U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2004

IN RE: Petitioner: [redacted]
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:

[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.

for 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 bakery and distributor of baked goods. It seeks to employ the beneficiary permanently in the United States as an expediting clerk. 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 that the beneficiary is not qualified for the proffered position, and denied the petition accordingly.

On appeal, 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 first issue to be discussed in this case is whether or not the petitioner has established its ability to pay the proffered wage. 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.

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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 26, 2001. The proffered wage as stated on the Form ETA 750 is $16.34 per hour, which amounts to $33,987.20 annually.

With the petition, the petitioner submitted no evidence of its ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 4, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 2001 and 2002. The tax returns reflect the following information for the following years:

	2000	2001
Ordinary income	-$119,244	-$188,301
Current Assets	$486,668	$439,094
Current Liabilities	$131,012	$207,913
Net current assets	$355,656	$231,181

In addition, counsel submitted a copy of a letter from C.P.A. who stated that he has been the petitioner's owners' accountant for over 20 years. The accountant's letter states the following:

> [The petitioner] (an S Corporation) is only one of ["several very successful bakery"] businesses and is a supplier of bakery goods to the other bakeries . . . From a single location, they have now expanded to over 23 locations.
>
> [The petitioner] was set-up [sic] to handle a large volume of growth in these bakeries and to specifically market the "Alligator" pastry product on a national level. Due to these reasons, it was anticipated by the owners that it would take many years before this particular aspect of their business would show a profit. But, in the long run, their investment will be returned many times over. I see no problem with their ability to pay [the beneficiary] wages of $33,000 plus per year. The owners agree that these wages are a cost of doing business in a rapidly growing economy.

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the quarters ending June 30, 2002 through December 31, 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Additionally, the petitioner submitted a copy of its fictitious business name statement indicating that Viktor Bene's Distributing Co. is the fictitious business name of the petitioner.

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 June 24, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's shareholders draw all or most of the net income from the corporation leaving little or not taxable income in order to avoid double taxation. Counsel implies that the petitioner can adjust its shareholder compensation to provide for the proffered wage. The petitioner submits brochures concerning the petitioner's bakery as well as the petitioner's tax returns that were previously submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the proffered wage in 2001.[1]

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, CIS will next examine the net income figure reflected on the petitioner's 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).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, are $231,181, which is more than sufficient to cover the proffered wage of $33,987.20. Thus, the petitioner has demonstrated its ability to pay the proffered wage out of its net current assets in 2001.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether the petitioner has established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is February 26, 2001.

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[1] While the petitioner provided its financial information for the year 2000, it is not relevant since the priority date is in 2001.

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of computer support specialist. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	n/a
	College Degree Required	n/a
	Major Field of Study	n/a

The applicant must also have two years of employment experience in the job offered, but none in a related occupation. Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she was employed by Masis L. T.D. Inc., 608 S. Hill Street, #310, Los Angeles, CA 90014, as an Expediter from January 1998 through February 2001. Masis L. T.D. Inc. was apparently a diamond import/export business and she worked forty hours per week doing the following:

> Contact vendors and shippers to ensure that merchandise, supplies and equipment are forwarded on specified shipping date: contact vendor by mail and phone, to verify shipment of goods on specified date. Communicate with transportation company to preclude delays in transit. Arrange for distribution of stones upon arrival. Contact vendors to requisition materials. Inspect stones for quantity to ensure adherence to specifications.

She provides no further information concerning her employment background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

With the initial petition, the petitioner submitted a letter dated September 9, 2002, on Masis L.D.T. Inc. letterhead and signed by Karina Pogosian, the Owner. The letter confirms the beneficiary's employment with the company as an expediter for 40 hours per week from January 1998 to February 2001 and recites the same job duties as the beneficiary set forth on the Form ETA 750B.

The director's request for evidence made no mention of a deficiency in the evidence initially submitted in support of the petition. The director requested the beneficiary's Form W-2, Wage and Tax Statement, from 1998 to the present presumably to corroborate her employment experience. In response to the director's request for evidence, the petitioner submitted a declaration signed by the beneficiary that states the following:

> Masis L.D.T. Inc. was our family business owned by my father.

> While I was working for Masis L.D.T. Inc. I did not get paid as the entire family drew it's [sic] income from the business without paying our individual salaries.
>
> Since March 2001 I have been unemployed.

In the director's final decision, he stated the following:

> [CIS] acknowledges receipt of the Masis L.D.T. Inc. letter dated September 09, 2002 and signed by stating [the] beneficiary was employed by the company, however, as there were no wages paid; the beneficiary's employment with said company cannot be confirmed. Based on the documentation submitted, it has not been established [sic] the beneficiary had met the minimum requirement of experience listed on the Form ETA 750 at the time the request for certification was filed.

On appeal, counsel states that the petitioner has established the beneficiary's qualifications through the letter of experience and declaration of the beneficiary previously submitted, as well as a supplemental declaration submitted on appeal. Counsel states that the beneficiary served as the "Vice President" o and although she was compensated for her work, she did not receive a W-2 form because she did not have a social security number. In support of that fact, counsel submits a copy of an application for an employer identification number signed by the beneficiary as "V. President" in December 1997. Additionally, counsel states that "[a]s it was a family owned business the entire income of the business was reported on the [t]ax [r]eturn of the [b]eneficiary's father." The supplemental declaration on appeal, signed by the beneficiary, states the following:

> Between January 1998 and February 2001 I worked full time at Masis LDT.,Inc.
>
> Since I did not have a Social Security number I could not have received a W-2 form from the company.
>
> As it was a family owned business the entire income of the business was reported on the Tax Return of the mother.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements

> for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The director is entitled to seek evidence corroborating the petitioner's assertion of a fact in the petition. Since seeking corroborating evidence of the beneficiary's past employment experience, the issue has become laden with inconsistencies and discrepancies that must result in a denial on this issue. The beneficiary's declarations state alternatively that her mother or her father owned the company and reported all of its income on his or her tax returns.[3] No evidence was submitted to corroborate that factual assertion. The beneficiary states that she could not produce proof of compensation because she did not have a social security number. However, counsel states that the beneficiary was remunerated for her employment. Presumably there are alternative means of producing such evidence of remuneration, such as cancelled checks, bank account statements evidence deposits, or other affidavits or declarations from other witnesses to the past employment. Additionally, the record is inconsistent as to whether the beneficiary's past employment experience was as a "vice president" or as an "expediter." The petitioner has failed to provide necessary clarity concerning these factual points. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

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[3] Counsel states that it is her father who is the owner. The beneficiary states in a declaration submitted in response to a request for evidence that the owner was her family. The experience letter is signed by the "owner" by who is listed as the beneficiary's mother on her Form G-325, Biographic Information sheet submitted into the record of proceeding in connection with an adjustment of status to lawful permanent resident application.