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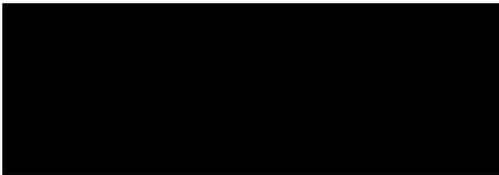
FILE: EAC-01-256-51643 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: 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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Brazilian specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Brazilian specialty. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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) 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 turns, in part, 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. The petition's priority date in this instance is May 11, 1998. The beneficiary's salary as stated on the labor certification is \$459.00 per week or \$23,868.00 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 16, 2001 the director required evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The director specifically requested copies of the petitioner's U.S. federal income tax returns for the years 1998, 1999 and 2000, with all schedules and attachments.

Counsel's initial submission lacked sufficient evidence on the beneficiary's experience, and the RFE also requested additional evidence on that issue.

In response to the RFE counsel submitted copies of the first page of Form 1120S U.S. federal income tax return for the petitioner for the years 1998, 1999 and 2000. Concerning the beneficiary's experience counsel submitted an affidavit dated April 8, 1998 from Real Contabilidade Serrana Ltda. of Serro, Minas Gerais, Brazil, with certified English translation; and an undated affidavit from the Secretariat of State for the Child and Juvenile, Government of the State of Minas Gerais, Brazil, with certified English translation.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

In the notice of appeal counsel checked the block indicating that a brief and/or evidence would be submitted to the AAO within thirty days. Nonetheless, to date no additional documentation is in the file.

Counsel states on appeal that the director improperly relied on the net income of the petitioner when evaluating the petitioner's ability to pay the proffered wage and failed to consider all of the evidence provided in support of the petition.

The director found that the petitioner's tax returns showed net losses of -\$5,541 for 1998, -\$2,432 for 1999 and -\$4,106 for 2000. The director found that these amounts were insufficient to establish the ability of the petitioner to pay the proffered wage of \$23,868.00. The director rejected counsel's assertion that the director should look to the gross revenues of the petitioner rather than to the net income when evaluating the petitioner's ability to pay the proffered wage. The director also rejected the assertion of counsel that the beneficiary would be performing many of the duties formerly performed by the petitioner's owner, services which purportedly accounted for a substantial portion of the petitioner's expenses. The director noted that the Form 1120S in evidence indicated a total of only \$362 paid for compensation of officers and \$1,444 for salaries and wages.

With regard to the net losses of the petitioner, the director's analysis was correct. The figures cited by the director were taken from Line 21 of the Form 1120S for the years 1998, 1999 and 1999, showing the petitioner's ordinary income as negative in each of those years.

The director was also correct in looking to the net income, rather than to the gross income of the petitioner in evaluating the petitioner's ability to pay the proffered wage. 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. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc.*, *supra* at 1084, the court held that 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.

Finally, the director was correct in rejecting counsel's assertion that a substantial portion of the expenses shown on the petitioner's tax returns were for payments to the petitioner's owner for services which in the future would be performed by the beneficiary. The assertions of counsel were not supported by evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In discussing the above point the director referred to a total shown on Form 1120S of \$362 paid for compensation of officers and \$1,444 for salaries and wages. The director's reference incorrectly suggests that those figures represent a total for those items for the three years of tax returns submitted, for 1998, 1999 and 2000. In fact, those figures represent only the amounts for compensation of officers and for salaries and wages shown on the petitioner's tax return for 1999. Nonetheless, the figures for those items on the returns for 1998 and for 2000 are similar to the figures on the return for 1999. For 1998, the year of the priority date, the petitioner's tax return shows no amount paid for compensation of officers and \$176.17 paid for salaries and wages. For 2000 the petitioner's tax return shows no amount paid for compensation of officers and \$4,301.10 paid for salaries and wages. Those amounts are insufficient to cover the amount of the proffered wage, even if it were assumed that after being hired the beneficiary would be performing the services for which those payments were made.

The petitioner failed to submit copies of the Schedule L with each return, showing the petitioner's assets and liabilities. Therefore the record contains no basis for an evaluation of whether the net current assets of the petitioner during the relevant time period were sufficient to pay the proffered wage.

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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.