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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 02 143 50848 Office: VERMONT SERVICE CENTER Date: OCT 21 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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 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.

Helen E. Crawford for

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 an "other worker." The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, current counsel argues that depreciation should be added back to the petitioner's taxable income when determining the petitioner's financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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) states 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 02, 2001. The beneficiary's salary as stated on the approved labor certification is $12.00 per hour or $24,960 annually. The evidence in the record indicates that the petitioner has employed the beneficiary since 1998.

The petition was filed on March 26, 2002. As evidence of its ability to pay, the petitioner submitted a copy of its Form 1120 U.S. Corporation Income Tax Return for the year 2000. This return showed that the petitioner declared a taxable income before net operating loss deduction (NOL) and special deductions of -$10,013. Schedule L showing current assets and liabilities indicated that the petitioner's

net current assets were $839. The beneficiary's offered wage could not be met by either of these figures.

On May 13, 2002, the director requested further evidence relevant to the petitioner's ability to pay pursuant to the requirements at 8 C.F.R. § 204.5(g)(2). The director also requested the original Dept. of Labor Form ETA-750, Parts A and B. The petitioner responded by submitting the original Form ETA-750 and a copy of the beneficiary's 2001 W-2. Her W-2 shows that the petitioner paid her $6,843.75 in wages for that year.

The director denied the petition. He determined that the petitioner had not established its continuing ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. The director also noted that the beneficiary's wage for 2001 was less than the proffered wage.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. It was not available at the time that it was previously requested by the director. Current counsel contends that the petitioner's depreciation of $10,025, as shown on its 2001 corporate tax return, should be applied toward the proffered wage. Counsel also states that the petitioner's salary was included in the salaries and wages that the petitioner declared on its 2001 tax return.

The petitioner has not established its ability to pay the proffered wage of $24,960. 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).

In this case, the petitioner's 2001 corporate tax return shows that it claimed -$10,121 as taxable income before the NOL and other special deductions. Schedule L indicates that the petitioner had -$312 in net current assets. The difference between the proffered wage and the sum that the petitioner paid the beneficiary in 2001 was $18,116.25. This amount could not be covered by either the petitioner's net current assets figure or its negative taxable income for that year.

As noted by the director, the petitioner has not submitted sufficient persuasive evidence to establish its ability to pay the beneficiary's offered wage as of the visa priority date of April 02, 2001 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.