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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



FILE: [Redacted]

Office: VERMONT SERVICE CENTER

Date: NOV 29 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:



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Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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 Director, Vermont Service Center, denied the preference visa petition that 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 chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief 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 granting 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.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year.

On the petition, the petitioner stated that it was established on 1993 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Herndon, Virginia.

In support of the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on March 11, 2003, the Vermont Service Center requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2001 tax returns, annual reports, or audited financial statements and requested that, if the petitioner had employed the beneficiary during 2001, it provide copies of the 1099 or W-2 forms showing the amount it paid to the beneficiary.

In response, counsel submitted a letter, dated May 19, 2003, in which she stated that the beneficiary did not work for the petitioner during 2001. Counsel also submitted a copy of the petitioner's 2001 Form 1120 U.S.

Corporation Income Tax Return.<sup>1</sup> That return shows that the petitioner declared a loss of \$1,699 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,962 and current liabilities of \$5,997, which yields net current assets of \$2,965.

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 July 30, 2003, denied the petition.

On appeal, counsel argues that the petitioner currently has the ability to pay the proffered wage. Counsel also states that the beneficiary is "a chef of grand renown" and that the petitioner believes that as a result of hiring the beneficiary "the restaurant's income will increase substantially . . . ." Counsel offers no evidence in support of the assertion that the beneficiary is a renowned chef or in support of the belief that hiring him will financially benefit the petitioner.

Counsel also provides the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return.<sup>2</sup> That return shows that the petitioner declared a loss of \$10,211 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$8,715 and current liabilities of \$2,936, which yields net current assets of \$5,779.

Counsel states that the petitioner expects to improve financially as a result of hiring the beneficiary because of the beneficiary's renown as a chef. However, counsel provides no evidence that the beneficiary is a renowned chef and no evidence that the petitioner's financial condition will improve. Even if one believed that the petitioner's finances might improve as a result of hiring the beneficiary, counsel provided no evidence from which one might calculate the amount by which the petitioner's net profits are likely to improve.

Counsel further stated that upon hiring being hired, the beneficiary will replace the petitioner's current chef. Counsel provides no evidence of the amount the current chef earns. Counsel provides no evidence of the amount of the current chef's salary. Further, counsel provides no evidence of the assertion that the petitioner will release its current chef upon hiring the beneficiary.<sup>3</sup>

The statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Unsupported assertions

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<sup>1</sup> The return states that it is the return of Violets Incorporated, but gives the name and address of the petitioning restaurant as its address.

<sup>2</sup> That return also states that it is the return of Violets Incorporated. Although it does not mention Harvest of India, the name under which the petitioner filed, the evidence appears to show that Violets Incorporated is the name under which the petitioning restaurant was incorporated.

<sup>3</sup> If the petitioner demonstrated that it intended to replace its current chef with the beneficiary, and that the current chef's salary would be sufficient to pay the proffered wage, this intent would raise an additional issue. The basis of the instant petition is that the proffered position is a shortage occupation. Firing a U.S. worker and hiring an alien out of preference is contrary to the intent of the statutes and regulations governing this visa category.

of counsel are, therefore, insufficient to sustain the burden of proof. In the absence of evidence, no such expectancy will be included in the determination of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, 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. The court specifically rejected the argument that CIS 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$25,000 per year. The priority date is April 27, 2001.

During 2001 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$2,965. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated

that any other amount was available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of \$2,936. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other amount was available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

An additional issue exists in this case that was not discussed by in the decision of denial. The petitioner proposes to employ the beneficiary as a chef in Herndon, Fairfax County, Virginia, for \$25,000 per year.

The Department of Labor (DOL) maintains a website at [www.ows.doleta.gov](http://www.ows.doleta.gov) which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the beneficiary is to be employed. The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), employees in OWL Level 1 positions are:

beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.

They may assist staff performing tasks requiring skills equivalent to a Level 2 and may perform high-level work for training and development purposes.

These employees work under close supervision and receive specific instruction on tasks and results expected.

The level 1 job can require education and/or experience, but it does not require an advanced level of understanding to perform the job duties. Level 1 includes entry-level jobs, but may also include some supervised activities, which exceed those normally considered as entry level.

See also "DOL Issues Guidance on Determining OES Wage Levels," Training and Employment Guidance Letter No. 5-02 (DOL August 2002).

According to GAL 2-98 (DOL), a Level 2 position is the following:

Level II employees are fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex

problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

*See id.*

According to the DOL On-line Wage Library, the predominant wage for Level 1 Chefs and Head Cooks in Fairfax County, Virginia is \$20,426 annually and the predominant wage for Level 2 Chef's and Head Cooks is \$43,618.

Counsel's assertion that the beneficiary is "a chef of grand renown" who is expected to improve the petitioner's financial condition implies that he is a Level 2 chef, rather than a Level 1 chef. As was noted above, however, counsel's assertion is not evidence. Absent any evidence that the position is an opening for a Level 2 chef, this office shall not disturb the implicit finding that the position is a Level 1 position and that the petitioner is offering the predominant wage.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.