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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

[redacted]

FILE: WAC 01 154 55076 Office: CALIFORNIA SERVICE CENTER Date: AUG 12 2005

IN RE: Petitioner:
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]

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, California 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 second motion to reopen/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, the petitioner's owner submits his own letter, dated February 19, 2004, and a letter from his accountant, dated February 24, 2004.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts 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 July 28, 2000. The proffered wage as stated on the Form ETA 750 is $10.92 per hour, which equals $22,713.60 per year.

On the petition, the petitioner stated that it was established during September 1998 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the

petitioner since June 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Phoenix, Arizona.

With the petition counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes pursuant to the calendar year and that during 2000 it declared taxable income before net operating loss deduction and special deductions of $9,335. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $5,344 and current liabilities of $1,779, which yields net current assets of $3,565.

The petitioner did not submit evidence of any wages it paid to the beneficiary with the petition.

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 August 12, 2002, denied the petition.[1]

On appeal, counsel provided Form 1120 U.S. Corporation Income Tax Returns and Form 1120X Amended U.S. Corporation Income Tax Returns for 1999 and 2000.

On the 1999 return, the petitioner stated that its taxable income before net operating loss deduction and special deductions was $29,629 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. Because the priority date is July 28, 2000, however, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On the new 2000 return, which is dated September 11, 2002, the petitioner stated that its taxable income before net operating loss deduction and special deductions was $33,085, rather than the $9,335 is stated on its original Form 1120 U.S. Corporation Income Tax Return. The accompanying Schedule L was unchanged.

With the appeal, the petitioner did not submit evidence of any wages it paid to the beneficiary.

The Director, AAO found that the evidence submitted does not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and dismissed the appeal. The director also noted that no evidence was provided to demonstrate that the amended 2000 tax return was submitted to IRS.

On the motion, the petitioner's owner states that he is providing evidence that the amended 2000 return was submitted to IRS. With the motion the petitioner's owner submits a letter, dated February 24, 2004 from the petitioner's accountant. The petitioner did not submit evidence of any wages it paid to the beneficiary with the motion.

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[1] The Service Center did not issue a Request for Evidence. The regulation at 8 C.F.R. § 103.2(b)(8) might be read to require issuance of a Request for Evidence. The cure for that failure, however, would be to consider all of the evidence subsequently submitted, which this office will do on appeal. Therefore, even if 8 C.F.R. § 103.2(b)(8) is construed to require a Request for Evidence, the failure to issue one was harmless error.

The accountant's letter states that the accountant prepared the amended 1999 and 2000 returns and provided them to the petitioner's owner for submission to the IRS. The accountant's letter does not, therefore, demonstrate that the returns were submitted to IRS, merely that they were provided to the petitioner's owner.

The petitioner's owner also provided IRS printouts, dated February 25, 2004, of figures from the petitioner's 2000 tax records. Those printouts show that the petitioner stated, on the most recent return filed with IRS for 2000, that it had total income of $141,049 during that year, and total deductions of $131,714, which yields taxable income before net operating loss deduction and special deductions of $9,335, the same figure that was shown on the original 2000 tax return. The IRS printout does not, therefore, support the petitioner's owner's contention that the amended 2000 tax return was submitted to IRS.

Notwithstanding the petitioner's owner's assertion to the contrary, the record contains no evidence that the petitioner's amended 2000 return was submitted to IRS. The figures from that amended 2000 return will not be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 priority date is July 28, 2000. The proffered wage is $22,713.60 per year.

During 2000 petitioner declared taxable income before net operating loss deduction and special deductions of $9,335. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of $3,565. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence to demonstrate that it had any other funds available to it during 2000 with which it could

have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 2000. 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 January 27, 2004 is affirmed. The petition is denied.