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

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OFFICE OF ADMINISTRATIVE APPEALS
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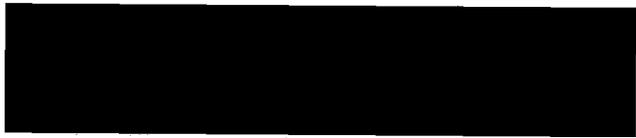
Office: VERMONT SERVICE CENTER

Date: JUL 03 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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
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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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). Here, the petition's priority date is November 20, 2000. The beneficiary's salary as stated on the labor certification is \$40,000.00 annually.

Counsel initially submitted a copy of the petitioner's 1999 Form 1065 U.S. Partnership Return of Income and a copy of the owner of

the restaurant's personal income tax return for 1999. On September 17, 2001, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's 2000 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of \$1,286,942; gross profit of \$905,362; salaries and wages paid of \$261,362; guaranteed payments to partners of \$133,978; and an ordinary income (loss) from trade or business activities of -\$361,294.

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the petitioner bank statements for the period from March 31, 2000 through December 29, 2000, and argues that "[i]t is noteworthy that in many cases, the Associate Commissioner has sustained appeals and granted employment-based immigrant visa petitions despite a loss shown on the employer's tax return. The evidence established that the loss shown was properly taken for tax accounting purposes and that the employer has sufficient cash on hand or checking account balances to pay the proffered salary."

In *Elatos Restaurant Corp., etc. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), the court held the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage. The court rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, the court found the petitioner must establish its ability to pay the proffered wage at the time the petition is filed, not at the time of the actual adjudication. See *Chi-Fend Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989).

The petitioner's Form 1065 for calendar year 2000 shows an ordinary income of -\$361,294.00. The petitioner could not pay a salary of \$40,000.00 a year from this figure.

Accordingly, after a review of the federal tax return and other evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing 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 not met that burden.

ORDER: The appeal is dismissed.