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U.S. Citizenship
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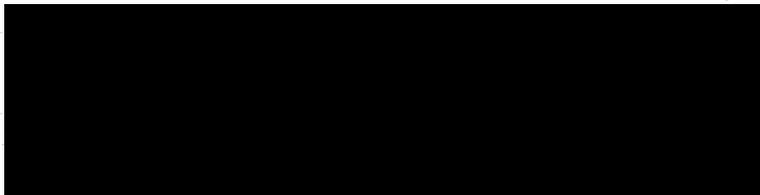
FILE: EAC 02 158 52167 Office: VERMONT SERVICE CENTER Date: **MAY 12 2004**

IN RE: Petitioner:
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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

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 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.

On appeal, counsel submits a Form I-290B 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 January 22, 2001. The beneficiary's salary as stated on the labor certification is \$17.50 per hour for a forty-hour workweek, which equates to \$36,400.00 per annum.

With the petition, counsel for the petitioner did not provide any evidence of the petitioner's ability to pay the proffered wage. In response to a request for additional evidence by the director specifically requesting regulatory-sanctioned evidence such as complete tax returns with all schedules and attachments and information on the petitioner's business, counsel submitted a copy of the petitioner's tax return for the year 2001 and a letter from the petitioner explaining the nature of its business.¹

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

¹ The director also requested an experience verification letter to corroborate the beneficiary's claims of experience set forth on the labor certification form. Since the director did not base his denial of the petition on the beneficiary's qualifications for the position, there is no need to further discuss this issue.

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 director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's net income was significantly less than the proffered wage.

On appeal, counsel submits a Form I-290B accompanied by a letter from the petitioner, which urges reconsideration of the director's decision based on the fact that the beneficiary would be replacing a current employee. The AAO will first review the evidence that was present in the record prior to adjudication and then address the issues raised on appeal.

The petitioner's 2001 tax return displays a net income of \$14,892.00. Since the proffered wage in this case is \$36,400.00 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.² In this case, the petitioner's net current assets of \$7,107.00 were insufficient to pay the proffered wage. Consequently, the AAO concurs with the director's decision that the petitioner failed to demonstrate an ability to pay the proffered wage as of the priority date of the petition.

On appeal, counsel submits a letter from the petitioner and a copy of the 2001 W-2 form for the petitioner's president. In the letter, the petitioner's president requests that the AAO consider depreciation expenses in determining the petitioner's net income. This request is not allowable. 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.

The petitioner's president also states that the beneficiary would be assuming the position that he currently performs, and submits a copy of his personal W-2 form showing that in the year 2001, he received compensation in the amount of \$22,100.00. Prior to adjudication, the director rejected this line of reasoning, and found that the compensation paid to the petitioner's president could not be considered, since these funds were already expended in 2001 and therefore could not be viewed as available funds from which to pay the beneficiary's proffered wage. The AAO concurs with the director's findings, but disagrees slightly with his analysis.

While CIS generally will not consider wages paid to other employees as a means from which to pay the proffered wage, there are exceptions to this reasoning. Specifically, if a beneficiary is being hired to replace another individual employed by the petitioner, and this employee held the same position as the position being offered, CIS may consider wages paid in determining the petitioner's ability to pay the proposed salary set forth on the labor certification form. However, in order to meet this exception, this employee must also have *left the business*. In this case, the petitioner's president is still working in the proffered position. Although he urges the office to

² 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, set forth on Schedule L of the tax return, 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.

consider the fact that he will be retiring in the future if the petition is approved, this contention is not enough to warrant approval of the petition.

A petitioner must establish the elements for the approval of the petition at the priority date. Since it is clear that the beneficiary would be replacing an employee who is still working in the proffered position, the petitioner's ability to pay cannot be established under the exception to this rule. The fact that the petitioner's president will retire if the petition is approved is insignificant. While the director properly excluded this financial evidence from consideration, he failed to outline the correct reasoning for such action.

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. The petition is denied.