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

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

File: EAC 02 045 53957 Office: VERMONT SERVICE CENTER Date: **APR 13 2004**

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.

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 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 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. Here, the Form ETA 750 was accepted on February 26, 2001. The

proffered wage as stated on the Form ETA 750 is \$700 per week, which equals \$36,400 per year.

The Form I-140 petition states that the petitioner employs 100 workers. With the petition counsel submitted a letter, dated October 15, 2001, from the petitioner's vice president. That letter states that the petitioner employed "about 100 people and realized a gross annual income in excess of \$5 million during 2000." The letter also stated that the petitioner "clearly [has] the ability to pay" the proffered wage.

Counsel also provided a 2000 Form W-2 Wage and Tax Statement and an Earnings Summary. Those documents show that the petitioner paid the beneficiary gross pay of \$17,643.91 during that year, from which it subtracted meal expense of \$648 to equal Form W-2 line one Wages, Tips, and Other Compensation of \$16,995.91 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on January 25, 2002, requested additional evidence pertinent to that ability. The Service Center requested evidence for each year beginning on the priority date that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a letter, dated March 21, 2002, in which he stated that the petitioner has had the continuing ability to pay the proffered wage since the priority date. Counsel cited the petitioner's gross receipts, salary and wage expense, total assets, and bank balances as indices of that ability.

With that letter, counsel submitted copies of (1) the petitioner's business bank account statements for January, February, and March of 2001 and for January, February of 2002, (2) a 2001 W-2 form and Earnings Summary showing wage payments the petitioner made to the beneficiary during that year, and (3) the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return.

The Earnings Summary shows that the petitioner paid the beneficiary \$16,513.11 during 2001, reduced by \$601.50 for meals, to equal W-2 form line one Wages, Tips and Other Compensation of \$15,911.61.

The 2000 tax return shows that the petitioner declared a loss of \$54,885 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 27, 2002, denied the petition.

On appeal, counsel again asserts that the petitioner's gross receipts, wage and salary expense, and bank balances show that it is able to pay the proffered wage. Counsel noted that the petitioner has opened two additional restaurants since it first commenced operations and that the petitioner's expansion has been funded, in part, by shareholder loans, resulting in liabilities reported on the petitioner's tax returns.

Counsel further asserts that the petitioner's failure to declare a profit during the salient years should not be construed as a flaw, as it was the result of allowable business deductions. With the appeal, counsel provides copies of additional monthly bank statements.

This office notes that the petitioner claims to employ 100 employees or approximately 100 employees. 8 C.F.R. § 204.5(g)(2) states, as is noted above, that if the petitioner employs 100 or more workers, CIS may accept, in lieu of documentation of the petitioner's historical ability to pay the proffered wage, the statement of a financial officer of the company indicating that the petitioner has the ability to pay the proffered wage. The petitioner, however, never provided any evidence of its assertion that it employs 100, or roughly 100, workers. 8 C.F.R. § 204.5(g)(2) does not indicate that CIS may accept the unsupported assertion of the petitioner that it employs 100 or more workers.

Further, in the letter of October 15, 2001, the petitioner vice president did not unequivocally state that the petitioner employs 100 or more workers.

Counsel's reliance on the bank statements in this case is misplaced. 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 its tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and probative evidence of a petitioner's ability to pay a proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Counsel's observation that the petitioner's income was reduced by allowable deductions is not on point. Unless the petitioner can show that

hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income², 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 taxable income before net operating loss deduction and special deductions.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the taxable income before net operating loss deduction and special deductions 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 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. 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.

Because the Form I-140 petition in this matter was submitted on November 20, 2001, the petitioner's 2001 tax return was not yet available. The request for additional evidence of the petitioner's ability to pay the proffered wage was issued on January 25, 2002, when the petitioner's 2001 tax return was also unlikely to be completed. The petitioner could presumably have submitted its 2001 tax return with its appeal, which was submitted on October 24, 2002, or with the brief it filed to supplement that appeal, which was submitted on December 13, 2002.

¹ 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.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

Under these circumstances, however, the petitioner's failure to provide its 2001 tax returns shall be excused.

The petitioner is still obliged, however, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is February 26, 2001. In the absence of evidence directly pertinent to the petitioner's ability to pay the proffered wage during 2001, this office must rely on the best available evidence, evidence of the petitioner's income and assets during 2000. In view of the excused absence of any other evidence, this office must assume that the petitioner's performance during 2000 was typical of the its performance during other years.

The proffered wage is \$36,400 per year. The petitioner paid the beneficiary total compensation of \$16,995.91 during 2000 and must show the ability to pay the remaining \$19,404.09. During 2000, the petitioner declared a loss of \$54,885 and ended the year with negative net current assets. The petitioner's income and assets during that year, the only year for which data was submitted, were insufficient to pay the balance of the proffered wage.

The petitioner has not demonstrated 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.