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

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 118 50618 Office: CALIFORNIA SERVICE CENTER Date: SEP 08 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a licensed board and care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel submits a brief.

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 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day 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). Here, the request for labor certification was accepted on January 14, 1998. The proffered salary as stated on the labor certification is $13.87 per hour or $28,849.60 per year.

With the petition, counsel submitted copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ended December 31, 2000, March 31, 2001, June 30, 2001, and September 30, 2001. This documentation was considered insufficient proof of the petitioner's ability to pay the proffered wage and on April 12, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, complete federal tax returns, or audited financial statements. The petitioner was requested to provide this evidence from 1998 to the present.

In response, counsel submitted copies of the petitioner's 1998, 1999, and 2000 Forms 1065, U.S. Partnership Return of Income, and a copy of the petitioner's Form 8736, Application for Automatic Extension of Time to File U.S. Return for a Partnership, REMIC, or for Certain Trusts, for the year 2001. The tax returns reflected

ordinary incomes of -$54,207, -$49,228, and -$18,590, respectively. No information was contained on the Schedule L's of the returns.

On August 8, 2002, the director informed the petitioner that the evidence provided lacked information related to the petitioner's current assets and currents liabilities and that this documentation was needed to help determine its ability to pay the proffered wage. The director also requested copies of the beneficiary's Forms W-2, Wage and Tax Statements, if the petitioner currently employed the beneficiary.

In response, counsel submitted a letter stating that the petitioner had not employed the beneficiary and that the petitioner does not keep track of its current assets and current liabilities since it is not a requirement on the income tax returns. Counsel also provided a complete copy of the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. The return reflected an ordinary income of $13,618.

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 December 6, 2002, denied the petition.

On appeal, counsel asserts that depreciation, guaranteed payments to partners, and interest should be added back to the ordinary income to determine the ability the proffered wage. Counsel also states that one of the partners could pay the proffered wage from her personal income and that Citizenship and Immigration Services (CIS) should consider the beneficiary's ability to generate income in determining the petitioner's ability to pay the proffered wage in the future.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services will first examine 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 present matter, the petitioner did not provide evidence that it employed the beneficiary from 1998 through 2001.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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. 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the

depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 1998 through 2001 tax returns reflect ordinary incomes of -$54,207, -$49,228, -$18,590, and $13,618, respectively. The petitioner could not pay the proffered wage in any of the years from these incomes.

The petitioner is a general partnership. Partners/owners of general partnerships are required to pay the debts and obligations of the partnership out of their own funds. The petitioner's owners are also obliged to show that they were able to pay the proffered wage out of their adjusted gross income, the amount left after all appropriate deductions. Furthermore, they are obliged to show that the amount remaining after the proffered wage is subtracted from their adjusted gross income is sufficient to support their family, or that they have other resources and need not rely upon that income. Therefore, the income and assets of the partners may be considered in determining the ability of the petitioner to pay the proffered wage. In this case, the evidence does not include the personal income tax returns of either of the partners/owners. The Service Center requested no budget information from the partners/owners and they provided none. It is noted that counsel did provide copies of one of the partner's 1998, 1999, and 2000 Forms 1099-MISC, Miscellaneous Income. However, without the partner's Forms 1040, U.S. Individual Income Tax Return, it is impossible to determine if these wages could be used to pay the proffered wage. Again, that determination would be based on the individual's adjusted gross income for the given years.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits for a board and care facility. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns.

Counsel asserts:

> Guaranteed Payments to Partners is really the profit left at the end of the year after all business expenses were paid. Since 1998, Petitioner had two general partners who received such payments; therefore, in order to pay the proffered wage, the general partners, at their

> discretion, could have distributed this payment towards the proffered wage owed. Therefore, the Guaranteed Payments to Partners should be added to the Ordinary Income.

Counsel does not provide any evidence, however, that the partners would be willing to forego the guaranteed payments to pay the beneficiary's wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the record shows that the partners received payments only during 1998 and 2001. Even had the payments been added back to the ordinary income, the result would have been less than the proffered wage.

Counsel states:

> The interest claimed in 1998 through 2001 should also be added to the Ordinary Income because the Interest was a cash expense, but not a proper business expense because the mortgage that was financed was/is the personal real estate investment of the partners and not an expense required to run the business. As such, the Interest amount should also be added to the Ordinary Income.

Counsel appears to imply that the interest deducted by the petitioner was unnecessary; however, counsel's position appears to be contradicted by the petitioner having claimed it. 26 U.S.C. § 162, relating to trade or business expenses, states that only necessary expenses may be deducted from income. In any event, counsel provided no information from which this office may determine where this interest should have been deducted (Form 1040) or how it would have affected the partner's adjusted gross income.

Finally, no evidence was provided that the petitioner possessed other resources with which to pay the proffered wage and no evidence was provided to establish that the beneficiary would be replacing another full-time cook. Beyond the decision of the director, we note that the record contains inconsistencies regarding the address of the petitioner. While the labor certification and petition both indicate that the petitioner will work at 11393 Yorba Avenue, the petitioner's tax returns suggest that is actually the address of one of the partners. A separate address is listed for the petitioner both on the petitioner's tax returns and the partners' schedules K-1 (in the box relating to the partnership's address), an address that changes in 2001.

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.