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U.S. Citizenship
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invasion of personal privacy**

BL

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

APR 08 2004

IN RE:

Petitioner:

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:

[Redacted]

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 initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a notice of intent to revoke the approval of the preference visa petition, together with his reasons therefore. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought 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 a skilled worker. The petitioner is a Filipino/Chinese restaurant and catering business. It sought to employ the beneficiary permanently in the United States as a Filipino specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on February 5, 2001. It was approved on May 14, 2001. When the alien beneficiary filed an application to adjust his status to that of lawful permanent resident (Form I-485), the director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary's proffered wage and that the I-140 had been approved in error. He issued a notice of intent to revoke the approved I-140 on June 19, 2002. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on September 27, 2002.

On appeal, the petitioner, through counsel, asserts that the evidence demonstrates that it had the continuing ability to pay the beneficiary's proffered wage.

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(i) of 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 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is

October 2, 2000. The beneficiary's salary as stated on the labor certification is \$11.55 per hour based on a 40-hour week, or \$24,024 annually. The record indicates that the petitioner is organized as a corporation. The visa preference petition reflects that it was established in 1996 and employs three people.

With the petition, counsel submitted a copy of the petitioner's 1999 Form 1120, U.S. Corporate Income Tax Return. It reflects that the petitioner files its tax returns on a calendar year basis. During the calendar year of 1999, the petitioner's taxable income before net operating loss (NOL) deductions and special deductions was \$4,297. Schedule L of the tax return shows that the petitioner had \$120 in net current assets.

The director subsequently requested additional financial information from the petitioner in support of its ability to pay the proposed salary of \$24,024 per year. On February 25, 2002, the director requested the petitioner's 2000 and 2001 federal tax returns and advised the petitioner that it must demonstrate the ability to pay the proposed wage as of the priority date and until the beneficiary obtains lawful permanent residence. The petitioner's response included a copy of the petitioner's federal quarterly tax return for the quarter ending December 31, 2001, showing that it paid \$18,300 in wages for that quarter and \$75,000 in salaries and wages in 2001. The petitioner also submitted a copy of its 2000 corporate federal tax return. This tax return is more relevant to the determination of the petitioner's ability to pay the proffered wage than the 1999 return because it covers the priority date of October 2, 2000. It indicates that the petitioner declared a taxable income before the NOL deduction of \$12,158. Schedule L shows that it had \$12,278 in current assets and declared no current liabilities. The difference between current assets and current liabilities represents a petitioner's net current assets or level of liquidity at the end of the filing year. Net current assets are assets that could reasonably be expected to be converted to cash or cash equivalents within the year to be available to pay the proffered wage. As noted by counsel on appeal, since the priority date is October 2, 2000, on a prorated basis, either the petitioner's taxable income or its net current assets were sufficient to meet the remaining \$3,949 portion of the proffered wage for that calendar year.

On June 19, 2002, the director issued a notice of intent to revoke the approved I-140. The director noted that the 1999 and 2000 federal tax returns did not establish the petitioner's continuing ability to pay the proffered salary. The director cited the regulation at 8 C.F.R. § 204.5(g)(2) and further noted that the record did not contain a copy of the petitioner's 2001 tax return. The director afforded the petitioner thirty additional days to respond to the notice of intent to revoke the petition.

In response to the director's notice of intent to revoke the I-140, counsel submitted a copy of a letter, dated July 18, 2002, from the Bank of America, stating that the petitioner has a current savings balance of \$22,936.47 and a current checking account balance in two accounts totaling \$3,778.80. The letter also stated that the average balance of the three accounts was \$4,932.47 for the savings account, \$1,938.97 for one checking account and \$2,086.45 for the other checking account. Counsel also submitted a "Citi Platinum Select Card" credit card statement dated June 25, 2002. It does not show the cardholder's name. Counsel additionally submitted a duplicate copy of the petitioner's 2001 quarterly federal tax return, a duplicate copy of the petitioner's 2000 federal corporate tax return, a copy of the petitioner's 2000 state corporate tax return, a copy of a "Capital One" credit card statement, dated June 14, 2002, showing that the petitioner owed \$1,485.88, and copies of two other Capital One credit card statements, dated March and May 2002, respectively. The two Capital One account numbers are both different than the statement in the petitioner's name and the cardholder names are not shown. Finally, counsel submitted copies of two California Federal bank letters signed by a customer service representative. The two bank letters, dated July 11, 2002, reflect that Efrén and Suzita Chya had \$6,765.47 in a checking account and \$2,157.17 in a savings account.

