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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

B6

[redacted]

FILE: EAC 02 040 51671 Office: VERMONT SERVICE CENTER Date: NOV 18 2004

IN RE: Petitioner: [redacted]
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:

[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.

Michael Valdez
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: the Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a statement and additional evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, on the motion, counsel implies that the director incorrectly applied the pertinent law.

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 unavailable in the United States.

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.

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. Here, the Form ETA 750 was accepted on May 26, 1998. The proffered wage as stated on the Form ETA 750 is $18.89 per hour, which equals $39,291.20 per year.

With the petition the petitioner submitted a copy of its nominal 1998 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes based on a fiscal year running from November 1 of the nominal year through October 31 of the following year.

During its 1998 fiscal year, which ran from November 1, 1998 through October 31, 1999, the petitioner declared a loss of $3,753 as its ordinary income. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had current assets of $30,062 and current liabilities of $19,570, which yields net current assets of $10,492.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on January 14, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 1999 and 2000 income tax returns.

In addition, the Service Center asked whether the proffered position is a newly created position. The Service Center asked, if the position is not newly created, how long the position has existed, what wage the incumbent was being paid, and the identity of that incumbent employee. The Service Center asked for evidence of that salary paid to the incumbent and evidence that the position is now vacant. Finally, the Service Center requested copies of Form 941, Employer's Quarterly Tax Returns for the period since the priority date.

The petitioner's previous counsel responded to that request with a letter, dated April 1, 2002. In that letter, counsel stated,

> The requested business income taxes for the years of 1998, 1999, and 2000. [sic] Kindly notice the CONTINUOUS income of the business reaching the one million figures. [sic] with all due respect to the service NO business would be successfully in operation for close to 20 years. [sic] In other words, how could a business of this size would [sic] successfully operate without cooks? Case in point, it is impossible to fathom a business of this size & healthy finances, having difficulties in paying salaries to its employees.

[Emphasis in the original.]

Previous counsel returned the questionnaire with handwritten answers, although who provided those answers is unknown to this office. According to those answers, the proffered position is not newly created, but has existed since the inception of the company. In answer to the wages paid to the incumbent, the printed answer "N/A" appears. In answer to the request for the identity of the incumbent in the proffered position, the answer "Not Currently Working" appears. No evidence that the position has been vacated was submitted. The requested Quarterly Tax Returns were also not submitted.

The petitioner's previous counsel also submitted copies of the petitioner's nominal 1999 and 2000 Form 1120S, U.S. Income Tax Returns for an S Corporation.

The 1999 return, which covers the fiscal year running from November 1, 1999 through October 31, 2000, indicates that the petitioner reported ordinary income of $3,255 during that fiscal year. The corresponding

Schedule L shows that at the end of that fiscal year the petitioner had current assets of $40,868 and current liabilities of $24,019, which yields net current assets of $16,849.

The 2000 return, which covers the fiscal year running from November 1, 2000 through October 31, 2001, indicates that the petitioner reported ordinary income of $10,067 during that fiscal year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $28,108 and current liabilities of $18,239, which yields net current assets of $9,869.

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 12, 2002, denied the petition.

On appeal, the petitioner's previous counsel, citing the amount of the petitioner's salaries and wages, its gross receipts, and its gross profits, argued that the petitioner has submitted evidence sufficient to demonstrate its ability to pay the proffered wage.

The Director, AAO noted that gross profits are not an index of a petitioner's ability to pay the proffered wage, and dismissed the appeal.

With the motion, the petitioner's present counsel submits a letter, dated July 11, 2003, from an accountant. The accountant states that the petitioner's compensation of officers is discretionary. The accountant notes that the petitioner's compensation of officers and its profit during various years, added together, show the ability to pay the proffered wage. Neither the petitioner, the accountant, nor counsel submitted any evidence in support of the assertion that the petitioner's compensation of officers is discretionary, that is, that the petitioner is not obliged, contractually or otherwise, to pay compensation to its officers.

On the motion, counsel argues that the petitioner had sufficient income during 1998, 1999, 2000, and 2001 to pay the proffered wage, citing the accountant's letter.

Counsel and the accountant urge that the compensation paid to the petitioner's officers was discretionary. Neither produced any evidence of that assertion. This office will not assume, absent clear and convincing evidence, that the petitioner's officers did not require any compensation, were not due any compensation, and would not have insisted on any compensation. As such, that line item from each of the petitioner's tax returns will not be included in the determination of its 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. Showing that its gross profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.[1] 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 priority date is May 26, 1998. The proffered wage is $39,291.20 per year. The petitioner submitted no evidence pertinent to its ability to pay the proffered wage between the priority date and October 31, 1998, the end of its 1997 fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage during that period.

During its 1998 fiscal year, which ran from November 1, 1998 through October 31, 1999, the petitioner declared a loss. The petitioner has not demonstrated the ability to pay the proffered wage any portion of the proffered wage out of its profits during that year. At the end of that fiscal year, the petitioner had net current assets of $10,492. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available during that fiscal year with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

During its 1999 fiscal year, which covers ran from November 1, 1999 through October 31, 2000, the petitioner reported ordinary income of $3,255. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had net current assets of $16,849. That amount is also insufficient to pay the proffered wage. The petitioner submitted no evidence of any other funds available with which to pay the proffered wage during that fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage the proffered wage during its 1999 fiscal year.

During its 2000 fiscal year, which ran from November 1, 2000 through October 31, 2001, the petitioner reported ordinary income of $10,067. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had net current assets of $28,108. That amount is also insufficient to pay the proffered wage. The petitioner submitted no evidence of any other funds available with which to pay the proffered wage during that fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage the proffered wage during its 2000 fiscal year.

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[1] If the petitioner had demonstrated that the beneficiary would replace an existing employee, the incumbent in the proffered position, and that the existing employee's wages would be sufficient to pay the proffered wage, the petitioner might, in that way, have demonstrated its ability to pay the proffered wage. However, the petitioner declined to provide evidence relevant to that approach despite a direct request for it.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered from May 26, 1998, the priority date, to October 31, 1998, the end of its 1997 fiscal year. The documentation is also insufficient to demonstrate the petitioner's ability to pay the proffered wage during its 1998, 1999, and 2000 fiscal years. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of June 20, 2003 is affirmed. The petition is denied.