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Citizenship and Immigration Services

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

[REDACTED]

File: [REDACTED] Office: Texas Service Center

Date: NOV 03 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

ON BEHALF OF PETITIONER:

[REDACTED]

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, Texas 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 the beneficiary had the requisite experience as of the priority date of the visa petition. The director further determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority 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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on August 21, 2000, indicates that the minimum requirement to perform the job duties of the proffered position of specialty cook is four years of experience in the job offered.

The petitioner submitted a letter from Liberty Noodles of Dallas, Texas, which stated that the beneficiary worked there from approximately December 1997 to May 1999; a letter from Bangkok in Boca of Boca Raton, Florida, which stated that the beneficiary worked there from April 1, 1999, to February 22, 2001; and a letter from Reaun Ho Restaurant of Bangkok, Thailand, which states that the beneficiary worked there from May 1990 until June 1991. All three letters indicate that the beneficiary worked fulltime as a Thai cook.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite experience of four years and denied the petition accordingly.

The director was correct in denying the petition on this basis. On appeal, counsel argues that the beneficiary has more than four years of experience as a cook; however, to qualify, the beneficiary must possess all the requirements of the labor certification as of the priority date of the petition, in this case August 21, 2000. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). As of August 21, 2000, the beneficiary had at most three years and eleven months of experience. Additionally, the employment letter furnished by Reaun Ho Restaurant of Bangkok is in doubt because the petition indicates that the beneficiary entered the United States on April 4, 1988, in an undetermined manner; thus, it does not appear that he was in Thailand to gain the claimed experience. As noted in *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), "[d]oubt cast on any aspect of the petitioner's proof may lead to reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The petitioner has not established that the beneficiary had the required experience as of the petition's priority date.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage.

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 August 21, 2000. The beneficiary's salary as stated on the labor certification is \$21,900.00 per annum.

Counsel submitted a copy of the petitioner's unaudited financial statement for the year 2000, a copy of the petitioner's Internal Revenue Service (IRS) Form 1120S for 1999, and a copy of the petitioner's IRS Form 1120 for the year 2000 which reflected a taxable income of -\$521,358.84.

In determining the petitioner's ability to pay the proffered wage, CIS 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 both CIS 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).

On appeal, counsel submits bank statements for the petitioner for 2001 and the first six months of 2002, summary income and expenses statements for the petitioner for 2000 and 2001, and a copy of the petitioner's IRS Form 1120 for 2001 which shows a taxable income of -\$149,191.82.

Counsel explains that the petitioner has "had an operating profit since its second full year of operation except for the year 2000."

Counsel further explains that the corporate loss was due to the expense of building and construction of a second restaurant in April of 2000.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

The unaudited income statements which were submitted as proof of the petitioner's ability to pay the proffered wage are in the record. However, they have little evidentiary value as they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), already quoted above in part, states that:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

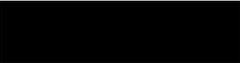
This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Additionally, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. 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).

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's taxable income for 2001 is -\$521,358.84. The petitioner could not pay a salary of \$21,900.00 a year from this figure.

Therefore, the director's decision to deny the petition has not been overcome and the petition may not be approved.



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.