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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, D.C. 20536



File: EAC 01 248 50100 Office: VERMONT SERVICE CENTER

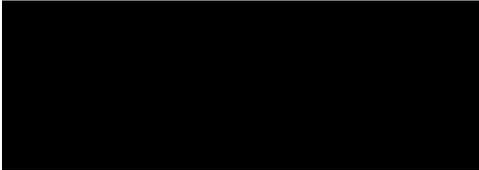
Date: FEB 12 2004

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 employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 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. The director also concluded that the petitioner had failed to submit documentation demonstrating the beneficiary's qualifications required by the position.

On appeal, counsel submits additional evidence and contends that the compensation of the petitioner's officers could be decreased to apply toward the beneficiary's offered 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) also provides in pertinent part:

(2) *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 [CIS].

In this case, the petitioner must establish its 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, and continuing. The petitioner must also show, pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(B), that the beneficiary has the necessary education and experience required by the terms of the labor certification for the job offered. Here, the petition's priority date is November 29, 2000. The beneficiary's salary as stated on the approved labor certification is \$14.72 per hour or \$30,617.60 annually. The record indicates that the petitioner has employed the beneficiary since 1996.

As evidence of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120S U.S. Income Tax Return for an S Corporation for the year 2000. The information presented on this return shows that the petitioner declared an ordinary income of \$6,082. Schedule L of this tax return also reflected that the petitioner had \$4,655 in net current assets.

On October 14, 2001, the director requested additional evidence of the petitioner's ability to pay the offered wage pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). The director also instructed the petitioner to send evidence of the beneficiary's required two years of employment experience and copies of the beneficiary's W-2s showing wages paid by the petitioner.

In response, the petitioner submitted a letter from the petitioner's accountant dated December 13, 2001. The accountant noted that the \$124,800 paid as officer's compensation and the \$80,000 paid as rental to the owners could be decreased by 15% in order to meet the beneficiary's proffered wage.

The director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The director noted that the compensation paid to the officers represented monies already expended by the corporation. The director concluded that neither the petitioner's net income or net current assets as shown on its 2000 tax return represented sufficient amounts to meet the proffered wage. While the accountant's letter speculates that the petitioner's owners could decrease certain expenses in the future in order to meet the proffered wage, it cannot be concluded that these monies were available to be paid to the beneficiary as of the visa priority date.

The director also denied the petition due to the lack of evidence establishing that the beneficiary had the required two years of experience as a specialty cook. On appeal, counsel submits a letter from a previous employer to document the requisite experience. Counsel asserts for the first time that the letter had not been available to be submitted because of the difficulty soliciting the letter from the beneficiary's former employer in Costa Rica. Even if this evidence is considered to overcome one of the grounds for the director's denial, the petition will still be denied because it cannot be concluded that the data presented in the petitioner's tax return supports its ability to pay.

On appeal, counsel submits another letter, dated December 10, 2001, from the petitioner's accountant that reiterates the assertion that expenses already paid to the owners could be diverted in the future to the beneficiary. In determining the petitioner's ability to pay the proffered wage, CIS will examine 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 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Furthermore, since the petitioning entity

in this case is a corporation, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

In this case, neither the petitioner's ordinary income in 2000 of \$6,082 nor its net current assets in 2000 of \$4655 reflect an amount sufficient to meet the proffered wage of \$30,617.60.

Based on the evidence contained in the record, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage as of the priority date of the petition and continuing until the present.

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.