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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

JUL 16 2003

File: WAC 02 133 51230 Office: California 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:

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, 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 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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief.

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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on January 19, 2001. The proffered salary as stated on the labor certification is \$11.55 per hour which equals \$24,024 annually.

With the petition, counsel submitted a letter from the petitioner's owner. That letter states that the petitioner owns three restaurants and that its gross annual income of \$1.08 million during 2000 clearly evinces the ability to pay the proffered wage.

Counsel also submitted an unsigned copy of the petitioner's 2000 income tax return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$9,556 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities were greater than its current assets.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 29, 2002, requested additional evidence pertinent to that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center emphasized that the petitioner must submit copies of annual reports, copies of signed federal tax returns, or audited financial statements showing the ability to pay the proffered wage during 2000 and 2001. The Service Center also requested copies of the petitioner's California Form DE-6 quarterly wage reports for the preceding four quarters.

In response, counsel submitted a signed copy of the petitioner's 2000 tax return, the salient figures from which are reported above, and a signed copy of the petitioner's 2001 Form 1120 U.S. corporation income tax return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$3,094 during that year. The corresponding Schedule L shows that at the end of the year, the petitioner's current liabilities were greater than its current assets.

Counsel also submitted copies of the petitioner's California Form DE-6 quarterly wage reports for the second, third, and fourth quarters of 2001 and the first quarter of 2002. Those reports indicate that the petitioner did not employ the petitioner during those quarters.

On August 2, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel correctly observed that, because the priority date of the petition is January 19, 2001, the petitioner needs to establish the ability to pay from that date forward. As such, data pertinent to the petitioner's finances during 2000 are not directly relevant.

Further, counsel stated,

In order to establish the petitioner's ability to pay wage (sic) to the beneficiary, we have enclosed (the petitioner's) financial statements audited by a certified public accountant for the year of 2001.

Counsel did submit what purport to be the petitioner's financial statements. The accountant's report appended to those statements, however, clearly state that they were not audited by that accountant, but compiled. The accountant specified that he or she had compiled information submitted by the petitioner and presented it in the form of a financial statement, but that he or she had not audited or reviewed the financial statements and that he or she expressed no opinion or any other form of assurance pertinent to the accuracy of the information. As such, the unaudited balance sheet merely restates the petitioner's representations, and is not evidence of their veracity or their accuracy. Pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), the only competent evidence submitted pertinent to the petitioner's income during 2001 is the petitioner's tax return for that year.

Counsel also noted that the petitioner paid compensation of officers of \$99,900 during 2001. Counsel stated that, if necessary, the officers were willing to accept less compensation in order to pay the proffered wage.

Counsel submitted no evidence to support his statement that the petitioner's officers would be willing to accept less compensation. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In determining the petitioner's ability to pay the proffered wage, the Bureau will first 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 both Bureau and 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. Texas 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 the Bureau,

then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

During 2001, the petitioner's taxable income before net operating loss deduction and special deductions was \$3,094 and the petitioner ended the year with negative net current assets. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.