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FILE: [Redacted]  
WAC-03-065-53009

Office: CALIFORNIA SERVICE CENTER

Date: 11/17/2005

IN RE: Petitioner: [Redacted]  
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 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 Chinese restaurant. 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, 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 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 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 April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$16.67 per hour, which amounts to \$34,673.60 annually. On the Form ETA 750B, signed by the beneficiary on April 18, 2001 above a warning concerning a penalty for committing perjury, the beneficiary did not claim to have worked for the petitioner. On Form G-325, Biographic Information sheet, submitted into the record of proceeding with a concurrent filing of an application to adjust status to lawful permanent resident and signed by the beneficiary on December 4, 2002 above a warning concerning a penalty for committing perjury, the beneficiary indicated he worked for the petitioner from March 2001 to "the present time."

On the petition, the petitioner claimed to have been established in August 1998, to have a gross annual income of \$400,000, and to currently employ nine workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 8, 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. The director specifically requested evidence for 2001 and 2002 and any evidence of wages paid to the beneficiary.

In response, the petitioner submitted its Forms 1120 Corporate tax returns for the years 2000<sup>1</sup> and 2001. Although counsel's accompanying letter indicates that the petitioner was submitted its 2002 corporate tax return as well, the record of proceeding did not contain it at the time of that submission. The petitioner also submitted the petitioner's owner's individual income tax returns for 2001 and 2002.

The petitioner's corporate tax return reflects the following information:

	<u>2001</u>
Net income <sup>2</sup>	\$6,471
Current Assets	\$41,971
Current Liabilities	\$13,920
Net current assets	\$28,051

In addition, counsel submitted copies of the petitioner's state and federal quarterly wage reports for all four quarters of 2001, all four quarters of 2002, and the first quarter of 2003. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Counsel's accompanying letter states that the beneficiary does not have a social security number and thus W-2 forms "are not available."

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 1, 2003, the director again requested additional evidence pertinent to that ability. The director stated that the petitioner's business is a sole proprietorship and requested the sole proprietor's monthly expenses.

In response, counsel stated that the petitioner is not a sole proprietorship and submitted copies of the petitioner's articles of incorporation and other evidence showing that the petitioner's business operates as a corporation.

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 February 5, 2004, denied the petition. The director noted that the net income and net current assets from the petitioner's 2001 corporate tax return were both less than the proffered wage<sup>3</sup>.

On appeal, counsel asserts that the director misread the tax returns and states that he is submitting a letter from the petitioner's accountants explaining "the cost analysis and budget corrections of the additional contract available to the [petitioner]." The petitioner submits a letter from Mr. [REDACTED] who does not identify his profession or relationship to the petitioner, of [REDACTED] without a description of the service that business provides, who explains that the petitioner entered into a contract as of November 1, 2003 to provide food at "their" location. Mr. [REDACTED] states that "[f]or the first two months of this contract, they earned \$12723.19. They have been guaranteed at least \$5000.00 a month. They have exceeded that." Thus, Mr. [REDACTED] states that the gross profit would result in sufficient profiting to cover the proffered wage including the addition of depreciation expenses to the petitioner's actual cash flow. The petitioner also resubmits its 2001 corporate tax

<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

<sup>3</sup> The director incorrectly stated that this tax return was for 1999.

return; a letter from [REDACTED] Director of Washoe Medical Center (Washoe), stating that it has a contract with the petitioner to supply lunch specials to its cafeteria; and a Form 1099, Miscellaneous Income, reflecting that Washoe paid the petitioner \$12,723.19 in 2003.

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. Despite the conflicting statements noted above, in the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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, contrary to Mr. [REDACTED] assertion. 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). 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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.<sup>4</sup> 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.

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In that year, the petitioner shows a net income of only \$6,471 and net current assets of only \$28,051, which are both amounts that are less than the proffered wage of \$34,673.60, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner submits unsupported evidence into the record of proceeding on appeal. It is not clear that Mr. [REDACTED] statements are in the capacity of a certified public accountant for the petitioner. Additionally, although the petitioner demonstrated that it earned \$12,723.19 in 2003 from Washoe, CIS and the AAO would need to see the petitioner's corporate tax return for that year to see if that resulted in sufficient net income and net current assets, after expenses, to demonstrate the petitioner's ability to pay the proffered wage in 2003. The evidence indicated that this additional income was not procured until 2003 and 2004. The AAO notes that as such, the evidence is unhelpful since a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, the letter from Washoe and the 1099 form for 2003 is insufficient evidence of the specified contractual term so it is unclear that this is a steady source of additional income for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.