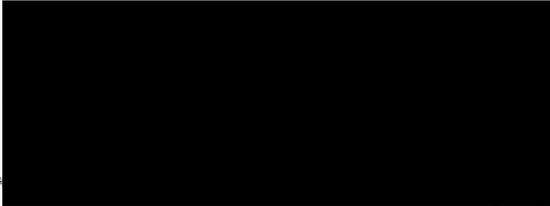




U.S. Citizenship
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FILE: EAC 02 142 53429 Office: VERMONT SERVICE CENTER

Date: MAY 21 2004

IN RE: Petitioner:
Beneficiary:



PETITION: 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 petitioner is a restaurant and caterer. 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, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is \$12.60 per hour or \$26,208 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated June 19, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE requested the petitioner's 2001 federal income tax return, annual report, or audited financial statement, as well as evidence of wage payments to the beneficiary, namely, the 2001 Wage and Tax Statement (Form W-2).

Counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. It reported an ordinary loss from trade or business activities of (\$63,981), less than the proffered wage. Schedule L for 2001 reflected the difference of current assets, \$51,071, minus current liabilities, \$46,164, being net current assets, of \$4,907, less than the proffered wage. The petitioner did not submit the beneficiary's Form W-2. The record contained the petitioner's 2000 Form 1120S, but it did not pertain to the priority date.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits its tax returns from its founding, 1991-2001, its bank statement as of the priority date, and the beneficiary's 2001 W-2. Scattered financial statements included a balance sheet as of April 30, 2001 and an income statement for ten (10) months ending October 31, 2002. Counsel provided no brief on appeal.

The financial statements, labeled for "management purposes only," disclaimed any audit. They are of little evidentiary value because they are based solely on representations of management. See 8 C.F.R. § 204.5(g)(2).

The petitioner discussed the financial data in a letter, dated October 18, 2002 (opinion letter), and concluded that:

Under either an income or asset test we believe we are a long standing corporation with an unblemished business record. Although our business was somewhat effected [sic] by the difficult economic climate which effected [sic] other businesses in 2001 our job offer to [the beneficiary] is *bona fide* and ongoing. As our tax returns indicate we were and remain able in the present and future to pay the wage offered.

Specifically, the opinion letter calls attention to the beneficiary's 2001 Form W-2, since it reflects wages paid of \$12,717. As for the remainder, \$13,491, of the proffered wage, the opinion letter stated chosen expenses to add back into income. These selections included charges, in 2000 and 2001, of \$90,000 to construct new back offices with upgraded computer and phone line systems and, in 2001, of \$60,000 for salary and compensation of officers. The opinion letter, also, urges the consideration of the petitioner's gross income in 2000 and 2001, respectively, \$1,143,575 and \$1,166,737.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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. Tex. 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.*, 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. Finally, 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 offers its bank statement at the priority date as alternative evidence of the ability to pay the remainder of the proffered wage from the cash. The opinion letter asserts that the balance, \$23,615.38, is net current assets, available to pay the proffered wage. As already noted, 2001 Form 1120S, showed net current assets of only \$4,907 and an ordinary loss from trade or business activities of (\$63,981), less than the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The proceedings contain Forms 1120S from 1991-2001. At best, they reflect ordinary income from trade or business activities equal to, or greater than, the proffered wage only in 1996 of \$61,509, 1997 of \$108,454, and 1999 of \$29,671. No Schedule L for any year reported net current assets equal to, or greater than, the proffered wage. Such representations do not demonstrate the ability to pay the proffered wage because the 2001 Form 1120S, alone, pertains to the priority date, and it is deficient.

The opinion letter correctly stipulates that the petitioner must demonstrate the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

Counsel referenced further documentation in the appeal, but did not submit a brief. The opinion letter cites no authority for its various points. The AAO may, in its discretion, use, as advisory opinions, statements submitted as expert testimony. However, when an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept, or may give less weight to, that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1998).

After a review of the federal tax returns, Form W-2, bank statement, unaudited financial statements, and opinion letter, 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.