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U.S. Citizenship
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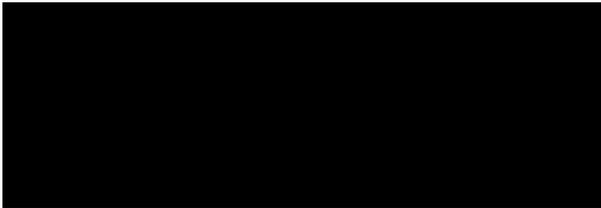
MAR 1 2004

FILE: WAC 02 198 50898 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 an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian (curry) 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 determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, counsel submits additional evidence and argues that the petitioner has had the ability and means to pay the beneficiary's proffered salary.

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.

8 C.F.R. § 204.5(g)(2) states 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 is based 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 January 18, 2000. The beneficiary's salary as stated on the labor certification is \$600 per week for a 40 hour week or \$31,200.00 per year.

As evidence of the petitioner's ability to pay the proffered wage, counsel initially submitted partial copies of Form 1065, U.S. Return of Partnership Income for the calendar years 1999, 2000, and 2001. These tax returns bear the name "Bombay Cafe I Ltd." and state a completely different address as that given for the petitioner on the labor certification or the petitioner's May 21, 2002, letter offering the beneficiary employment. Counsel offers no clarification for this discrepancy. Nonetheless, as the priority date is covered by the tax return filed for the 2000, it is noted that this return shows that the filer declared ordinary income of \$17,623. The 2001 tax return indicates that the filer declared ordinary income of -\$65,424. Current assets and current liabilities revealed on Schedule L of the 2001 return show that Bombay Cafe I Ltd. reported \$84,734 in current assets and -\$231,738 in current liabilities. The difference between these figures is the filer's net current assets, or -\$147,004.

In a request dated August 26, 2002, the director instructed the petitioner to submit any additional evidence that would support its ability to pay the beneficiary's salary in the year 2000. The director advised the petitioner to submit either copies of annual reports, federal tax returns or audited financial statements, and to include a copy of the company's payroll summary and any Wage and Tax Statements (W-2s) evidencing wages paid to the

beneficiary. The director also requested the petitioner to submit employment verification supporting the beneficiary's eligibility for the position of Indian (curry) chef.

In addition to a former employer's letter summarizing the beneficiary's culinary experience, counsel's response included a payroll summary summarizing the wages paid for the pay period ending August 31, 2002. This summary shows that Bombay Cafe I Ltd. employed the beneficiary and paid him \$900 that pay period. Counsel also offered copies of the beneficiary's W-2s issued for 2000 and 2001 by Bombay Cafe I Ltd. In 2000 and 2001, this entity paid the beneficiary \$27,630 and \$30,200, respectively. Counsel also resubmitted a copy of the 2000 partnership return for Bombay Cafe I Ltd.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director inaccurately presented the beneficiary's salary and the 2001 cash assets, but concluded that these figures failed to support the petitioner's ability to pay the proffered wage. The director failed to note the discrepancy between the names appearing on the tax returns and the approved labor certification. Although we concur with the director's conclusion, it is noted for the purpose of this discussion that if these payroll and tax records are deemed to be that of the petitioner's, then the wages paid to the beneficiary must be considered. The difference between the wages that the beneficiary received and the proposed salary in 2000 was \$3,570. This sum could have been covered by the ordinary income of \$17,623 as shown in the 2000 tax return.

Neither the -\$65,424 ordinary income, nor the -\$147,004 as net current assets shown on Schedule L, however, was enough to cover the \$1,000 shortfall represented as the difference between the 2001 wages paid and the proffered salary of \$31,200.

On appeal, counsel submits a letter from an accounting firm dated November 27, 2002. This letter maintains that the health of the company is shown by the increase in salaries and wages paid as shown on the tax returns. The accountant states that the accounting method adopted by some cash based businesses typically accelerates payment of expenses resulting in an overdraft of the cash account as shown by the tax returns. Counsel also subsequently submits a copy of a restaurant review article appearing in the L.A. Times on August 27, 2003. This article gives the petitioning business two "***" or a "very good" recommendation, based on four "****" as the maximum rating of "outstanding."

It remains that 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, there remains an unanswered question as to whether the tax returns submitted represent the petitioner's financial data or another restaurant in a chain. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). As it is, neither the declared ordinary income of -\$65,424 or the 2001 net current assets figure of -\$147,004, as revealed on Schedule L, represents a sufficient amount to cover the difference between the beneficiary's proposed salary of \$31,200 and the wages already paid in that year. Similarly, while Bombay Cafe I Ltd. may have increased the number of employees it supported from 2000 to 2001, its tax returns also reflected an increase in expenses such as rents, repairs and maintenance. Rents went up approximately \$7,000 and repairs and maintenance increased about \$14,000. It is also noted that wages already paid to

others are not generally available to prove the ability to pay the proffered salary to the beneficiary at the priority date. As set forth by the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner bears the burden to show that it has had an ongoing ability to pay the proposed salary of \$31,200 as of the priority date of January 18, 2000.

Based on the foregoing and upon review of the argument and evidence presented on appeal, 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.

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.