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U.S. Department of Homeland Security

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

**001 28 2003**

File: SRC 01 260 52354 Office: NEBRASKA 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner has retained at least two different attorneys while this petition had been pending. All representations will be considered, but the decision will be furnished only to the petitioner and its current attorney of record.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a tandoori chef. 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, the petitioner's present 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 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 January 5, 2000. The proffered wage as stated on the Form ETA 750 is \$560 per

week, which equals \$29,120 per year.

With the petition, the petitioner's previous counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$0 during that year. The accompanying Schedule L shows that the petitioner's current assets at the end of that year totaled \$7,160 and its current liabilities were \$1,870, which yields net current assets of \$5,290.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on April 3, 2002, requested additional evidence pertinent to that ability.

The Service Center emphasized that the petitioner is obliged to show that it had the ability to pay the proffered wage beginning on the priority date and to show that it continues to have that ability. The Service center further emphasized that the evidence must include copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted statements for the petitioner's checking account with one bank for each month from July 2000 to April 2001, statements for a checking account with another bank each month from May 2001 through May 2002, and statements for an account with a third bank from November 2001 through May 2002.

Counsel also submitted what purport to be the petitioner's monthly financial statements for each month from January 2001 to November 2001, and for January through April 2002. No evidence was submitted to suggest that those reports were produced pursuant to an audit.

Further, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared a loss of \$21,305 as its taxable income before net operating loss deduction and special deductions during that year. The accompanying Schedule L was photocopied such that part of the page was not copied. The amounts of the petitioner's year-end current assets and current liabilities do not appear on that photocopy.

With the evidence submitted in response to the request for evidence, counsel submitted no statement to indicate any way in which that evidence may be read as having demonstrated 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 17, 2002, denied the petition.

On appeal, counsel stated:

The Service erred (sic) in its decision when determining that the petitioner did not have enough income to pay the beneficiary the offered/prevaling wage.

Subsequently, counsel submitted a brief, copies of the petitioner's 1995, 1996, 1997, and 1998 tax returns, a complete copy of the petitioner's 2001 Schedule L, and copies of documents previously submitted and discussed above. Because the priority date is January 5, 2000, the information from previous years' tax returns has no direct relevance to the ability of the petitioner to pay the proffered wage or to any other issue in this case.

The 2001 Schedule L shows that the petitioner ended the year with current assets of \$5,685 and current liabilities of \$4,122, which yields net current assets of \$1,563.

In the brief, counsel stated that the director erred in finding that the petitioner failed to submit evidence sufficient to demonstrate its ability to pay the proffered wage. Counsel further stated that the director apparently did not consider all of the evidence.

This office does not find that conclusion to be apparent, and counsel did not state any theory pursuant to which the evidence submitted might be taken to demonstrate the petitioner's ability to pay the proffered wage.

Had the petitioner submitted audited financial statements, those financial statements would have evidentiary weight and be considered as evidence of the ability to pay the proffered wage. The financial statements the petitioner submitted, however, are not accompanied by the accountant's report or by any other evidence to indicate that they were produced pursuant to an audit. Those financial statements have no evidentiary value and will not be considered.

Counsel's reliance on the bank account statements in this case is inapposite. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. Third, bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage. The balances shown on the petitioner's bank account

statements will not be considered.

Instead, the Service will rely on the petitioner's federal tax returns, which are the only evidence in the file of any type recognized by 8 C.F.R. § 204.5(g)(2) as competent evidence of a petitioner's ability to pay a proffered wage.

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 the 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. Supp. at 1084.

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. On a Form 1120 U.S. Corporation Income Tax Return, the net income figure is the taxable income before net operating loss deduction and special deductions.

The priority date is January 5, 2000. During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of \$0 and had year-end net current assets of \$5,290. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner is obliged to show the ability to pay the entire proffered wage during 2001. During that year, the petitioner declared a loss of \$21,305. The petitioner ended the year with net current assets of \$1,563. Counsel submitted no evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2000 and 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.