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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

B6

MAR 17 2004

File: WAC-02-252-53481 Office: California Service Center Date:

IN RE: Petitioner: [redacted]
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 [redacted]

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 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 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 director determined the petitioner had not established its ability to pay the proffered wage.

On appeal, the petitioner counsel asserts that the petitioner 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 November 14, 1997. The beneficiary's salary as stated on the labor certification is $11.62 per hour or $25,536 per year.

With its initial petition, the petitioner submitted copies of its 1999 through 2001 Form 1065 U.S. Return of Partnership Income. The petitioner did not provide tax figures for 1999. The tax return for 2000 reflected gross receipts of $230,960; gross profit of $152,303; salaries and wages paid of $10,174; and ordinary income of $40,093. The tax forms for 2000 reflect current assets of $3,692; current liabilities of $493; and net current assets of $3,199.

The tax return for 2001 reflected gross receipts of $264,162; gross profit of $172,132; salaries and wages paid of $14,000; and ordinary income of $58,211. The records reflected current assets of $4,119; current liabilities of $657; and net current assets of $3,462.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 23, 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 federal income tax return, annual report or audited financial statement for 1997 through 2001, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary, if any, for 1997 through 2001.

In response to the director's RFE, counsel submitted copies of the petitioner's 1997 through 2001 Form 1065 U.S. Return of Partnership Income. Duplicate data for the years 1999 through 2001 will not be restated. The tax return for 1997 reflected gross receipts of $78,850; gross profit of $56,245; salaries and wages paid of $24,472; and an ordinary income of - $8,276. The tax return for 1998 reflected gross receipts of $88,500; gross profit of $62, 835; salaries and wages paid of $21,902; and ordinary income of - $15,732. No figures were presented for the petitioner's net current assets for 1997 or 1998.

Additionally, counsel submitted the beneficiary's Form W-2 Wage and Tax Statements from the petitioner for the years 1997, 1998, 1999 and 2001. The W-2's indicated that the beneficiary earned $7,410 during 1997, $8,680 during 1998, $2,880 during 1999, and $6,500 during 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states, in pertinent part that:

> The original owners, Young E. Kim, Hee S. Han, reported a gross receipt of $78,850.00 for the year of 1997, of which $24,1472.00 [sic] were wages that exceeds the proffered wage of $24,169.60. The gross receipts for the year of 1998 was $88,500.00, of which $21,920.00 were wages, minus $2,249 of the proffered wage. The gross receipts for the year 1999 was $44,400.00, of which $11,760.00 were wages. The business was sold to the new owner on or about June of 1999, precipitating the lower income for the year of 1999. The new owners as of June, 1999, reported a gross income for the year 2000 of $230,960.00, of which $152,303.00 was the adjusted gross, the gross wage for 2001 was $264,162.00. The adjusted gross was $172,132.00 demonstrating the ability to pay the proffered wage.

Counsel's argument on appeal regarding wages paid is not corroborated by any documentary evidence and must therefore, be considered conjecture.

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 1065 for calendar years 1997 through 1999 shows an ordinary income of - $8,276 for 1997, - $15,73 for 1998, and $18,670 for 1999. The petitioner could not pay a proffered salary of $25,536 out of these figures even accounting the wages actually paid the beneficiary. Additionally, the petitioner could not pay the proffered wage out of its net current assets. Even if the petitioner established its ability to pay the proffered wage for 2000 and 2001, it must show a continually ability, and its illustrated inability to pay the proffered wage for 1997 through 1999 must result in the denial of the petition.

After a review of the federal tax returns, 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.