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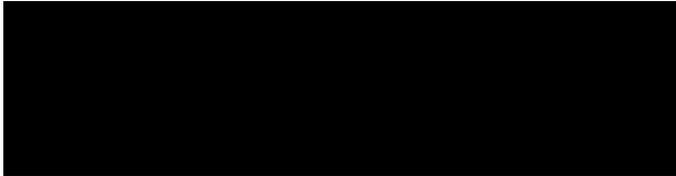
Office: NEBRASKA SERVICE CENTER

Date: FEB 10 2005

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

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

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Middle Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a pastry cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(i) of 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 or seasonal 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 wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 30, 2001. The proffered salary as stated on the labor certification is \$11.47 an hour or \$23,857.60 per year.

With the petition, counsel submitted copies of the petitioner's Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years October 1 through September 30, 1999 and 2000. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$1,239 and net current assets of \$8,670<sup>1</sup>. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$1,058 and net current assets of \$7,768. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on March 19, 2003, the director requested additional evidence of the petitioner's ability to pay the

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<sup>1</sup> The 1999 federal tax return does not cover the priority date of the petition, April 30, 2001, and, therefore, will not be considered in determining the petitioner's ability to pay the proffered wage.

proffered wage from the priority date and continuing to the present. The director specifically requested a copy of the petitioner's 2001 federal income tax return.

In response, counsel provided a copy of its Form 1120, U.S. Corporation Income Tax Return for the fiscal year October 1, 2001 through September 30, 2002, copies of its Forms 941, Employer's Quarterly Federal Tax Return, for the quarters ended June 30, 2001, December 31, 2002, and March 31, 2003, and an unaudited financial statement for the period ended May 31, 2003. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$1,745 and net current assets of \$6,308. The unaudited financial statement reflected total revenue of \$27,061.08, net income of -\$97.42, and net current assets of -\$20,275.16.

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. On July 11, 2003, the director denied the petition.

On appeal, counsel states:

On July 11, 2003 the BCIS issued a denial on the I-140 Petition for Immigrant Worker submitted by [REDACTED] Restaurant based upon its inability to pay the beneficiary's wage of \$23,400.00 per year as a pastry chef. The employer had provided copies of its financial records for the taxable [sic] year 2001 to 2003 including quarterly payroll reports and tax returns. A review of the employer's tax returns establishes the following information:

Gross earnings for 2001	\$85,152.00
Gross profit for 2001	\$55,861.00
Salaries and Wages for 2001	\$11,596.00
Depreciation Expense for 2001	\$ 336.00

The examiner believed that net income was the bottom line of the tax return which showed a loss of (\$1,745). However, the net income as defined by BCIS national standard operating procedures states that when determining net income that BCIS will look at income before the losses are deducted. 8 C.F.R. 204.5(g)(2).

As guidance on the employer's ability to pay BCIS refers to the following case law, *Matter of Great Wall*, 16 I & N Dec. 142 (R.C. 1977); *Matter of Sonogawa*, 112 I & N Dec. 612 (R.C. 1967); *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.C.C. 1988). BCIS can rely on net income to determine employer's ability to pay. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (SDNY 1986). Depreciation cannot be used as a deduction from net profit. It is an imaginary loss after net profit.

Herein, the Petitioner's net income before losses was \$55,861.00. This was well above the wage offered of \$23,400.00. Hence, the employer is able to pay the wage offered from the adjusted gross income. The Petition should not have been denied.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

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<sup>2</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.

current liabilities are shown on lines 16(d) through 18(d). 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 2000 and 2001 were \$7,768 and \$6,308, respectively. The petitioner could not have paid the proffered wage in 2000 and 2001 from its net current assets.

Counsel indicates that it is a CIS national standard operating procedure that when determining net income, CIS will look at income before the losses are deducted. Counsel is mistaken. CIS will consider taxable income before net operating loss deduction and special deductions, not gross profit as counsel suggests. It would be incorrect to only consider a company's profit and not its deductions in determining its ability to pay the proffered wage. Even if the Service Centers had a standard operating procedure using gross profit as a basis to establish the petitioner's ability to pay the proffered wage, the AAO is not bound to comply with the Service Center standard operating procedure. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petition on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$1,058 and net current assets of \$7,768. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$1,745 and net current assets of \$6,308. The petitioner could not pay the proffered wage from either its taxable income or its net current assets in 2001.

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.