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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 222 52592 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
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:



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*identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy*

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, California Service Center, and is now before the Administrative Appeals Office (AAO) 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 specialty chef. 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 a Form I-290B with a brief statement.

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 hinges 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. Here, the petition's priority date is December 28, 1998. The beneficiary's salary as stated on the labor certification is \$30,305.60 per annum.

With the petition, counsel provided an incomplete copy of the petitioner's 2001 tax return.¹ The director found this evidence insufficient, and issued a request for evidence on October 22, 2002. In that request, the director required the petitioner to submit complete copies of its federal tax returns from 1998 to the present, and additionally requested copies of the petitioner's quarterly wage reports for the previous four quarters. Counsel complied with this request, and in addition to the required documentation, counsel submitted a statement from the petitioner regarding its financial situation. The director found this additional evidence to be deficient, and consequently denied the petition on March 12, 2003.

On April 9, 2003, the petitioner's counsel filed Form I-290B with a statement advising the AAO that a brief and a statement from a financial expert would be submitted within thirty days. As of the date of this decision, no further documentation has been received in this office.

¹ Counsel for the petitioner also included three separate employment verification letters attesting to the work experience claimed by the beneficiary on the labor certification. Since the director's decision was not based on this issue, there is no need to further discuss the beneficiary's qualifications within the scope of this decision.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax returns, 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).

A review of the record shows that the petitioner submitted tax returns for 1998, 1999, 2000, and 2001. The AAO notes that the petitioner, originally a sole proprietorship, incorporated in 1999. The petitioner's adjusted gross income and business income for 1998, and ordinary income and net current assets from 1999 onward, is set forth below.

<u>Year</u>	<u>Adjusted Gross Income</u>	<u>Business Income</u>
1998	\$22,906.00	\$24,648.00
<u>Year</u>	<u>Ordinary Income</u>	<u>Net Current Assets</u>
1999	\$15,428.00	-\$ 3,804.00
2000	\$33,774.00	\$ 1,598.00
2001	\$27,258.00	\$ 9,471.00

In addition, quarterly wage statements for the petitioner were submitted for the quarters ending December 31, 2002, June 30, 2002, March 31, 2002, and December 31, 2001.² The wage reports shows that the petitioner paid the following amount of wages to the beneficiary:

<u>Quarter Ending</u>	<u>Amount Paid</u>
12/31/2002	\$1,140.48
06/30/2002	\$3,745.30
03/31/2002	\$3,256.38
12/31/2001	\$3,569.95

The total amount of wages paid to the beneficiary in 2002 was \$8,142.16. The total amount of wages paid to the beneficiary in 2001 was \$3,569.95.

The director determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Although the AAO agrees with the director's ultimate conclusion, the director's analysis is slightly flawed. The AAO will address each of the relevant years separately in assessing the petitioner's ability to pay.

In 1998, the petitioner filed as a sole proprietorship, and had an adjusted gross income of \$22,906.00, and a net profit of \$24,648.00. Although the figures on the 1998 return fall short of the proffered wage, the director failed to look at the priority date of the petition in determining the petitioner's ability to pay the beneficiary's salary. Since the priority date was established on December 28, 1998, the petitioner is only required to show that it had the funds to pay the beneficiary for the three remaining days in 1998. By pro-rating the beneficiary's salary, the

² The petitioner provided no explanation as to why the report for the quarter ending on September 30, 2002 was omitted.

petitioner must demonstrate that it could pay the beneficiary \$249.09. Since the petitioner has sufficient funds to meet this wage, the AAO finds that the petitioner established its ability to pay the proffered wage as of the priority date of the petition.

In 2000, the petitioner's net income of \$33,774.00 surpassed the proffered wage of \$30,305.60, and therefore demonstrated its ability to pay. In 2001, the petitioner's net income was \$27,258.00, and it paid the beneficiary wages in the amount of \$3,569.95. By subtracting the wages paid from the proffered salary, the petitioner becomes responsible for demonstrating that it could pay the remaining amount of \$26,735.65. The petitioner's income for 2001 clearly exceeds this amount, thereby establishing its ability to pay.

A review of the record, therefore, shows that the petitioner met its burden for the years 1998, 2000, and 2001.³ The petitioner's financial performance for 1999, however, presents a problem.

In 1999, the petitioner had a net income of \$15,428 and negative assets. There is no evidence in the record to suggest that the petitioner employed the beneficiary during this period; therefore, it is not possible to offset the amount of the proffered wage by wages paid to the beneficiary. Although the petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date, which it has done in this case, it must also demonstrate a *continued* financial ability to pay this wage until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). (Emphasis added). Although the petitioner has established its ability to pay for 1998, 2000, and 2001, this ability must be continuing throughout the relevant period. By failing to establish its ability to pay the proffered salary in 1999, the petitioner failed to fully satisfy the regulatory requirements.

The petitioner also submitted a prepared statement in letter form regarding its financial status. This statement, however, is of little evidentiary value because it is based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). The figures set forth on the tax returns, therefore, are the only acceptable evidence contained in the record upon which to review this decision.

Although counsel for the petitioner alleged that a financial statement from an expert would be submitted on appeal, the record fails to reflect any such evidence. After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing thereafter.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ Although wage statements were submitted for 2002, no tax documentation to show the petitioner's net income for that year was provided. The AAO recognizes that at the time this documentation was submitted in early January of 2003, it was unlikely that the petitioner had filed its taxes for 2002. The petitioner would have to have net income in excess of \$22,163.44 to establish its continuing ability to pay the proffered wage for 2002.