

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

B6

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

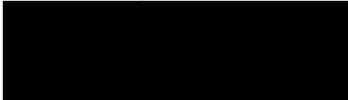
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 Eye Street N.W.
Washington, D.C. 20536



File: EAC 02 174 51241 Office: VERMONT SERVICE CENTER

Date: **DEC 13 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

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 asserted that the evidence submitted demonstrates its ability to pay the proffered wage.

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 wage offered beginning on the priority date, the day 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 on April 16, 2001. The proffered wage as stated on the labor certification is \$12.24 per hour, which equals \$25,459.20 per year.

With the petition the petitioner submitted no evidence of its

ability to pay the proffered wage. Therefore, the Vermont Service Center, on August 13, 2002, requested evidence pertinent to that issue. The Service Center specifically requested evidence pertinent to 2001.

In response, the petitioner submitted the 2001 Form 1120S U.S. Income Tax Return for an S Corporation of Stellar, Inc., which presumably does business as Ancient Mariner, the named petitioner in this case. That tax return shows that the petitioner declared an ordinary income from trade or business activities of \$2,400 in that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$63,074 and current liabilities of \$6,229, which yields \$56,845 in net 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 December 13, 2002, denied the petition.

On appeal, the petitioner argues that the amount of the petitioner's depreciation deduction, compensation to officers, salaries paid and wages paid should all be included in the computation of its ability to pay the proffered wage.

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 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 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*, Supra. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

None of the various expenses the petitioner cited may be added back into income in determining the petitioner's ability to pay the proffered wage. The petitioner must demonstrate that it had the ability to pay the proffered wage **in addition to** the expenses which it actually paid. Merely demonstrating that it paid expenses that were greater than the proffered wage is

insufficient. This calculation would change somewhat if the petitioner demonstrated that hiring the petitioner would reduce some of its expenses.

Thus, that the petitioner paid wages and salaries in excess of the proffered wage is of no weight, absent evidence that the beneficiary will replace a named employee whose wages will be used, and sufficient, to pay the proffered wage.

That the petitioner paid compensation to officers in excess of the amount of the proffered wage is of no weight, absent evidence demonstrating that the compensation paid to officers might readily have been used to pay the proffered wage instead.

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; *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as equipment and buildings deteriorate. This deduction 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 depreciation deduction represents the accumulation of funds necessary to replace perishable equipment and buildings, and that amount is not available to pay wages.

The proffered wage is \$25,459.20. During 2001, the petitioner declared income of \$2,400. The petitioner was clearly unable to pay the proffered wage out of income. Another measure of the petitioner's ability to pay the proffered wage, however, is the value of the petitioner's net current assets. At the end of 2001, the petitioner had net current assets of \$56,845. The petitioner's net current assets were sufficient to cover the proffered wage.

Therefore, the petitioner has established that it had the ability to pay the proffered salary during 2001 and has overcome the sole objection to approval of the petition.

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 met that burden.

ORDER: The appeal is sustained.