a loss of \$4,876 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 5, 2002, denied the petition.

On appeal, counsel argues that the petitioner's 2000 income tax return, together with its 2001 bank statements, shows the petitioner's ability to pay the proffered wage. Counsel stressed

the amounts of the petitioner's 2000 gross income, gross profit, end-of-year cash, loans to shareholders, and depreciation deduction. Counsel did not volunteer any calculation pursuant to which those various 2000 figures might show the petitioner's ability to pay the proffered wage beginning on March 27, 2001.

Counsel also emphasized the amounts of the petitioner's 2001 monthly bank balances. Counsel noted that those monthly balances exceeded the amount of the proffered wage which would have been due to the beneficiary had he then been employed by the petitioner during those months.

Counsel stated that the W-2 forms submitted show that the petitioner is able to pay wages to its employees.

Counsel's reliance on the bank accounts in this case is inapposite. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, 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 the tax return. Third, bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

Counsel's observation that the petitioner has been in business since 1983 and is not mortgaged is insufficient to dispose of the issue of the petitioner's ability to pay the proffered wage. The petitioner is obliged to show that it has the ability to pay the proffered wage, in addition to the expenses it has been required to pay to remain open.

Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its other expenses*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration

* The petitioner might demonstrate this by showing, for instance, that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

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 CIS 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 March 27, 2001. The proffered wage is \$20,875.40. The petitioner reports taxable income based on a fiscal year running from November 1 of the nominal year to October 31 of the following year. Therefore, the priority date fell within the petitioner's 2000 fiscal year. During FY 2000, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date.

On the priority date, 146 days of 365-day FY 2000 had already elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 219 days of that year. The proffered wage multiplied by $219/365^{\text{th}}$ equals \$12,525.24, which is the amount the petitioner must show the ability to pay during its FY 2000.

During FY 2000, the petitioner declared a loss of \$4,876. The petitioner has not demonstrated the ability to pay the salient portion of the proffered wage out of its FY 2000 income. The petitioner finished that fiscal year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its assets. The petitioner has not shown that any other funds were available with which to pay the proffered wage.

The petitioner has not demonstrated the ability to pay the proffered wage during the period beginning on the priority date and ending on October 31, 2001, the end of the petitioner's FY 2000. 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.