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

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



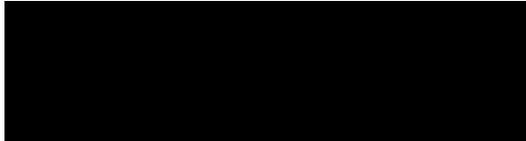
File: WAC 02 235 54150 Office: CALIFORNIA SERVICE CENTER Date: **DEC 17 2003**

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

The petitioner is a board and care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a 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 January 4, 2000. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 28, 2002, the director required additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax return, annual report or audited financial statement for 2000, as well as further evidence of experience and clarification of training.

Counsel submitted the petitioner's 2000 and 2001 Forms 1120, U.S. Corporation Income Tax Return. They reported taxable income before net operating loss deduction and special deductions of, respectively, \$3,375 and \$4,030, less than the proffered wage. Counsel called attention to "outside services" for amounts paid in wages, viz., \$10,596 in 2000 and \$32,073 in 2001.

The petitioner's balance sheet of December 31, 2002, offered as proof of the ability to pay the proffered wage, is an unaudited financial statement. The director considered it unacceptable. It is of little evidentiary value because it is based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date continuing until the present and denied the petition.

On appeal, counsel submits a brief, an unsigned and undated, corporate federal tax return for 2002, and Forms DE-6. Forms DE-6 reflect no wages paid to the beneficiary. The 2002 tax return reported taxable income of \$1,048, less than the proffered wage, and outside services expense of \$30,259.

Counsel gives no authority for, but advocates, the addition of various expenses, such as officers' compensation, salaries and wages, and outside services, to establish the ability to pay the proffered wage. The tax service that files the petitioner's returns supposes that officers' compensation "could have been easily reduced by [the proffered wage] annually."

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).

Contrary to counsel's contention, pertinent authority negates the use of expenses and depreciation to prove the ability to pay the proffered wage. Counsel contended, in response to the RFE, that depreciation is a non-cash, paper loss to add back to taxable income. 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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. *K.C.P. Food Co., Inc.*, 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.

After a review of the federal tax returns, the tax service's letter, the petitioner's unaudited financial statement, and counsel's briefs, it is concluded that the petitioner has not established its ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.