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*Blp*  
U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*  
*CIS, AAO, 20 Mass, 3/F*  
*425 I Street, N.W.*  
*Washington, DC 20536*

[REDACTED]

File: [REDACTED] Office: VERMONT SERVICE CENTER

Date: APR 07 2004

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:

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.

*[Signature]*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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, the counsel submits a brief and additional evidence.

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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year.

With the petition the petitioner's previous counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return states that the petitioner declared a loss of \$4,325 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had net current assets of \$19,125 and no current liabilities, which yields net current assets of \$19,125. This office observes that because the priority date is April 30, 2001, information from the petitioner's 2000 tax return is not directly relevant to the petitioner's ability to pay the proffered wage.

On June 14, 2002, the Vermont Service Center requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. The Service Center requested that, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner demonstrate its continuing ability to pay the proffered wage, beginning on the priority date, with copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also specifically requested that the petitioner provide a copy of the Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary, the petitioner's 2001 income tax return, and the petitioner's 2001 annual reports.

In response, the petitioner's previous counsel submitted an additional copy of the petitioner's 2000 tax return and a letter, dated July 25, 2002, from the petitioner's accountant. The letter states that the petitioner's 2001 tax return had not yet been completed and that the petitioner has the ability to pay the proffered wage. The petitioner did not provide copies of annual reports or W-2 forms. The petitioner provided no evidence that it employed the beneficiary during 2001.

Although the petitioner provided no reason for its failure to provide its 2001 annual reports, this office infers that it does not issue an annual report.

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 October 22, 2002, denied the petition.

On appeal, the petitioner's previous counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and stated that it should constitute sufficient evidence of the petitioner's ability to pay the proffered wage.

The petitioner's 2001 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$8,719 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,149 and no current liabilities, which yields net current assets of \$26,149.

Subsequently, the petitioner's present counsel submitted a brief to supplement the appeal. With the brief, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. The tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$6,482 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$28,658.

In the brief, counsel implied that the petitioner's taxable income, depreciation deduction, current assets, and retained earnings should be added together to calculate the funds the petitioner had available to pay the proffered wage.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054. The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel asserts that the petitioner's 2001 Form 1120 shows that the petitioner is able to pay the proffered wage. Counsel urges that the petitioner's ability to pay the proffered wage should be computed by adding

its taxable income before net operating loss deduction and special deductions, its net current assets, and its year-end retained earnings.

Counsel states that the taxable income is correctly part of the determination of the petitioner's ability to pay the proffered wage. The correct net income figure from the petitioner's Form 1120 U.S. Corporation Income Tax Returns is the taxable income before net operating loss deduction and special deductions. In this case, the petitioner had no operating loss deduction and special deductions during either of the salient years. During the salient years, therefore, the petitioner's taxable income before net operating loss deduction and special deductions was equal to its taxable income. In this case, the petitioner's taxable income is, therefore, part of the determination of the ability to pay the proffered wage.

Counsel urges that the petitioner's current assets should be included in the determination of its ability to pay the proffered wage. In fact, the petitioner's net current assets, the current assets net of the current liabilities, are appropriately part of that calculation because current assets consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year. In this case, the petitioner had no current liabilities during either of the salient years. The petitioner's current assets are equal to its net current assets and are therefore, in this case, appropriately part of the calculation.

Counsel urges that the petitioner's retained earnings should also be included in the determination of the petitioner's ability to pay the proffered wage. Retained earnings are the sum over time of the net income of a company. This year's retained earnings are last year's retained earnings plus this year's net income. Stated another way, they are the difference between assets and liabilities over time. However they are viewed, adding them to income and assets is duplicative, at least in part. The petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's ability to pay the proffered wage, because they do not represent funds, in addition to income and assets, available for disposition.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 in determining 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).

In *K.C.P. Food Co., Inc. v. Sava*, the court held the INS, 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 INS, now 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 v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is April 30, 2001. The proffered wage is \$25,000 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 119 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 246 days. The proffered wage multiplied by  $246/365^{\text{th}}$  equals \$16,849.32, which is the amount the petitioner must show the ability to pay during 2001.



The petitioner declared loss of \$8,719 during 2001 and finished the year with net current assets of \$26,149. Although the petitioner was unable to pay any portion of the proffered wage from its taxable income before net operating loss deduction and special deductions, the petitioner has demonstrated the ability to pay the salient portion of the proffered wage during 2001 out of its net current assets.

During 2002, the petitioner is obliged to show the ability to pay the entire proffered wage. The petitioner declared a taxable income before net operating loss deduction and special deductions of \$6,482 during 2002 and finished the year with net current assets of \$28,658. Again, although the petitioner's taxable income before net operating loss deduction and special deductions was insufficient to pay the proffered wage, the petitioner has demonstrated the ability to pay the proffered wage out of its net current assets.

The petitioner has demonstrated the ability to pay the proffered wage during both of the salient years. Therefore, the petitioner has 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.