

**PUBLIC COPY**

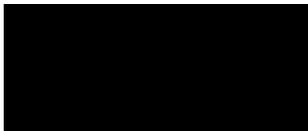
U.S. Department of Homeland Security

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



**DEC 13 2003**

File: SRC 01 120 52241

Office: TEXAS SERVICE CENTER

Date:

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

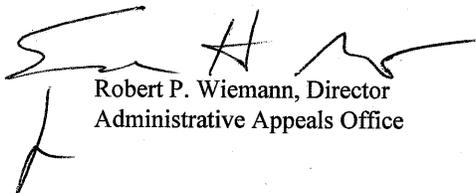
**INSTRUCTIONS:**

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 Acting Director, Texas 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 record, however, does not contain a Form G-28 showing that the petitioner has agreed to be represented. All representation will be considered, but the decision shall be furnished only to the petitioner.

The petitioner is a fast food franchise. It seeks to employ the beneficiary permanently in the United States as an information manager. 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 Acting 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 submits a statement.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

*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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization

which establishes the prospective employer's ability to pay the proffered wage. 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 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 October 14, 1999. The proffered wage as stated on the Form ETA 750 is \$54,000 per year.

The petition was initially filed pursuant to section 203(b)(2) of the Act. On January 12, 2001, the Acting Director, Texas Service Center, denied the petition, finding that the petitioner had not demonstrated that the proffered position requires an advanced degree, as is required for that classification.

On February 28, 2001, the petitioner's putative representative filed a motion for reconsideration, stating that the petition had been mistakenly filed pursuant to section 203(b)(2) of the Act. The putative representative requested that the petition be amended to reflect that it is a petition for a skilled worker or professional pursuant to section 203(b)(3) of the Act.

On December 10, 2001, the Texas Service Center issued a Request for Evidence. That request indicated that the petition was being considered as a new petition for a skilled worker pursuant to section 203(b)(3) of the Act. The Service Center also noted that the petition was submitted without evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center requested that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements to demonstrate that ability.

In addition, the Service Center requested that the petitioner provide its last three quarterly tax returns, its 2000 Form W-3, its 2000 federal tax returns, documentary proof of its federal tax identification number, copies of its articles of incorporation, and its last six bank statements.

On May 15, 2002, the Service Center sent the petitioner a notice that although computer records indicated that a response had been received, that response was not in the record. The Service Center requested that the petitioner resubmit the evidence

In response, the petitioner provided a form letter, dated January 28, 1997, from the Georgia Secretary of State, indicating that

the petitioner incorporated on March 2, 1993. The petitioner provided an undated form letter from the Georgia Secretary of State inviting the petitioner to update its annual corporate registration and a second notice, dated March 6, 2001, inviting the petitioner to update its corporate registration.

The petitioner also provided copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Returns, for the first, second, and third quarter of 2001 and a copy of the petitioner's 2000 Form W-3 transmittal as requested.

Further still, the petitioner provided copies of its 1999 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The 1999 return shows that the petitioner declared a loss of \$15,799 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 2000 return shows that the petitioner declared a loss of \$26,555 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had \$13,889 in current assets and \$9,500 in current liabilities, which yields net current assets of \$4,389.

Finally, the petitioner provided copies of 2001 bank account statements. Those statements confirm the petitioner's federal tax identification number.

On May 3, 2002, the petitioner again wrote to the Service Center stating that although the petition was mistakenly filed under another visa category, it should be amended to reflect that it is a petition pursuant to section 203(b) of the Act. Two other letters of the same date, one from the petitioner's putative representative and the other from the beneficiary, contain the same request.

The Acting Director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on June 13, 2002, denied the petition. That decision states that the petition was being regarded as a petition for a skilled worker pursuant.

On appeal, the petitioner stated that the petition was considered under the wrong classification. The petitioner also stated that it has the ability to pay the proffered wage.

Initially, this office notes that the petition is for a skilled worker or professional and was so considered. The same requirement that the petitioner demonstrate the ability to pay the proffered wage applies to both of those alternative classifications. The petitioner's remaining objection to the decision is the petitioner's assertion that it has the ability to

pay the proffered wage.

This office also notes that, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, rather than merely alleging that it has that ability, unless it demonstrates that it employs 100 or more workers. The petitioner is obliged to show that ability with copies of annual reports, federal tax returns, or audited financial statements.

The record contains some indication that the petitioner may currently employ the beneficiary. If that is so, then the petitioner presumably pays the beneficiary wages. If the record contained evidence of the wages the petitioner paid the beneficiary during various years, then those amounts might have been considered in the determination of the petitioner's ability to pay the proffered wage during those years. The record contains no such evidence, and those amounts cannot be considered.

The reason for the Service Center's request for copies of the petitioner's bank statements is unclear to this office. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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. Finally, bank statements 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.

In determining the petitioner's ability to pay the proffered wage, the Service 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 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 Service 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 Service should have considered income before expenses were paid rather than net income.

The priority date of the petition is October 14, 1999. The proffered wage is \$54,000 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1999, but only that portion which would have been due if the petitioner had employed the beneficiary beginning on that date. On the priority date, 286 days of that 365-day year had elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 79 days of 1999. The proffered wage times  $79/365^{\text{th}}$  equals \$11,687.67.

The petitioner declared a loss of \$15,799 during 1999 and ended the year with negative net current assets. The record does not demonstrate that the petitioner had any other funds with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the appropriate portion of the proffered wage during 1999.

The petitioner is obliged to demonstrate the ability to pay the entire proffered wage during 2000. The petitioner declared a loss of \$26,555 during that year and ended the year with net current assets of \$4,389, an amount insufficient to pay the proffered wage. The record does not demonstrate that the petitioner had any other funds with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999 and 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.