



U.S. Citizenship  
and Immigration  
Services

*Bo*

[REDACTED]

FILE: [REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: **SEP 28 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]

**PUBLIC COPY**

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 chef. 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 25, 2001. The beneficiary's salary as stated on the labor certification is \$42,000 per year.

With the initial petition, counsel submitted the petitioner's owner's Form 1040 U.S. Individual Income Tax return for the year 2000, which predates the qualifying period and is of little probative value in determining the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 22, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax return, audited financial reports, and bank account records or a statement from a financial officer of the organization.

In response to the RFE, counsel submitted copies of bank statements from the First bank of [REDACTED] San Souci's bank account statements from Bank of America, bank statements from the U.S. Bank and a personal profit and loss statement from the petitioner. In addition, counsel submitted a letter of credit from U.S. Bank indicating that the petitioner had a \$35,000 line of credit. The letter indicated that this account was opened after the priority date. The bank statements from the [REDACTED] cover the period March 16, 2001 through June 15, 2001. The bank statements from Bank of America cover the period February 28, 2001 through March 28, 2002. The bank statements from U.S. Bank cover the period December 3, 2001 through March 31, 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the beneficiary has worked for the petitioner the "entire period," but that due to the beneficiary's status, the petitioner cannot provide pay stubs or employment records. Counsel submits an affidavit from [REDACTED] who asserts that the beneficiary worked for the petitioner from March 2001 forward and

was paid by the petitioner. In addition, counsel submits a letter from [REDACTED] who attests to the petitioner's ability to pay the proffered wage.

Counsel's statements that the beneficiary has been working for the petitioner since March 2001 is not corroborated by any documentary evidence. Therefore, 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 line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Although requested, the petitioner has proffered no tax documents for the period from the priority date forward. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its federal tax returns or audited financial statements. Even though the unaudited financial statement submitted reveals that the petitioner is operating at a loss, the tax returns and financial statements would have demonstrated the amount of taxable income the petitioner reported to the IRS, thereby revealing its ability to pay the proffered wage. 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).

Further, the photocopied checks submitted in response to the RFE made out to cash, or in some instances the beneficiary's fiancé, do not constitute evidence that the petitioner paid the beneficiary as claimed. The petitioner has proffered no evidence as to why any payment by check to the beneficiary would not be made out payable to the beneficiary.

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, not gross receipts, 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 CIS, then the Immigration and Naturalization Service,

had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Although counsel submitted evidence of the petitioner's monthly bank balances, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect uncommitted funds. As previously stated, even though the director requested federal tax documents for all ensuing years subsequent to the priority date of April 25, 2001, no tax documents for 2001 forward were submitted.

Finally, the checks allegedly demonstrating payment to the beneficiary are issued to "cash" or Victoria Morris, the beneficiary's alleged fiancé. The record does not allow us to trace these funds to the beneficiary.

After a review of the evidence 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.