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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

OCT 02 2003

File: [REDACTED] EAC 99 278 51599 Office: VERMONT SERVICE CENTER

Date:

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:

[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, Vermont 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 evidence and asserts that the petitioner has established its 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 January 29, 1999. The beneficiary's salary as stated on the labor certification is \$11.00 per hour (35 hour week) or \$20,020 annually.

The petitioner initially submitted insufficient evidence to support its ability to pay the proffered wage. The director instructed the petitioner to submit additional financial information on June 25, 2000. Included in its response, the petitioner submitted copies of its payroll records, quarterly tax returns, and its U.S. Income Tax Return for an S Corporation for the years 1998, 1999 and 2000. The 1998 tax

return indicates that it includes the petitioner's financial data during a fiscal year that begins September 30, 1998 and ends September 28, 1999, covering the January 29, 1999 priority date of this petition. The 1998 Form 1120S tax return shows that the petitioner had \$1,798,829 in gross receipts or sales, no officers' compensation, \$487,730 in salaries and wages, and an ordinary income (loss) of -\$87,301. Schedule L attached to this return indicates that the petitioner's net current assets were -\$207,397.

The petitioner's 1999 tax return shows that it had \$2,044,251 in gross receipts or sales, no officers' compensation, \$484,080 in salaries and wages, and an ordinary income of \$174,456. Schedule L for this year shows that the petitioner had -\$217,883 in net current assets.

The petitioner's 2000 tax return indicates that it claimed \$2,088,078 in gross receipts or sales, no officers' compensation, \$494,245 in salaries and wages, and an ordinary income of \$204,819. Schedule L shows that it had -\$65,435 in net current assets.

The director concluded that evidence failed to establish that the petitioner had demonstrated that it had the ability to pay the proffered wage as of the filing date of the labor certification. We concur. The petitioner's 1998-1999 figures shown on its 1998 tax return indicate that it showed a substantial loss of ordinary income as well as a negative balance as net current assets. Neither figure is sufficient to meet the proffered wage of \$20,020 as of the priority date, January 29, 1999. As noted above, 8 C.F.R. § 204.5(g) requires that the petitioner demonstrate its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel submits copies of the petitioner's bank statements covering January 1, 1999 through November 30, 1999 in order to support her assertion that the petitioner had sufficient income to meet the beneficiary's offered wage as of the priority date. There is no proof, however, that these figures somehow represent additional funds beyond those reflected in the tax returns covering that period of time.

The record on appeal also contains a letter from the petitioner's owner. It states that the position of full-time cook that the beneficiary's is filling is not a new position, thereby implying that the beneficiary would be replacing a previous employee. Absent evidence regarding the identity and actual salary of the employee who has left the organization, this factor may not be considered.

On appeal, counsel also contends that the director's decision does not take into consideration the petitioner's depreciation, real estate assets, and gross income as set forth on the 1998 tax return. In determining the petitioner's ability to pay the proffered wage, the Bureau 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 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); *K.C.P. Food Co. 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). It is also noted that real property is not representative of assets that can easily be converted to cash.

Based on the evidence contained in the record, the petitioner has not persuasively demonstrated its ability to pay the proffered wage as of the January 29, 1999 priority date 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.