U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 22 2004
EAC-03-040-53590

IN RE: Petitioner: [redacted]
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:

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. 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 states that the evidence establishes the petitioner's ability to pay the proffered wage.

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:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is $520.00 per week, which amounts to $27,040.00 annually. On the Form ETA 750B, signed by the beneficiary on March 24, 2001, the beneficiary claimed to have worked for the petitioner from January 1998 until December 2000.

On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of $245,000.00, and to currently have five employees.

In support of the petition and in response to a request for evidence issued by the director, the petitioner submitted the following documents: a letter dated May 14, 2002 on the letterhead of the China Buffet Restaurant signed by the petitioner's contact person on the I-140 petition; a copy of the Form 1065 U.S. Return of Partnership Income of the China Buffet Restaurant for 2000; a copy of the Form 1065 U.S. Return of Partnership Income of the China Buffet Restaurant for 2001 covering the period January 1, 2001 until March 31, 2001; a copy of the Form 1120 U.S. Corporation Income Tax Return for 2002 of China Buffet, Inc., covering the period February 1, 2002 until January 31, 2003; copies of Form OS 114 Connecticut

monthly tax reports of the China Buffet Restaurant for January through September 2001; copies of statements for an account of the "China Buffet Chinese Restauran" [sic], at Fleet Bank, Hartford, Connecticut, for the months of April through July 2001; a copy of the Form 1040 U.S. individual income tax joint return for the beneficiary and his wife for 2002; a copy of the Form CT-1049 Connecticut resident income tax joint return for the beneficiary and his wife for 2002; a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2002 showing compensation received fro and a menu of the China Buffet II Chinese Restaurant.

In a decision dated April 16, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On the Form I-290B Notice of Appeal, received by CIS on May 18, 2004, counsel states that he will be submitting a brief and/or evidence within thirty days. No additional documentation was in the file as of October 20, 2004. Counsel was contacted by the AAO and notified that no further submission was in the file. On November 10, 2004 counsel sent to the AAO by fax transmission a brief dated November 9, 2004. Attached to the brief was a copy of counsel's Statement in Support of Notice of Appeal, dated June 16, 2004. The file contains no record of having received that June 16, 2004 statement prior to its submission on November 10, 2004.

Also attached to counsel's brief were copies several documents by counsel which had been submitted for the record prior to the director's decision. One of those is a letter from counsel dated December 18, 2004, the original of which is in the file. That letter states that enclosed are a Notice of Action, Form I-797; a copy of the petitioner's Schedule L for 2000; a U.S. Corporation Tax Return for 2001; and the Beneficiary's Form W-2 wage and tax statements. However, the first three of those documents are not in the record, and only a single Form W-2 for the beneficiary is in the record, the W-2 for 2002. Although counsel's brief states that the beneficiary's W-2 form for 2001 was submitted, that document is not in the record.

No copies of any evidentiary documents were attached to counsel's fax transmission of November 10, 2004.

In his brief, counsel states that the W-2 forms for the beneficiary show that the petitioner paid the beneficiary the proffered wage beginning in May 2001 and continuing through the year 2002. Counsel states that the evidence therefore establishes the petitioner's ability to pay the proffered wage.

Since no additional evidentiary documents have been submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

An initial question raised by the evidence concerns the identity of the petitioner. The record contains two Form 1065 U.S. returns of partnership income for the "China Buffet Restaurant." One of those returns is for 2000, covering calendar year 2000. The second of those returns is for 2001, covering the three-month period from January 1, 2001 until March 31, 2001. A handwritten note at the top of the 2001 return states, "Business was closed down 3/31/01 and was dissolved on 6/30/01." The address of the China Buffet Restaurant is the same as the address of the petitioner on the ETA 750 and on the I-140 petition. The two partnership returns therefore indicate that the China Buffet Restaurant was operating at its present location before the April 25, 2001 priority date, but was organized as a partnership.

On the Form ETA 750, filed on April 25, 2001, the petitioning employer is identified as "China Buffet, Inc. d/b/a China Buffet Restaurant." The "Inc." abbreviation in the petitioner's name indicates that as of the priority date the petitioner was a corporation.

The record contains no tax return covering the period from April 1, 2001 until January 31, 2002, notwithstanding counsel's assertion in his brief that a corporate tax return for the petitioner for that period had been submitted.

The next tax return in the record is a copy of the Form 1120 U.S. Corporation Income Tax Return for 2002 for "China Buffet, Inc.," covering the period February 1, 2002 until January 31, 2003. That name is consistent with the name of the petitioning employer on the ETA 750. However, on the I-140 petition the name of the petitioner appears as "China Buffet Restaurant," with no indication that the petitioner is a corporation. The I-140 petition was received by CIS on November 5, 2002, more than a year and a half after the petitioning employer identified itself as a corporation on the ETA 750.

A letter in the record dated May 14, 2002 on the letterhead of the China Buffet Restaurant and signed by Lai [redacted] states that the beneficiary "has been employed full time, for over two years at China Buffet since January 1998, as a cook, preparing sauces, meats and a variety of Chinese cuisines." That letter makes no reference to any change in the legal structure of the China Buffet Restaurant, nor to the closing down and dissolution of the business as stated in the handwritten note at the top of the Form 1065 partnership return for the China Buffet Restaurant for the period January 1, 2001 through March 31, 2001. Nor does the ETA 750B signed by the beneficiary contain any indication that the beneficiary's claimed work experience from January 1998 until December 2000 at the China Buffet Restaurant was for a different legal entity than the petitioning employer on the ETA 750, the name of which is [redacted]

No copy of the articles of incorporation fo[redacted] was submitted for the record. Nor were any other documents submitted with information concerning a change in the legal structure of the China Buffet Restaurant from a partnership to a corporation.

