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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS  
CIS, AAO, 20 MASS, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



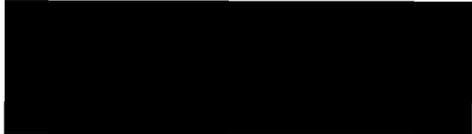
SEP 24 2003

File: EAC 01 170 52090 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:



**PUBLIC COPY**

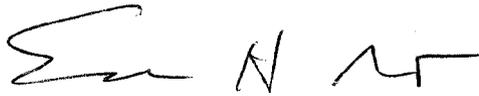
INSTRUCTIONS:

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 the 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, 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 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 the petitioner had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel provides 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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on 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 May 8, 1997. The beneficiary's salary as stated on the labor certification is \$9.65 per hour which equates to \$20,072.00 per annum.

The petitioner initially failed to submit any evidence of its

ability to pay the proffered wage as of the filing date of the petition. On October 9, 2001, the director requested evidence of the petitioner's ability to pay the proffered wage to include the petitioner's 1997 through 2000 federal tax returns.

In response, counsel submitted a copy of the petitioner's 1999 Internal Revenue Service (IRS) Schedule C, Profit or Loss from Business which showed a net profit of \$33,769, and a copy of the petitioner's IRS Form 1120S for 2000 which showed ordinary profit of \$5,977.

Counsel also submitted a copy of a 1998 IRS Schedule C, Profit or Loss from Business for [REDACTED] which showed a net profit of \$20,529, and a copy of IRS Form 1120 for [REDACTED] Inc. for fiscal year from August 1, 1997 through July 1, 1998 which showed a taxable income of \$9,134.

The director determined that this evidence did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly. The director noted that:

The 1998 income tax return reflects a business referred to [REDACTED] located at [REDACTED] in [REDACTED]. The name of your present business is [REDACTED] located at [REDACTED] in [REDACTED]. Therefore, it does not appear that the 1998 income tax is at all related to the petitioning business.

On appeal, counsel submits a copy of IRS Form 1120 for [REDACTED] for one fiscal year from August 1, 1996 through July 31, 1997 which shows a taxable income of \$1,722, and copies of the beneficiary's W-2 Wage and Tax Statement which show he was paid \$4,169.00 in 1997, \$4,620.00 in 1998, \$6,000 in 1999, and \$5,460.00 in 2001.

Counsel argues that:

Petitioner also requests that the Service kindly consider the 1998 taxes of [REDACTED] because Petitioner, [REDACTED] sold that business and invested this \$20,529 into [REDACTED]. The Business has been growing ever since. See hereto attached 1999 taxes with \$33,769 in net profit. Also in 2000, Petitioner incorporated the business. The business shows a net profit of \$5,977 and a cash value \$2,479. Upon considering the depreciation + cash value + net

value + Beneficiary's W-2 = sufficient money to fulfill the pro-offered wage.

In determining the petitioner's ability to pay the proffered wage, the CIS 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 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 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. The court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent 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.

A review of the IRS Form 1120 for fiscal year from August 1, 1997 through July 31, 1997 shows a taxable income of \$1,722. The petitioner could not pay a salary of \$20,072.00 a year from this figure, even adding to it the \$4,169.00 shown on the beneficiary's W-2.

It appears that the petitioner could pay the salary offered in 1998 and 1999; however, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the 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.