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

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

JUL 03 2003

File: EAC 00 066 50143 Office: Vermont 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:

**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.

*Selen E Crawford for*  
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 chef. 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 previously submitted 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 filing 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 filing date is May 26, 1999. The beneficiary's salary as stated on the labor certification is \$9.00 per hour or \$18,720.00 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On August 28, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage to include the petitioner's 1999 tax return.

In response, counsel submitted a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return which reflected gross receipts of \$462,622; gross profit of \$234,561; compensation of officers of \$24,000; salaries and wages paid of \$85,713; and a taxable income before net operating loss deduction and special deductions of \$6,236.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner has a "significant cash reserve and is generating pastime income nas (sic) has the ability to pay a salary of \$18,720 to a new employee." Counsel further requests consideration of the depreciation figure of \$1,022 on the tax return.

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 1120 for calendar year 1999 shows a taxable income of \$6,236. The petitioner could not pay a proffered wage of \$18,720.00 a year out of this income.

Accordingly, after a review of the federal tax return 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.