The Board of Immigration Appeals has stated in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), that "[i]t 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 letter dated May 14, 2002 on the letterhead of the China Buffet Restaurant implies that the beneficiary worked for the same legal entity from January 1998 until May 2002. That letter is therefore inconsistent with the tax return information discussed above. In addition, the statement on the Form 1065 for 2001 that the China Buffet Restaurant business was dissolved on June 30, 2001 is inconsistent with the statement on the I-140 petition submitted on November 5, 2002 that the petitioner had been established in 1988.

Since the petitioner has offered no explanation for the evidentiary inconsistencies discussed above, the petitioner has failed to satisfy the requirements of *Matter of Ho*, 19 I&N Dec. at 591-592. The petition therefore must be denied.

Furthermore, even assuming that the petitioner began its legal existence as a corporation approximately in April 2001, the evidence in the record would fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In determining the petitioner's ability to pay the proffered wage, CIS first examines whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the

instant case, the beneficiary stated on the ETA 750B that he was employed by the petitioner from January 1998 until December 2000. Those dates were before the priority date in the instant petition. For the year 2001, which is the year of the priority date, the only evidence indicating the beneficiary's employment by the petitioner is the letter dated May 14, 2002 on the letterhead of the China Buffet Restaurant, which is discussed above. But that letter gives no information on the wages paid to the beneficiary, nor does any other evidence in the record contain information on the amount of any compensation received by the beneficiary in 2001. Although counsel states in his brief that a copy of the beneficiary's Form W-2 for 2001 was submitted in evidence, the record contains no Form W-2 of the beneficiary for 2001. Therefore, the evidence in the record relevant to the beneficiary's employment in 2001 fails to establish the petitioner's ability to pay the proffered wage that year.

For the year 2002, the record contains a copy of the beneficiary's Form W-2 Wage and Tax Statement showing compensation in the amount of $27,040.00 received from China Buffet, Inc. Assuming that China Buffet, Inc. is the legal name of the petitioner, the beneficiary's Form W-2 for 2002 would be is sufficient to establish that the beneficiary was employed by the petitioner in 2002. Moreover, since the amount received by the beneficiary from the petitioner that year was equal to the proffered wage of $27,040.00, the beneficiary's Form W-2 for 2002 would be sufficient to establish the petitioner's ability to pay the proffered wage that year. But that evidence on the year 2002 would not satisfy the petitioner's burden to establish its ability to pay the proffered wage beginning on the April 25, 2001 priority date.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the instant petition, the only tax return in the record for the year 2001 is the Form 1065 U.S. Return of Partnership Income of the China Buffet Restaurant for 2001, covering the three-month period from January 1, 2001 until March 31, 2001. That return is for a different legal entity than the petitioner, and, in any event, it is for a period which does not include the April 25, 2001 priority date. The record contains no tax return for the period from April 1, 2001 until January 31, 2002. Therefore no tax return establishes the petitioner's ability to pay the proffered wage in the year of the priority date.

For the year 2002, the record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return, covering the period February 1, 2002 until January 31, 2003. As a corporate tax return, that document indicates that as of February 1, 2002 the petitioner was structured as a corporation. For calendar year 2002 the petitioner's ability to pay the proffered wage would be established by the beneficiary's Form W-2, as discussed above. Therefore it is not necessary to analyze the petitioner's Form 1120 tax return for the period February 1, 2002 until January 31, 2003.

The record also contains copies of statements for an account of the petitioner at Fleet Bank, Hartford, Connecticut, for the months of April through July 2001. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In the instant petition, only four monthly statements were submitted in evidence. The statements are in the name "China Buffet Chinese Restauran" [sic]. For purposes of analysis, it will be assumed that the statements are for an account of the petitioner. On the bank statements the ending balances are $9,453.77 for April 2001; $8,834.52 for May 2001; $9,398.80 for June 2001; and $6,787.44 for July 2001. The ending balance for April 2001, the month of the priority date, is not sufficient to pay the proffered wage for one year of $27,040.00, and the ending balances on the four bank statements in evidence do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns.

In any event, no bank statements for the last five months of 2001 or for any of the months in 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002. It should be noted that even though beneficiary's W-2 form for 2002 shows that the petitioner paid the beneficiary the proffered wage in 2002, if the petitioner were to rely on bank statements as evidence of its ability to pay the proffered wage, those statements would have to establish that ability both for 2001 and for 2002, since inconsistent methods of proof could result in counting the same financial resources twice. For example, funds in a bank account of the petitioner in 2001 could have been the resources used to pay the beneficiary's wage in the year 2002. The petitioner has the burden to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director failed to note the evidentiary inconsistencies discussed above concerning the identity of the petitioner. The director analyzed the Form 1065 for the first three months of 2001 and the Form 1120 for 2002 without noting that those returns were for different legal entities. The director also failed to note that the three-month period covered by the Form 1065 for 2001 is a period which does not include the April 25, 2001 priority date. However, the director correctly stated that a handwritten note on the Form 1065 for 2001 described the closing down and dissolution of the business. Despite the errors in the director's analysis, the director's decision to deny the petition was correct. As discussed above, the record fails to resolve evidentiary inconsistencies concerning the petitioner's identity, and even assuming that those inconsistencies were resolved, the record would fail to establish the petitioner's ability to pay the proffered wage in the year 2001, which is the year of the priority date.

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.