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20 Mass, Rm. A3042, 425 I Street, N.W.  
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U.S. Citizenship  
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FILE: EAC 02 183 53302 Office: VERMONT SERVICE CENTER

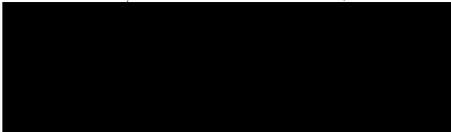
Date: APR 22 2004

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 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 employment based immigrant 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 seeks 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cashier and food checker supervisor. 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 submits additional information in support of the petitioner's ability to pay the proffered wage.

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) also 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 [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered 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 March 23, 2001. The beneficiary's salary as stated on the labor certification is \$480 week or \$24,960 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1991 and has eight employees.

The petitioner initially submitted an incomplete copy of its 2001 Form 1120S, Income Tax Return for an S Corporation. On September 15, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit annual reports, federal tax returns, or audited financial statements, as well as a complete federal tax return for 2001, and copies of the beneficiary's Wage and Tax Statements (W-2s), if the petitioner employed her.

The petitioner, through counsel, submitted copies of the beneficiary's 2001 W-2 and a copy of an October 6, 2002, pay stub. The W-2 reveals that the petitioner paid the beneficiary \$4,400 in wages during 2001. The pay stub shows that the petitioner paid the beneficiary \$6,100 in 2002, as of the issue date of the pay stub, and that the beneficiary earned \$400 during that pay period. The petitioner's corporate tax return reflects that the petitioner declared \$2,436 in ordinary income during 2001. Besides net income, Schedule L of the tax return shows a

petitioner's current assets and current liabilities. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets, as well as a petitioner's net income, because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, the petitioner had \$6,539 in current assets and \$18,335 in current liabilities, producing -\$11,796 in net current assets. As the visa priority date is March 23, 2001, the petitioner need only demonstrate the ability to pay the proffered wage for that portion of the year remaining after the priority date. In this case, however, neither the petitioner's ordinary income of \$2,436, nor its net current assets of -\$11,796 were sufficient to cover the \$14,320 that results after deducting the wages paid to the beneficiary from the approximate prorated 2001 salary of \$18,720. As such, the petitioner has not demonstrated its ability to pay the proffered wage.

On appeal, counsel resubmits a copy of the petitioner's 2001 tax return and offers a copy of its 2002 tax return, but makes no specific assertion as to the significance of either document. In determining the petitioner's ability to pay the proffered wage, CIS reviews 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

The 2002 return reveals that the petitioner declared an ordinary income of \$5,353 and had net current assets of -\$15,331. A copy of the beneficiary's 2002 W-2, submitted on appeal, shows that the petitioner paid her \$10,500 in wages. The difference between the wages already earned by the beneficiary and the proffered wage required by the terms of the labor certification is \$14,460. In 2002, the petitioner could not pay the additional \$14,460 out of either its ordinary income of \$5,353 or its net current assets of -\$15,331.

Although a 2003 pay stub, submitted on appeal, indicates that the petitioner is paying the beneficiary the proffered wage of \$480 per week, it remains unclear if she is employed full-time. Her year-to-date earnings as of the pay period of March 9, 2003 were \$2880, which appears to be somewhat less than a full-time salary if she had been employed since January 1<sup>st</sup>. Nonetheless, the petitioner failed to establish a continuing ability to pay the proffered wage beginning at the visa priority date. Eligibility for the visa classification must be established at the time of filing the petition. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

Following a review to the evidence contained in the record, and upon further consideration of the documentation presented on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered 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.

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**ORDER:** The appeal is dismissed.