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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



File:

Office: NEBRASKA SERVICE CENTER

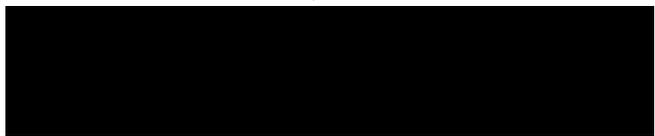
Date: DEC 16 2003

IN RE: Petitioner:
Beneficiary:



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:



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 on appeal. The appeal will be sustained.

The petitioner is a restaurant and retail firm. It seeks to employ the beneficiary permanently in the United States as a pastry 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 hinges 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is November 21, 2000. The beneficiary's salary as stated on the labor certification is \$26,728 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Request for Evidence dated October 25, 2001, the director requested the complete 1999 and 2000 corporate tax returns to establish that the

petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel submitted the petitioner's 1999 and 2000 Forms 1120S, U.S. Income Tax Return for an S Corporation. The federal tax return for 1999 reflected taxable income of (\$324), a loss, and for 2000 a taxable income of \$6,405, both less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition on January 4, 2002 (the decision).

Counsel filed, and the director received on February 6, 2002, a timely appeal from the decision (substantive appeal). The director rejected the appeal as improperly filed by the beneficiary on June 1, 2002. 8 C.F.R. § 103.3(a)(2)(v)(A)(1). Counsel appealed from the rejection on June 19, 2002 (procedural appeal) and pointed out that the general manager of the petitioner, an affected party with the same last name as the beneficiary, had, indeed, filed the appeal. 8 C.F.R. § 103.3(a)(2)(i). Both appeals are now before the AAO and will be sustained.

Counsel submits a brief dated March 6, 2002 (brief) on the substantive appeal and the 2001 Form 1120S and attachments of the petitioner. The appeal includes a letter dated February 12, 2002 from the petitioner's certified public accountant (CPA opinion) in respect to the ability to pay the proffered wage.

Counsel states:

. . . [The CPA opinion] explains that the depreciations represent only book and tax deductions and, therefore, did not have (sic) negatively impact on the actual cash available to [the petitioner] to pay the \$26,768 (sic) salary offered from November 21, 2000 to the present.

This addition of "depreciations" back to cash is not well taken. In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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. v. Sava*, the court held that 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. 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. v. Sava*, 632 F.Supp. at 1054.

The CPA's opinion merely adopts counsel's mistake as to depreciation and, thus, reveals no other assets. The Schedules L of the tax returns, however, show net current assets (defined as current assets less current liabilities) for 1999, 2000 and 2001 as \$75,645, \$100,919, and \$108,596, respectively, more than the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

A review of the procedural appeal confirms that an affected party did, in fact, file the substantive appeal.

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 substantive and procedural appeals are sustained, and the petition is approved.