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Citizenship and Immigration Services

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

[REDACTED]

OCT 02 2003

File: [REDACTED] LIN 02 122 52891 Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner:
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:

[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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a Russian 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 priority date of the visa petition.

On appeal, counsel submits additional information and asserts that this documentation establishes the petitioner's ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 April 13, 2001. As noted by the director, the beneficiary's salary as stated on the labor certification is \$26,728 per year.

As evidence of its ability to pay, the petitioner initially included a profit and loss statement showing its net income as \$66,085.91. This financial statement's figures covered a period from April 1, 2001 through February 8, 2002. The director instructed the petitioner to submit additional evidence pursuant to 8 C.F.R. § 204.5(g)(2) in the form of annual reports, the petitioner's 2001 federal tax

return, or its *audited* financial statements. (Original emphasis). In response, the petitioner submitted its 2001 Form 1120 U.S. Corporation Income Tax Return covering a fiscal year beginning March 1, 2001 and ending March 31, 2002. This return shows that the petitioner had gross receipts/sales of \$464,758, no officers' compensation, salaries and wages of \$53,605 and a taxable income before net operating loss deduction of -\$42,529. Schedule L of this tax return also reflected that the petitioner had \$23,217 in net current assets.

The director denied the petition, noting that the petitioner's negative income for 2001 as shown on its 2001 federal tax return was insufficient to meet the proffered wage as of the established priority date of April 13, 2001. We concur. As noted above, 8 C.F.R. § 204.5(g)(2) requires audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the primary evidentiary requirements. It is noted that the petitioner's profit and loss statement does not represent an audited document and as such, is of lesser evidentiary value because it is based solely on the representations of management.

On appeal, counsel resubmits the petitioner's 2001 corporate tax return. Counsel contends that the depreciation and amortization expenses should be considered as supporting the assertion that the petitioner established its ability to pay the proffered wage. 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. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel also submits a letter from the owner of the petitioning business who asserts that two temporary cooks (the owner and her husband) collectively were paid \$23,446.14 in 2001 for their cooking services.¹ The petitioner's letter expresses the view that by hiring the beneficiary, it could replace these services with the beneficiary's. Generally these kinds of expenditures represent funds already disbursed and are not readily available to pay the wage of the beneficiary as of the filing date of the petition. It is also noted that if the original employee performed other kinds of work, then the beneficiary could not have replaced him or her. More importantly, it is noted that this figure is still less than the beneficiary's offered wage as set forth on the approved labor certification.

¹ Counsel subsequently submitted additional financial data accompanied by a cover letter dated May 2, 2003. Such evidence is not considered with this appeal as it represents submissions to the record over six months past the appeal deadline as set forth in 8 C.F.R. § 103.3(2)(i).

Neither the petitioner's taxable income before the NOL deduction nor its net current assets in 2001 were sufficient to cover the beneficiary's offered wage. We cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

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.