

**PUBLIC COPY**

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 Eye Street N.W.  
Washington, D.C. 20536

OCT 28 2003

File: EAC 02 083 54251 Office: VERMONT 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 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 preference 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 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 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 statement 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 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 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 day the Form ETA 750 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 Form ETA 750 was accepted on November 20, 2000. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which equals \$39,291.20 per year.

With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage. Subsequently, counsel submitted a letter, dated September 24, 2001, from the petitioner's accountant and a copy of the petitioner's 2000 Form

1120S U.S. Income Tax Return for an S Corporation.

The accountant's letter states that the petitioner has the ability to pay the proffered wage. The tax return shows that, during 2000, the petitioner declared an ordinary income from trade or business activities of \$7,955. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage, the Vermont Service Center, on March 14, 2002, requested additional evidence pertinent to that ability. The Service Center requested evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested a copy of the petitioner's 1999 tax return.

Counsel responded with a letter, dated April 4, 2002, with which he provided a copy of the petitioner's 1999 tax return, but observed that the priority date of the petition is November 20, 2000. This office notes that, because the priority date of the petition is November 20, 2000, information pertinent to the petitioner's income and assets during 1999 is not directly pertinent to the petitioner's ability to pay the proffered wage or to any other issue in this case.

Counsel also provided a copy of the accountant's September 24, 2001 letter, but submitted no other evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 13, 2002, denied the petition.

On appeal, counsel provided an additional letter, dated September 5, 2002, from the petitioner's accountant and a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation.

The 2001 tax return shows that the petitioner declared ordinary income from trade or business of \$9,098 during that year. The corresponding Schedule L was not submitted with that return.

The accountant's letter stresses the petitioner's gross receipts, gross profits, compensation to officers, and salaries and wages paid during 1999, 2000, and 2001. The accountant also noted that the petitioner has never had a problem meeting its payroll obligations. The accountant stated that she foresaw that the petitioner would have no problem paying the proffered wage.

On the brief, counsel noted that the salaries paid by the petitioner exceed the proffered wage. Counsel also stated that some portion of those salaries were paid to part-time, temporary employees who would be eliminated if the petitioner employed the beneficiary. Counsel supplied no information from which any savings might be projected and provided no evidence of his assertion that the petitioner would replace other employees.

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentary evidence are competent to show the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. An accountant's opinion is not competent to show the ability to pay the proffered wage. Without competent evidence in the record to support it, the accountant's opinion is of no weight. Because counsel submitted no annual reports and no audited financial statements, the petitioner's income tax returns are the only competent evidence in the record pertinent to the petitioner's finances and ability to pay the proffered wage.

Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses\*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In determining the petitioner's ability to pay the proffered wage, CIS 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 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that INS (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.

---

\* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date of the petitioner is November 20, 2000. The proffered wage is \$39,291.20 per year. During 2000, the petitioner need not show the ability to pay the entire proffered wage, but only that portion which would have been due had the petitioner been able to employ the beneficiary beginning on the priority date. On the priority date, 324 days of the 366-day year had passed, and 42 days remained. As to 2000, the petitioner is only obliged to show the ability to pay the proffered wage during the remaining 42 days. The proffered wage times  $42/366^{\text{th}}$  equals \$4,508.83. The petitioner had ordinary income of \$7,955 during 2000. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner is obliged to show the ability to pay the entire \$39,291.20 proffered wage during 2001. During that year, the petitioner had ordinary income of \$9,098. Counsel did not provide the petitioner's 2001 Schedule L, from which the petitioner's net current assets could have been calculated. The petitioner has not demonstrated its ability to pay the proffered wage during 2001 out of either its income or its assets.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.