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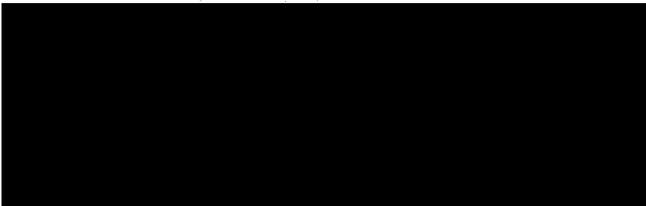
FILE: WAC 02 151 51138 Office: CALIFORNIA SERVICE CENTER Date:

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 of the Administrative Appeals Office 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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) 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)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established its ability to pay the proffered wage.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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. . . . 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 [CIS].

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 15, 1998. The beneficiary's salary as stated on the labor certification is \$2,002 per month or \$24,024 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1990 and is organized as a corporation.

The petitioner, through counsel, initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998 and 1999 as evidence of its ability to pay the proffered wage. It also submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000. The 1998 corporate tax return shows that the petitioner declared a taxable income before the net operating loss (NOL) deduction and special deductions of -\$16,410. Schedule L of this tax return reflects that the petitioner had -\$21,417 in current assets and \$2,763 in current liabilities, resulting in -\$24,180 as the petitioner's net current assets. CIS will review a petitioner's net income as well as net current assets as part of the determination of a petitioner's ability to pay the proffered wage. Net current assets represent cash or cash equivalents that would reasonably be available to pay a beneficiary's proposed salary during the year covered by the balance sheet as shown in Schedule L of a petitioner's federal tax return. Here, in 1998, neither the petitioner's taxable income, nor its net current assets

could cover the beneficiary's wage offer of \$24,024 per year.

The 1999 corporate tax return reflects that the petitioner had \$1,393 in taxable income before the NOL and special deductions. Schedule L shows that it had \$8,359 in current assets and \$3,663 in current liabilities, resulting in \$4,696 in net current assets. The petitioner could not pay the proffered wage out of either its taxable income or its net current assets in 1999.

The 2000 tax return shows that the petitioner declared \$12,800 as ordinary income. Schedule L indicates that it had \$15,213 in current assets and \$5,002 in current liabilities. The difference of \$10,211 represents the petitioner's net current assets. Neither its ordinary income, nor its net current assets were enough to cover the beneficiary's wage offer of \$24,024.

On May 23, 2002, the director requested additional evidence from the petitioner to support its continuing financial ability to pay the beneficiary's wage offer of \$24,024. The director instructed the petitioner to demonstrate its ability to pay the proffered wage by submitting either copies of signed federal tax returns, annual reports, or audited financial statements from January 1998 to the present. The petitioner was also advised to submit copies of its state quarterly wage reports for the last four quarters filed, copies of payroll records evidencing wages paid to employees, and copies of its federal quarterly tax returns.

Along with the requested state wage reports and its federal quarterly tax returns, the petitioner responded with a copy of an unaudited balance sheet and income statement for the period ending December 31, 2001, as well as an undated copy of a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for the year 2001.

The director denied the petition, noting that the petitioner's declared net income was not sufficient to meet the proffered wage for the years 1998 through 2000, as shown on the corporate tax returns. The AAO concurs and would further note that the unaudited materials submitted to represent the financial health of the petitioner in 2001 provide little evidentiary support, as they are internally generated documents and are solely management's representations.

On appeal, counsel includes a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. It indicates that the petitioner had \$21,697 in ordinary income. Schedule L shows that the petitioner had \$18,909 in current assets and \$73,608 in current liabilities, producing -\$54,699 in net current assets. Similar to the other relevant years, neither the petitioner's net current assets, nor its taxable income were sufficient to meet the beneficiary's proffered wage in 2001.

Counsel asserts on appeal that the petitioner's ability to pay the proffered wage should also include non-cash deductions such as depreciation and amortization as set forth in a letter from a bookkeeping and accounting service. This argument is not persuasive. 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). Depreciation as the decreased value of the assets of a business is not considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

Counsel also offers copies of the petitioner's bank statements covering a period from January 1998 through December 2000, as well as an unaudited income statement and balance sheet for the six-month period ending June 30, 2002. A review of the figures contained on the bank statements indicate that the highest monthly ending balance was approximately \$9,000 with a more common range of ending balances between \$1,000 and \$4,000. They reflect only a partial picture of the petitioner's ability to pay as they do not reflect other liabilities and do not represent a consistent sustainable source out of which the annual proffered wage of \$24,024 could be paid. Similarly, the petitioner's unaudited internally generated 2002 financial statements have little independent probative value because, like the previously submitted 2001 financial statements, they represent solely management representations of the petitioner's financial data. Additionally, the regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that an unaudited document is an acceptable form of evidence of the petitioner's ability to pay the proffered wage.

Counsel maintains that the petitioner has sustained losses at another restaurant that it operates and this affected the combined figures reported on its tax return. It is unclear why, if the petitioner elects to operate two businesses and report their combined income and expenses on its tax returns, CIS should disregard those encumbrances in its review of the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a continuing ability to pay a proposed wage offer through annual reports, audited financial statements, or federal tax returns. Additional documentation may be offered, but it cannot be substituted for the required evidence. In the instant case, the petitioner could not persuasively establish, in any of the relevant years, that either its net current assets or its net income could meet the beneficiary's proffered wage of \$24,024 per year.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

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.