Counsel maintains that the petitioner's ability to pay the proffered wage is shown by the petitioner's Bank of America letter, the credit card statements providing a total credit limit of \$20,600, and by the evidence that the petitioner paid its other employees' salaries and wages in 2000 and 2001.

On September 27, 2002, the director found that the petitioner had failed to demonstrate a continuing ability to pay the proffered wage and issued a notice of revocation. The director found that the petitioner's credit card statements did not persuasively establish its ability to pay. The AAO concurs. Only one of the credit card statements had the petitioner's name on it, showing a debt of \$1,485.88 and a credit line of \$3,500. A line of credit may, at a minimum, show a petitioner's ability to borrow money, but it cannot be considered evidence of a sustainable ability to pay a beneficiary's wage offer because it represents a liability if the petitioner borrows against it.

Similarly, the regulation at 8 C.F.R. § 204.5(g)(2) enumerates the three basic forms of evidence that a petitioner must submit. These are federal tax returns, audited financial statements, or annual reports. In this case, the petitioner was requested to submit its 2001 federal tax return, but it failed to do so, and failed to submit either an audited financial statement or an annual report covering this period. Nor does the Bank of America letter summarizing the petitioner's checking and saving accounts adequately establish the petitioner's continuing ability to pay the proffered wage. It only reflects a snapshot of the petitioner's financial picture and fails to reflect the petitioner's liabilities.

Counsel's assertion that the payment of wages to other employees supports the petitioner's ability to pay the proffered wage is also not persuasive. The record reflects that the beneficiary did not commence employment with the petitioner until 2002. As noted by the director, the petitioner must show that it can pay the proffered wage in addition to the salaries that it is currently paying. As the petitioner failed to submit sufficient convincing evidence covering the period after the year 2000, it has not established its continuing ability to pay the beneficiary's wage offer of \$24,024 per year. As noted above, 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a *continuing* ability to pay the proffered salary beginning at the visa priority date. (Emphasis added).

On appeal, counsel submits a copy of the petitioner's corporate tax return for 2001. It shows that the petitioner declared \$11,157 in taxable income before the NOL deduction and had \$21,611 in net current assets. Neither the petitioner's taxable income, nor its net current assets was sufficient to meet the beneficiary's proposed wage offer of \$24,024.

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). Depreciation as the decreased value of the assets of a business is 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 contends that the beneficiary's potential to generate income should be included in the consideration of the petitioner's ability to pay the proposed salary, citing *Masonry Masters Inc. v. Thornburgh* 875 F.2d 898 (C.A.D.C. 1989). That case held that INS [n/k/a CIS] had erred in insisting on evidence of the petitioner's ability to pay anything more than the prevailing wage at the time of the application for labor certification. At the conclusion of the decision, the court opined that the INS' focus on requesting an income statement from the petitioner appeared to assume that the worker would contribute nothing to the income, and stated that it would be helpful if the INS revealed its theory as to how it assessed the ability to pay a wage. In this case, counsel has described the beneficiary's experience as a chief chef on a cruise ship and suggested that he will help the petitioner's business, but has provided no basis or criterion for the evaluation of such a contribution to earnings.

Counsel asserts on appeal that another business' resources, operated as a sole proprietorship by the petitioner's owner, should be considered in the petitioner's ability to pay the proffered wage. Counsel submits a partial copy of a 2001 federal tax return consisting of only a Schedule C, Profit or Loss From Business. It identifies the petitioner's owner as the proprietor and indicates only that he operates a restaurant. No restaurant name or address is identified, but a net profit of \$15,510 is declared on line 31. Counsel's assertion is not convincing. Notwithstanding the questionable quality of this evidence, there is nothing in the governing regulation at 8 C.F.R. § 204.5 allowing CIS to consider the financial resources of individuals or entities that have no legal obligation to pay the proffered wage. See *Sitar v. Ashcroft*, (2003 WL 22203713 (D. Mass.)).

Counsel finally asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*. Nor has it been shown that 2000 was an uncharacteristically unprofitable year for the petitioner. Counsel's contention that the mere addition of the beneficiary to the petitioner's business will increase revenues is not supported by any evidence in the record and is too speculative for consideration.

Accordingly, based on the evidence contained in the record and the foregoing discussion, the petitioner has not demonstrated its continuing ability to pay the proffered wage 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.