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**U.S. Department of Homeland Security**
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 199 54049 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(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 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 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 a Form ETA 750, Application for Alien Employment Certification, filed on September 25, 1998, and approved by the Department of Labor on April 24, 2002. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel indicated that no appeal brief would be submitted but asserted on the I-290B that the director failed to consider that "the alien was already on the payroll and that the adjusted gross income was after wages were paid." Counsel then simply noted the adjusted gross income for each year from 1998 to 20001. Counsel also indicated that the petitioner was submitting copies of the beneficiary's W-2 forms for 1998 through 2001 and Form DE6 as evidence of wages paid by the petitioner. Because the petitioner's representative has not offered any reasons why the director's decision is incorrect, the AAO could elect to summarily dismiss the appeal. However, the AAO will address the appeal in greater detail due to the fact that the W-2 forms were submitted on appeal, and to note significant questions raised by the documents submitted on the petitioner's behalf.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 25, 1998. The proffered wage as stated on the Form ETA 750 is $11.62 per hour, or approximately $22,310 per year.

With the petition, the petitioner's representative submitted merely the Form I-140 and the ETA 750. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the California Service Center, on September 18, 2002, requested additional evidence pertinent to those issues. Specifically, the Service Center requested proof of the ability to pay, noting that the petitioner should submit copies of annual reports, federal

tax returns, or audited financial statements. The Service Center also requested evidence to establish the beneficiary's experience as listed on the ETA 750, to include specific information regarding the beneficiary's title, duties, dates of employment and hours worked per week.

On or about November 4, 2002, counsel submitted various records related to the experience and ability to pay issues. Counsel submitted a letter dated October 30, 2002 from Omar Montiel, General Manager of the Hotel and Restaurant Galicia. The letter noted that petitioner worked at the restaurant from January 2, 1985, to December 1, 1990, for 40 to 45 hours per week as a cook preparing various specialized recipes. On the issue of ability to pay the proffered wage, counsel submitted copies of Form 1065 U.S. Return of Partnership Income with related schedules and attachments for tax years 1998 through 2001. Counsel also submitted Form 941 Employer's Quarterly Federal Tax Return for the first and second quarters of 2002.

The director, apparently satisfied as to the evidence supporting the beneficiary's experience, addressed only the ability to pay the proffered wage. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on December 19, 2002, denied the petition.

On appeal, counsel asserts simply that the decision was erroneous because the beneficiary's wages had already been paid. The AAO concludes that the evidence does not support the granting of the petition.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

On appeal, counsel has again submitted the 1998 through 2001 partnership tax returns and has supplemented them by including the W-2 Wage and Tax Statements for the beneficiary for tax years 1998 through 2001. As evidence of the wages paid to the beneficiary in tax year 2002, the record contains the employer's quarterly federal tax returns and DE 6 statements for the petitioner indicating wages paid for the first three quarters of the 2002 tax year. Counsel submits these records, the AAO assumes, as evidence of her assertion that the director should have considered the wages paid to the beneficiary along with the evidence of ability to pay demonstrated by the income figures on the tax returns. The evidence must demonstrate that, beginning with the priority date of September 25, 1998, the petitioner had the ability to pay the beneficiary's proffered wage of $22,310.

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, 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 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 the INS, now 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. *Supra* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The net income or ordinary income figures contained in the 1998 through 2001 Form 1065 partnership tax returns for Pete's Haven Burgers do not further the petitioner's case. The tax records reflect the following: for 1998 the ordinary income was ($15,732); for 1999 the ordinary income was ($161,988) for the first half of the year, and $18,670 for the second half of the year; for 2000 the ordinary income was $40,093; and for 2001 the taxable income was $58,211. Only the ordinary income for tax years 2000 and 2001 exceeds the amount of the proffered wage. The petitioner's representative has submitted copies of Forms 941 Employer's Quarterly Federal Tax Returns for the first three quarters of 2002, and copies of Forms DE-6 demonstrating wages paid to the beneficiary. These forms reflect that the beneficiary was paid approximately $10,530 in wages during the identified period. On an annualized basis this would reflect wages of approximately $14,000 for the 2002 tax year.

It is clear that for tax years 1998 and 1999 the ordinary income does not support the petitioner's ability to pay the proffered wage. The fact that the petitioner paid wages of $8,680, and $8,881[1] respectively for these years, does not further the petition as each of those amounts could not have been augmented by the petitioner as the tax records reflect losses for those tax years. Although the tax records reflect that for tax years 2000 and 2001 the ordinary income reflects that petitioner could pay the proffered wage in those years the petitioner must demonstrate its ability to pay the wage beginning with the priority date. While the latter wages reflect an increasing ability to pay the wage, this cannot cure the deficiencies of wages in the previous years, and counsel has offered no arguments or additional evidence in support for the petitioner's ability to pay the wage.

Issues Surrounding the Identity of the Petitioner

Beyond the decision of the director, a review of the record raises questions regarding the petition related to the identity of the petitioner. The employer identified in the ETA 750 is Pete's Haven Burgers. The various financial records, including tax returns and wage statements also relate to Pete's Haven Burgers. However, when the tax returns for 1999 and the ETA 750 are closely examined, these documents reflect that there was a change in the underlying partnership business arrangement relating to the petitioner. The owner of the petitioner is identified on the ETA 750 as Hee Soo Han. The tax records for the 1998 tax year reflect that Pete's Haven Burgers filed a Form 1065 U.S. Partnership Return of Income under Employer Identification Number (EIN) [redacted] The tax return reflects that the business was started on August 10, 1992. Schedule B of the return indicates that it was being filed on behalf of a general partnership that the Schedule K-1s (Partnership Share of Income, Deductions, Credits, etc.), identify as consisting of [redacted] and [redacted] These documents indicate that these individuals are general partners who each owned 50% of the business entity.

The petitioner submitted two Form 1065 returns for the 1999 tax year. The tax return for the first half of the year submitted on behalf of Pete's Haven Burgers reflects the same two partners identified above. However, a tax return for the second half of 1999 was also filed and a copy submitted in support of the petition. That return, also a Form 1065, was filed on behalf of two different partners, [redacted] and [redacted] Won [redacted] is the individual who signed the I-140 on behalf of the petitioner. The tax return indicates that the business was started on June 18, 1999, and reflects an EIN of [redacted] It appears, from an examination of the tax records, that the original partnership ceased to exist in mid-June 1999, and a sale of the business took place at that time. (See Form 4797 Sales of Business Property which indicates that the property

[1] This amount is obtained by combining the wages reflected in the two W-2s submitted for the 1999 tax year.

identified as Fast Food Business was sold on June 18, 1999, for $125,000 resulting in a loss of $155,000 to the original partners [redacted]

Although both partnership entities have operated the restaurant known as Pete's Haven Burgers, there has been a change in ownership of the business entity during the pendency of the labor certification and petition. The entity that seeks to pursue the petition on behalf of the beneficiary, while operating the same type of business, is a different partnership, and therefore a different business entity. While it is possible that the entity that came into existence in June 1999 is a successor-in-interest to the original entity, the record is devoid of any evidence on that issue.

The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The petitioner has failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage beginning with the priority date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. In addition, it appears that there is a significant issue relating to the identity of the petitioner.

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.