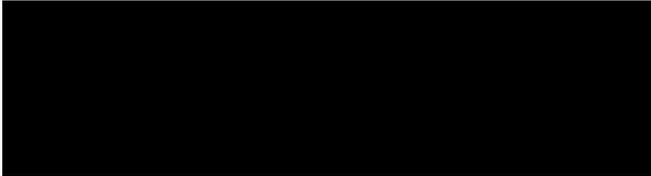




U.S. Citizenship  
and Immigration  
Services

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

2004 5 18

IN RE:

Petitioner:



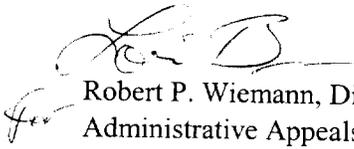
Beneficiary:

PETITION: Petition for Alien Worker as an Unskilled, Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

Administrative Appeals Office  
U.S. Citizenship and Immigration Services  
Washington, DC 20529

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 cook. 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 petitioner seeks to classify the beneficiary as an unskilled, other worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This category provides immigrant visas for qualified aliens who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

*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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 25, 2001. The beneficiary's salary as stated on the labor certification is \$7.25 per hour or \$15,080 per year.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 8, 2003, 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 RFE exacted, for 2001 and 2002, the petitioner's signed federal income tax returns or annual reports, Wage and Tax Statements (Forms W-2) or Form 1099 for wages and miscellaneous income, if any that the petitioner paid to the beneficiary.

In response, the petitioner submitted no item requested in the RFE and averred that:

Financial Information (sic) was previously summitted (sic) Please check file. IF (sic) you need more information please contact me immediately.

The director observed that the initial filing contained no financial information, that the response offered none, and that the petitioner's bare offer to accept further queries for information was not an appropriate response to the request of the RFE for specific documentation.

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 present, and denied the petition.

On appeal, the petitioner submits 2001-2003 Forms 1120S, U.S. Income Tax Return for an S Corporation. The responsible officer of the petitioning corporation urgently requests:

I feel uncomfortable about this personal information made public. Therefore, I am respectfully requesting that the information be treated with confidentiality.

Citizenship and Immigration Services (CIS), formerly the Service or INS, will characterize generally data for this decision, without reciting specifics in deference to this request, though with a full analysis. CIS will first examine whether the petitioner employed the beneficiary at or after the priority date. The petitioner presented no W-2, Form 1099, or other payroll record to document its employment, if any, of the beneficiary. Form ETA 750, in Part B, item 14, confirms that the beneficiary did not work for the petitioner.

Since the petitioner did not establish that it paid the beneficiary wages, equal to, or greater than, the proffered wage for any relevant period, CIS will next examine the petitioner's net income, as reflected on the petitioner's federal income tax return. The AAO carefully reviewed amounts of ordinary income (loss) from trade or business activities, as reported on 2001-2003 Forms 1120S. In no year was the ordinary income equal to, or greater than, the proffered wage.

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.*, 623 F.Supp 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. The court specifically rejected the argument that CIS should have considered gross receipts or income before expenses were paid rather than net income. Similarly, wages paid to others do not justify the ability to pay the beneficiary the proffered wage. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner paid no wage to the beneficiary, and the petitioner's net income is less than the proffered wage. Finally, CIS will review Schedules L of Forms 1120S to ascertain whether the petitioner's net current assets are equal to, or greater than, the proffered wage and, thus, justify the ability to pay it at the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>1</sup> For 2001 and 2003, current liabilities exceed current assets, and, thus, net current assets are a deficit. For 2002, the remainder of current assets minus current liabilities is less than the proffered wage. Net current assets do not support the ability to pay the proffered wage in any year.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing 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). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

<sup>1</sup> The difference of current assets minus current liabilities equals net current assets. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3<sup>rd</sup> ed. 2000).

After a careful review of the federal tax returns and the record of proceedings, 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.