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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[REDACTED]

File: [REDACTED]
LIN 02 247 53076

Office: NEBRASKA SERVICE CENTER Date:

DEC 15 2003

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an ethnic restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign foods specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on 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. The petition's priority date in this instance is January 8, 2002. The beneficiary's salary as stated on the labor certification is \$27,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 25, 2002, the director requested additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date, and evidence that the beneficiary had two (2) years of experience in the job offered and had completed high school before the priority date.

In response, counsel submitted a balance sheet and a statement of income and retained earnings from an accountant's compilation report (compilation), for the period from January 1 to September 30, 2002. The compilation reflected an operating loss of \$2,626. Current assets minus current liabilities for this period reflected a deficit of \$10,408.

In addition, the record contained the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. They showed, respectively, ordinary income (loss) from trade or business activities as losses of \$19,170 and \$79,571. Net current assets for 2000 and 2001, respectively, as reported in Schedule L and statements, were deficits of \$7,184 and \$1,797.

The petitioner offered eight (8) invoices in response to the RFE. Evidently, they simply repeated assets or income already found in financial statements and federal income tax returns.

The director reviewed all of the evidence, determined that it did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition in a Notice of Decision (NOD 1) dated January 27, 2003. Separately, the director denied the Form I-485, Application to Register Permanent Resident Status and Application for Employment Authorization (Form I-765).

Counsel filed a motion to reopen and reconsider (MTR) on March 3, 2003. The new evidence consisted of the petitioner's 2002 federal income tax return. It reported ordinary income of \$5,834, less than the proffered wage. Net current assets were a deficit of \$5,981.

Counsel contended in the MTR that:

Employee's salaries [sic] are not paid from the [petitioner's] income, however, they are paid from gross revenues, or \$242,940 for the year 2002. . . .

Moreover, the gross receipts for 2001, when [the petitioner] operated for four months, exceeded \$85,000, and in 2001, the gross receipts exceeded \$250,000.

The director observed that, contrary to counsel's assertions, the compilation and federal income tax return for 2002 reflected no payment for outside cost of labor. Further, the \$11,922 paid to

other employees was not available to disburse to the beneficiary. The I-140 indicated that the beneficiary would not occupy a new position, and, thus, he would replace other workers. Form I-140 claimed that there were eight (8). The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage offered to the beneficiary at the priority date of the petition and continuing to the present.

In a further decision (NOD 2), issued May 12, 2003, the director concluded that the MTR did not overcome the grounds of NOD 1 and, again, denied the petition.

On appeal, counsel argues, without authority, that:

To the contrary, actual assets listed are \$82,386. [Reference omitted]. The total number of assets should be added to the ordinary income and the depreciation amount for a total of \$95,720. Therefore, the tax return does reflect the financial ability to pay the wage at both the January, 2002 priority date and the December 31, 2002 end of the year date.

. . . The more appropriate evaluation should be analyzing the gross receipts of \$242,940, minus cost of goods expenses of \$79,957. From the total income, \$162,983, is where payroll expenses are deducted.

This reasoning is not persuasive. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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 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. Tex. 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.*, 623 F. Supp at 1084, the court held that INS 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Counsel has not explained the assertion in response to the RFE that the petitioner was bought out in 2001, closed for that reason, and, somehow, could not report any successful year. One Employer Identification Number applies to all of the tax returns in the proceedings. No evidence of record confirms that the petitioner qualifies as a successor-in-interest to an anonymous predecessor. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, unaudited financial statement, and invoices, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, another issue in this proceeding is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated that the position of foreign food specialty cook required two (2) years of experience in the job offered or in the related occupation of ethnic cook. The copy of the prior employer's letter does not attest to full-time experience. Employment is defined as permanent, full time work. 20 C.F.R. § 656.3, *Employment*.

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.