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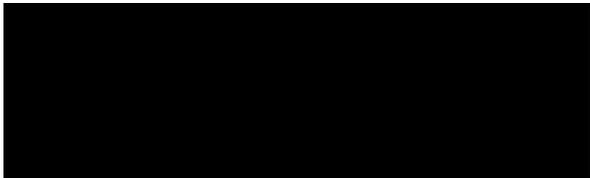
MAR 17 2004

FILE: WAC 02 198 53771 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 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 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 board and care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as an institutional 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 record reflects that the present beneficiary has been substituted for the original beneficiary named on the labor certification.

The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, the petitioner suggests that depreciation and other expenses should be considered when reviewing its ability to pay. The petitioner's notice of appeal, filed January 3, 2003, indicates that a brief and/or evidence will be sent to the AAO within 30 days. As no further documents have been received to the record, the appeal will be adjudicated on the evidence contained herein.¹

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.

(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 the Service.

Eligibility in this matter is based, in part, upon 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. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is May 5, 1998. The beneficiary's salary as stated on the labor certification is \$13.87 per hour for a 40-hour week or \$28,849.60 per year.

Counsel initially submitted insufficient evidence to support the petitioner's ability to pay the beneficiary's wage offer of \$28,849.60 per year. On August 29, 2002, the director requested further evidence to support the substitution of the present beneficiary, the petitioner's ability to pay the proffered wage, and additional documentation that the beneficiary has met the minimum education, training or experience requirements stipulated on the approved labor certification.

¹ The petitioner filed the appeal. As no withdrawal of representation is contained within the record, counsel will be provided with a copy of this decision.

Counsel's response included copies of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 1998, 1999, 2000 and 2001. These returns revealed the petitioner's taxable income before net operating loss deduction (NOL) and special deductions as:

| Year | Taxable Income (before NOL and special deductions) |
|------|--|
| 1998 | \$ 8,501 |
| 1999 | -\$10,919 |
| 2000 | \$ 2,358 |
| 2001 | \$ 7,226 |

As noted above, none of the years indicate that the petitioner could pay the proffered wage of \$28,849.60 out of its taxable income. Further, as shown on the corresponding Schedule L of each tax return, the petitioner's current liabilities exceeded its current assets. The petitioner's current assets and current liabilities in 1998 were \$181 and \$341, respectively. The difference between these amounts represents -\$160 in net current assets. In 1999, the petitioner declared -\$2,807 in current assets and \$10,726 in current liabilities, resulting in -\$13,533 in net current assets. In 2000, current assets were \$2,235 and current liabilities were \$16,663, yielding -\$14,428 in net current assets. Finally, in 2001, the petitioner had -\$3,233 in current assets and \$23,479 in current liabilities, resulting in net current assets of -\$26,712. None of the years show that the beneficiary's proposed salary of \$28,849.60 could be paid out of the petitioner's net current assets.

The director reviewed the figures reflected on the petitioner's corporate tax returns and denied the petition, finding that the petitioner had not established its continuing ability to pay the beneficiary's salary beginning at the priority date of May 5, 1998.

On appeal, the petitioner appears to suggest that depreciation and other expenses should be taken into consideration when examining its ability to pay the beneficiary's proposed wage. In determining the petitioner's ability to pay the proffered wage, CIS will review 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As set forth above, the regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay the proffered salary beginning on the priority date. None of the petitioner's figures representing taxable income before the NOL and special deductions or net current assets in any of the relevant years were sufficient to fund the beneficiary's proposed salary of \$28,849.60.

After a review of the federal tax returns, it is concluded that the petitioner has failed to establish 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.

Beyond the decision of the director, it is noted that the approved labor certification (Form ETA 750-A) requires that the beneficiary have two full years of experience as an institutional cook or two full years of experience in the related occupation of "cook." To be eligible for approval, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the employment verification

letters contained in the record do not establish that the beneficiary accrued the necessary experience or training prior to the priority date of May 5, 1998. One employment letter relates that the beneficiary was a head cook from December 1998 until February 2000. The other employment letter states that the beneficiary was a head cook at that establishment from February 2000 until the date of the letter, March 20, 2001. The beneficiary's certificate of attendance at a school of culinary arts reflects that the dates of attendance were from June 10, 1998 until December 10, 1998. None of these documents indicate that the beneficiary had attained the necessary two years of experience as a cook prior to May 5, 1998. A petition may not be approved if the beneficiary was not qualified at the priority date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.