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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

File: WAC 02 198 53754 Office: CALIFORNIA SERVICE CENTER

Date: AUG 22 2003

IN RE: Petitioner:  
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:

**PUBLIC COPY**

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
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 on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of prepared foods. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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 argues that the evidence shows that the petitioner is able to pay the proffered wage.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are not available.

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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 15, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

With the petition counsel submitted copies of the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1999 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of

\$39,999 during that year. The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$96,488 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 4, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. Because the priority date of the petition is January 15, 1998, the Service Center requested that the petitioner submit information for each year beginning with 1998.

In response, counsel submitted the petitioner's 1998 and 2001 Form 1120, U.S. Corporation Income Tax Returns.

The 1998 return shows that the petitioner declared a loss of \$135,187 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,306 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$867,672 and current liabilities of \$830,851, which yields net current assets of \$36,821.

Counsel also submitted Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during 1998, 1999, 2000, and 2001. The petitioner paid the beneficiary \$13,373.28, \$29,091.58, \$29,068.96, and \$26,570.33 during those years, respectively.

Further still; counsel submitted pay stub printouts from several months during October 2002. Those pay stubs include year-to-date totals. The last of those stubs is for the pay period from October 21, 2002 to October 27, 2002 and states that, as of that pay period, the petitioner had paid the beneficiary a total of \$25,180.85.

Finally, counsel submitted a copy of the petitioner's Form 941 Quarterly Federal Tax Return for the second quarter of 2002 and its California Form DE-6 Quarterly Wage Reports for the last quarter of 2001 and the first three quarters of 2002. Those wage reports show that the petitioner employed between 34 and 50 people during those quarters and that it employed the beneficiary during each of those quarters. The reports state that the

petitioner paid the beneficiary \$7,270.65, \$7,237.14, \$7,030.68, and \$7,563.90 during those quarters, respectively. This office notes that those amounts are consistent with the amounts the petitioner reported paying to the petitioner on its 2001 and 2002 W-2 forms and with the year-to-date amount shown on the October 27, 2002 pay stub.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on March 11, 2003, denied the petition.

On appeal, counsel stated that:

The Adjudicating officer did not take into consideration the fact that the alien was already on the payroll and was being paid above the proffered wage except for the year 1998, at which time the alien was paid below the wage being offered. However, the employer was able to pay the proffered wage in 1998 based in (sic) company's income. The alien is presently making more than the proffered wage. The decision to deny should be reversed and the I-140 approved.

Counsel is correct that the director's decision did not mention the wages paid to the beneficiary during the salient years. This office's determination of the petitioner's ability to pay the proffered wage shall include those wages.

The proffered wage is \$24,024 per year. The priority date of the petition is January 15, 1998. The petitioner is not obliged to show the ability to pay the entire proffered wage during 1998. The petitioner is only obliged to demonstrate that it could have paid that portion of the proffered wage that would have been due if it had been permitted to hire the beneficiary on the priority date. On the priority date, 14 days of 1998 had passed, and 351 days of that 365-day year remained. The petitioner is obliged to show that it was able to pay 351/365<sup>th</sup> of the proffered wage, or \$23,102.53.

During 1998, the petitioner actually paid the beneficiary \$13,373.28, which demonstrates its ability to pay that portion of the proffered wage. The petitioner must show the ability to pay the balance of \$9,729.25.

On its 1998 tax return, the petitioner declared a loss of \$135,187. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay the balance of the proffered wage during 1998.

The petitioner is obliged to show the ability to pay the entire \$24,024 proffered wage during the remaining years. During 1999

the petitioner declared a taxable income before net operating loss deduction and special deductions of \$39,999. The petitioner has demonstrated that it could have paid the proffered wage during that year out of its income. In addition, the petitioner paid the beneficiary \$29,091.58 in wages during 1999, which also shows that it was able to pay the proffered wage.

During 2000 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$96,488. The petitioner has demonstrated that it could have paid the proffered wage during that year out of its income. In addition, the petitioner paid the beneficiary \$29,068.96 during that year, which also demonstrates the ability to pay the proffered wage.

During 2001 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,306. The petitioner ended that year with net current assets of \$36,821. The petitioner has demonstrated that it was able to pay the proffered wage during that year out of its assets. In addition, the petitioner paid the beneficiary \$26,570.33 during that year, which also demonstrates the ability to pay the proffered wage.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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.