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**U.S. Citizenship
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FILE: [REDACTED]
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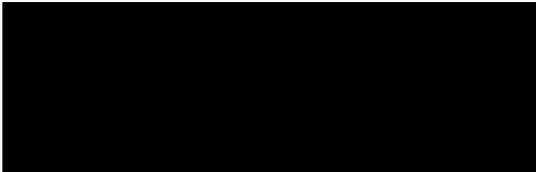
Office: CALIFORNIA SERVICE CENTER

Date: DEC 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

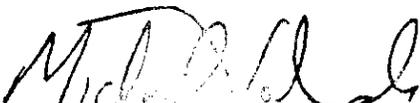
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 petition will be denied.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 the petitioner's Form 1065 for 2003, and resubmits the petitioner's and the beneficiary's tax returns for 2001–2002.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 8, 2001. The proffered wage as stated on the Form ETA 750 is \$11.95 per hour, or \$24,856 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 1999.

On the petition, the petitioner claimed to have been established in January 1991, to have a gross annual income of more than \$2 million, and to currently employ 33 workers. In support of the petition, the petitioner submitted:

- A G-28 for [REDACTED] (Ms. [REDACTED]) a form preparer;
- A Form 1065 return of the petitioner for 2001;
- The original form ETA 750; and,
- A translated letter from a former employer of the beneficiary.

The record indicates the petitioner is structured as a partnership and files its tax returns on Form 1065 on an accrual-based accounting system. The petitioner's fiscal year lasts from January 1 to December 31.

On December 6, 2002, the director requested additional evidence (RFE) pertinent to a written employment offer to the beneficiary and for signed copies of the 2001 returns, each of which the petitioner submitted in response on February 3, 2003.

On June 25, 2003, the director again issued an RFE requesting copies of the petitioner's income tax returns for 1999 and 2002 Form, the beneficiary's income tax returns for 2000–2002 along with W-2s the petitioner may have issued for those years, along with proof of payment to date of the proffered wage. On July 28, 2003, Ms. [REDACTED] sent the requested documents, including pay stubs dated December 27, 2002, for \$750

(\$19,947.57 year-to-date for 2002); May 2, 2003, for \$750; and May 30, 2003, for \$750 (\$8,250 year-to-date for 2003).

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	-\$83,193	\$31,261
Gross receipts	\$1,811,447	\$2,176,077
Salaries and wages	\$41,420	\$49,118
Current Assets	\$553,187	\$461,569
Current Liabilities	495,378	\$475,253
Net current assets	\$57,809	-\$13,684

On June 5, 2004, 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, denied the petition. The director cited the petitioner's 2001 federal tax return showing -\$83,193 in ordinary income despite the beneficiary's \$18,193 in wages for that year.

On appeal, counsel asserts that the petitioner tax return for 2001 shows it had sufficient cash and total assets to pay the proffered wage.

Counsel also submits the petitioner's Form 1065 return for 2003.²

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 has not established that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. Instead, the petitioner paid partial wages in the amounts of \$18,856 in 2001, \$19,947 in 2002, and \$19773.38 in 2003. Those wages paid in 2001 is \$6,000 less than the proffered wage; the wages paid in 2002 is \$4,909 less than the proffered wage; and the wages paid in 2003 is \$5,082.62 less than the proffered wage. The petitioner is therefore obligated to demonstrate that it could pay those differences between the wages actually paid to the beneficiary and the proffered wage.

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).

¹ Ordinary income (loss) from trade or business activities as reported on Line 22.

² The return for 2003 was unavailable on July 28, 2003, when former counsel responded to the second RFE.

The petitioner reported a net loss of -83,193 for 2001, a net income of \$31,261 for 2002, and a net loss of -\$47,908 for 2003. The petitioner has shown, based on its net income, the ability to pay the proffered wage only for 2002 but not for 2001 or 2003.

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.³ A partnership'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 partnership'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 reported net current assets for 2001 were \$57,809, and for 2003 were a negative -\$146,411.⁴ Based on its net current assets, the petitioner has shown it has the ability to pay the proffered wage for 2001.

However, counsel fails to establish the petitioner's ability to pay the proffered for 2003 under either form of financial analysis. The evidence shows that for 2003, the petitioner ended 2003 with a -\$47,908 net loss. It further showed that it ended 2003 with -\$146,411 in net current assets. Counsel having made no other claims that the petitioner has the ability to pay the proffered wage continuously and until the beneficiary obtains lawful permanent residence status, his evidence fails to demonstrate the petitioner's ability to pay the proffered wage.

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. The petition is denied.

³ 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.

⁴ For 2003, the petitioner reported a negative -\$13,684 in net current assets.