

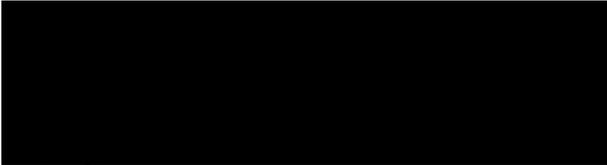
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U.S. Citizenship
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FILE: WAC 02 218 53071 Office: CALIFORNIA SERVICE CENTER Date: MAY 12 2004

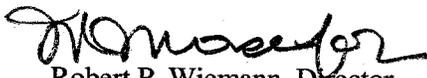
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 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 approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

Counsel submits a Form I-290B accompanied by a brief in the form of a motion to reconsider and additional evidence.

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 regulation at 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 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. Here, the petition's priority date is March 15, 2001. The beneficiary's salary as stated on the labor certification is \$2,005.00 per month, which equates to \$24,060.00 per annum.

With the petition, counsel submitted a copy of the petitioner's 1999 federal tax return. In response to a request for additional evidence by the director, counsel submitted a copy of the petitioner's 2001 tax return in support of the petitioner's ability to pay the proffered wage. The director found that the financial documentation contained in the record was insufficient to establish that the petitioner had the ability to pay the proffered wage at the establishment of the priority date and continuing thereafter.

On appeal, counsel submits a motion to reconsider accompanied by a letter and additional evidence, which urges reconsideration of the director's decision that the petitioner did not have sufficient funds to pay the proffered wage based on compensation paid to officers by the petitioner, as well as carry over inventory and other items specific to the restaurant industry. The AAO will first review the evidence that was present in the record prior to adjudication and then address the issues raised on appeal.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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).

The petitioner's 2001 tax return displays a net loss of \$12,950. Since the proffered wage in this case is \$24,060.00 per annum, this figure is clearly insufficient to pay the proposed salary of the beneficiary. The director also examined the petitioner's net current assets, as displayed on Schedule L of the tax return.¹ In this case, the petitioner's net current assets of \$8,601.00 were insufficient to pay the proffered wage.² Consequently, the AAO concurs with the director's decision that the petitioner failed to demonstrate an ability to pay the proffered wage during the relevant period.

The AAO notes that the petitioner's 2001 tax return covers the period from November 1, 2001 to October 31, 2002. Although not addressed by the director in his decision, this issue presents a serious problem. As previously stated, the priority date in this case is *March 15, 2001*. The regulations require proof of the petitioner's ability to pay the proffered wage from the establishment of the priority date and continuing thereafter. The record of proceeding, however, does not contain any financial evidence that references the petitioner's financial status in March of 2001.

The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although the director specifically and clearly requested that the petitioner submit financial evidence of its ability to pay the proffered wage from the time the priority date was established, the petitioner declined to provide a copy of its 2000 tax return, which encompassed the period from November 1, 2000 to October 31, 2001. The tax return for the petitioner's 2000 tax year would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage as of the priority date of the petition. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

On appeal, counsel submits a letter accompanied by a copy of the 2001 tax return that was previously submitted. Counsel urges consideration of the \$73,000.00 paid in officers' compensation as proof of the petitioner's ability to pay the proffered wage. This assertion is not persuasive for two reasons. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's counsel merely states these claims in his correspondence, and fails to provide independent documentation that would support the availability of funds from which the proposed salary could be paid. Although the tax return confirms that this amount was in fact paid in officers' salaries, there is no independent proof that these funds were available for other purposes, as counsel alleges. Second, the compensation paid to the officers cannot be considered, since these funds were already expended and therefore cannot be viewed as available funds from which to pay the beneficiary's proffered wage.

In addition, counsel asserts that the AAO should consider only the petitioner's gross income, and that "[e]xpensed items which reduced [the petitioner's] net operating income are not actual expenses to the business." The AAO

¹ As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets, set forth on lines 1 through 6, and current liabilities, set forth on lines 16 through 18.

² The figure displayed on Line 15 of Schedule L (\$7,776.00) was erroneously relied upon by the director and was erroneously referred to as "cash assets."

finds this argument unpersuasive. In *K.C.P. Food Co., Inc.*, 623 F. Supp at 1084, the court held that 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. In addition, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Accordingly, after a review of the record, 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 thereafter.

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.