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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: LIN 02 079 51262 Office: NEBRASKA SERVICE CENTER

Date: APR 21 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.

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 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, Nebraska Service Center. A motion to reopen was granted by the director, and the previous decision was affirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

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.

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, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$1,550 per month, which equals \$18,600 per year.

With the petition the petitioner submitted the petitioner's owner's and owner's spouse's 1998, 1999, and 2000 Form 1040 joint

personal income tax returns. Ownership is demonstrated by the corresponding Schedules C included with those returns. This office notes that, because the priority date is April 25, 2001, figures on those returns are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on March 12, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested a copy of the petitioner's owner's 2001 Form 1040 tax return, a list of the petitioner's owner's monthly expenses, and evidence of the petitioner's savings account balances.

In response, the petitioner submitted the requested documents. The petitioner's monthly budget states that the petitioner's owner has no mortgage or rent expense, no automobile payments, no installment loan payments, no credit card payments, and no household expenses. That budget also indicates that the petitioner's owner pays an electric bill of \$30.79, a gas bill of \$82.50, a telephone bill of \$37.76, and a cable bill of \$39.05 each month. Those monthly expenses indicate total annual expenses of 2,281.20.

A letter, dated March 26, 2002, from the petitioner's owner's bank gives balances of the petitioner's owner's two accounts. The letter states that one of those accounts was opened on September 18, 1998 and the other on July 20, 2000.

The petitioner's owner's 2001 Schedule C, Profit or Loss from Business (Sole Proprietorship) submitted with her Form 1040 tax return, indicates that the petitioner returned a net profit of \$6,303 during that year. The 2001 Form 1040 shows that the petitioner's owner declared an adjusted gross income of \$33,138 during that year, including all of the petitioner's profit, and has one dependent.

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 August 19, 2002, denied the petition.

With the motion to reopen to the director of the service center, counsel submitted copies of the petitioner's unaudited financial statements. 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

Counsel also submitted (1) a letter, dated September 12, 2002, from the customer service representative of a bank stating the balances of the petitioner's owner's accounts, (2) a letter, dated October 12, 2000, from the Loan Servicing Payoff Department of the same bank indicating that the petitioner's owner had paid off a loan, (3) a 2001 property tax bill addressed to the petitioner's owner and owner's spouse, and (4) the Schedule L from a 2001 Form 1120S U.S. Income Tax Return for an S Corporation for Confucius Restaurant.

The September 12, 2002 letter from the bank's customer service representative is from the same bank that previously reported that the petitioner had two accounts, one opened on September 18, 1998 and the other on July 20, 2000. The newer letter states that the petitioner also had two more accounts, an additional one opened on July 20, 2000 and one opened on June 27, 2001. Neither the customer service representative, nor the petitioner, nor counsel addressed the omission of those two accounts from the previous letter.

In her argument on the motion, counsel refers to the Schedule L stating that it reflects:

Documents valuing the sole proprietor's 33.33% ownership interest in Confucius Restaurant are attached hereto as Exhibit H. The value of that interest is \$189,790.

Exhibit H is not a partial ownership valuation but, as was stated above, is part of a Form 1120S U.S. Income Tax Return for an S Corporation. Further, counsel provided no evidence that the tax return pertains to the petitioner in any way.

On November 18, 2002, the Director, Nebraska Service Center, again ruled that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage and affirmed the previous decision denying the petition.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the failure of the petitioner's net income during a certain year to equal or to exceed the proffered wage is not dispositive. Counsel urges that:

[D]enial . . . is not mandated . . . where there is evidence that the size of the [petitioner's] business has increased, there are reasonable expectations of continued increase in business and profits, and the [petitioner] has the present ability to [pay the proffered wage].

Counsel further asserts that the petitioner's depreciation expense

is not an out-of-pocket expense and should be included in the determination of the ability to pay the proffered wage as a fund available for that purpose.

Counsel provides additional financial statements on appeal. The accountant's report that accompanied those statements, however, indicates that it was produced pursuant to a compilation, rather than an audit. A compilation contains the representations of management compiled into a standard format. The representations of management are not competent and probative evidence of the ability to pay the proffered wage. Again, the unaudited financial statements shall not be considered pursuant to 8 C.F.R. § 204.5(g)(2).

Counsel asserts that the petitioner's owner's personal income is sufficient to pay the proffered wage and that, in addition, the petitioner's owner has substantial assets with which to pay the proffered wage. Counsel submits documentation showing ownership of that house and asserts, but does not demonstrate, that the value of the petitioner's owner's house is at least \$111,300.

Counsel stated that the petitioner's owner owns a 1/3rd interest in the Confucius Restaurant, which counsel represents to be worth \$189,790. Again, counsel misrepresents the Schedule L described previously as "documentary evidence of the value of the partnership interest." That portion of a tax return neither values a partial ownership of the restaurant nor demonstrates the identity of any of its owners.

Counsel has not demonstrated the value of the petitioner's home. Further, real estate is not generally the sort of liquid asset that might feasibly be used to pay a proffered wage. The alleged value of the petitioner's owner's home will not be included in the calculation of the funds available to pay the proffered wage.

Counsel has alleged, but not demonstrated, that the petitioner's owner also owns one-third of a restaurant called the Confucius Restaurant. Counsel has alleged, but not demonstrated, that the value of the petitioner's owner's partial interest is \$189,790. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The alleged value of the petitioner's owner's alleged partial ownership of the Confucius Restaurant will not be considered.

Counsel states that the petitioner's depreciation deductions during various years should be considered funds available to pay the proffered wage. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and

equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532, 537 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. 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*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily first 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 (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 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.

In this case, however, the petitioner is a sole proprietorship. As such, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of her own funds as necessary. Therefore, the petitioner's owner's personal income and assets, if sufficiently proven, are correctly considered in the determination of the petitioner's ability to pay the proffered wage.

The priority date is April 25, 2001. The proffered wage is \$18,600 per year. The petitioner is not obliged to demonstrate

the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 114 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 251 days. The proffered wage multiplied by $251/365^{\text{th}}$ equals \$12,790.68, which is the amount the petitioner must show the ability to pay during 2001.

During 2001, the petitioner's owner had an adjusted gross income of \$33,138. If the petitioner's owner had been obliged to pay the salient portion of the proffered wage out of that adjusted gross income, she would have been left with \$20,347.32. Although this office is somewhat skeptical of the petitioner's owner's assertion that she can maintain herself and her dependent on \$2,281.20 annually, this office is unable to state that the petitioner's owner cannot support herself and her dependent on the \$20,347.32 which would have been left after paying the proffered wage.

The petitioner has demonstrated the ability to pay the proffered wage during 2001. No information pertinent to 2002 was requested or provided. Therefore, the petitioner has demonstrated the ability to pay the proffered wage during the only salient year.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.