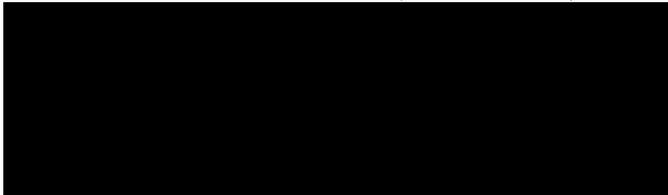




U.S. Citizenship  
and Immigration  
Services



FILE:



Office: VERMONT SERVICE CENTER

Date:

APR 26 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:

SELF-REPRESENTED

APR 26 2004

**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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a caterer. It seeks to employ the beneficiary permanently in the United States as a banquet chef. 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.

The director denied the petition because he determined the petitioner had not established its ability to pay the proffered wage.

On appeal, the petitioner asserts that it has the ability to pay the proffered wage.

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 regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is February 20, 2001. The beneficiary's salary as stated on the labor certification is \$800 per week or \$41,600 annually, excluding overtime.

With its initial petition, the petitioner submitted copies of the petitioner's 1998 and 1999 Form 1120 U.S. Corporation Income Tax Return and a 2000 Form 1120S U.S. Corporation Income Tax Return. These tax documents have no probative value in the determination of this petitioner's ability to pay the proffered wage because they all precede the priority date of the petition.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 21, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's ability to pay from the priority date, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary, if any, for 2001.

In response to the director's RFE, the petitioner submitted its 2001 Form 1120S U.S. Corporation Income Tax Return. The tax return for 2001 reflected gross receipts of \$218,888; gross profit of \$127,334; compensation of officers of \$38,600; salaries and wages paid of \$12,347; and a taxable ordinary income of \$7,035. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$15,627, and current liabilities of \$2,158, yielding net current assets of \$13,469. In addition, the petitioner submitted checking statements from December 31, 2000 to February 28, 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition because the petitioner's net income and banking statement balances were lower than the proffered wage.

On appeal, the petitioner states that it has sufficient funds in its checking account to pay the proffered wage and that it will have sufficient funds to pay the proffered wage if it can hire the beneficiary as a full-time chef and increase the business it will handle.

The checking statements do not indicate that the petitioner has maintained a continuing balance sufficient to pay the proffered wage. Further, the record contains no evidence that the funds in the checking account represent additional funds that would be available to pay the proffered wage over and above the \$12,707 reflected as cash on hand on the 2001 Form 1120S U.S. Corporation Income Tax Return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, not gross receipts, 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 both CIS and 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, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income

figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's Form 1120S for calendar year 2001 shows an ordinary income of \$7,035. The petitioner could not pay a proffered salary of \$41,660 out of this figure, or out of its net current assets of \$13,469.00.

The petitioner's claim that hiring the beneficiary will increase business appears to be speculation as it is not corroborated by any documentary evidence such as specifics as to just how the beneficiary will increase business and a detailed analysis of revenue projections. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns and bank statements, 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 until the beneficiary obtains lawful permanent residence.

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.