

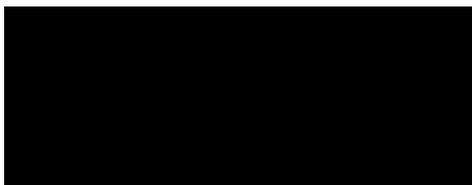
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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



U.S. Citizenship and Immigration Services

**PUBLIC COPY**



B6

FILE: [Redacted]  
EAC 02 214 51179

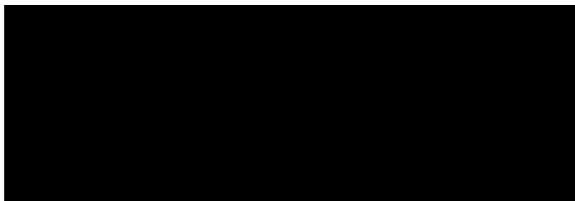
Office: VERMONT SERVICE CENTER

Date: FEB 25 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

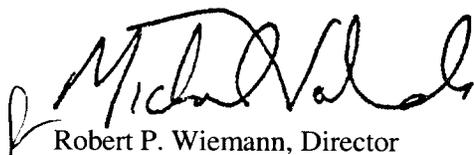
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 director denied the employment-based preference visa petition filed by the petitioner on June 8, 2002. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 stated that the petitioner has the ability to pay the proffered wage as of 1997. Counsel submits 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 8, 1997. The proffered wage as stated on the Form ETA 750 is \$9.10 per hour, which amounts to \$18,928 annually.<sup>1</sup>

The petitioner indicated in the petition that it was established in 1995, and that it has ten employees. With the petition, the petitioner submitted IRS Form 1120, the petitioner's federal corporate income tax return, for the year 1996.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 25, 2001, the director requested further evidence with

---

<sup>1</sup> The ETA750 indicates that the beneficiary would work from 3 A.M. to 10 A.M., a daily work schedule of 7 hours. The ETA 740 does not indicate how many days the beneficiary would work. It does indicate, however, that the beneficiary will work 40 hours a week. Thus, the annual salary would be \$18,928, and the weekly salary would be \$364.

regard to the petitioner's ability to pay the proffered wage as of the priority date of May 8, 1997. In particular, the director requested the petitioner's 1997 federal income tax return, or audited financial statements or annual reports. Due to lack of response by the petitioner, the director determined the petition to be abandoned, and on January 13, 2002, denied the petition. The director reopened the petition on motion. On November 8, 2002, 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 evidence that the petitioner had the ability to pay the proffered wage or salary of \$400 a week from the priority date and continuing to the present time.<sup>2</sup> The director also requested that the petitioner submit its 1997 and 2001 federal income tax returns, with all schedules and attachments. The director also requested W-2 forms for the beneficiary, if the petitioner had employed the beneficiary in 1997 or at any time since the priority date.

In response, counsel stated that the beneficiary's salary was \$17,928.<sup>3</sup> Counsel also noted that the petitioner's depreciation expense, which in its 1997 federal income tax return was \$21,654, could be used towards the beneficiary's salary. Counsel similarly stated that the petitioner's depreciation expense of \$22,590 for 2001 could also be used to pay the beneficiary's salary. Counsel also noted that in 2001, the petitioner paid salary and wages of \$100,534 and that this sum included the salary of a baker who no longer worked with the petitioner. Counsel asserted that the salary of the former employee could be used to pay the beneficiary's salary. Counsel submitted the petitioner's 2001 and 1997 federal income tax returns with accompanying schedules. Counsel also submitted the petitioner's Pennsylvania Corporate Tax Report for 1997.

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 May 30, 2003, denied the petition. The director stated that while the petitioner's 2001 federal income tax return established that the petitioner had the ability to pay the proffered wage in 2001, the 1997 federal income tax return did not demonstrate the petitioner's ability to pay the proffered wage as of the priority date.

On appeal, counsel asserts that the petitioner is able to pay the salary of the beneficiary, and submits a letter from [REDACTED] accountant, [REDACTED]. Counsel identifies [REDACTED] as the petitioner's accountant. Counsel also submits the petitioner's 2002 federal income tax return. [REDACTED] in his statement, does not identify himself as the petitioner's accountant, and merely states to an unidentified correspondent: "In reference to your comments regarding the ability of [the petitioner] to pay the beneficiary's salary in 1997, please note the following observations." [REDACTED] then states that the depreciation expense of \$21,654, which was taken by the petitioner in 1997, is a non-cash expense. By adding back the depreciation to the petitioner's 1997 income, the petitioner would have had a profit of \$15,758. In addition, the accountant stated that with the addition of the beneficiary to the petitioner's staff, the petitioner would be able to reduce the existing hours and payroll of the officers of the company allowing them to devote more time to other business ventures. [REDACTED] asserts that this change would save approximately \$10,000 in officer salaries. According to [REDACTED] when this additional \$10,000 is added to the net income plus depreciation figures of 1997, the petitioner would have had a profit of \$25,758. In addition, [REDACTED] points out that the petitioner's income tax return for 2002 shows gross sales of \$386,885, officer compensation of \$25,094, taxable income of \$7,816, depreciation of \$17,122, labor costs of

---

<sup>2</sup> See *supra*, note 1.

<sup>3</sup> See *supra*, note 1.

\$120,814, current assets of \$10,701, and current liabilities of \$15,000. [REDACTED] finally asserts that by adding back the 2002 depreciation of \$17,122 to the petitioner's profit of \$7,816, the petitioner's profit in 2002 would have been \$24,938.

With regard to the director's request for further evidence, it is inexplicable why the director only requested the petitioner's federal income tax returns for 1997 and 2001. The petitioner bears the responsibility of establishing its ability to pay the proffered wage from 1997 to the present time. This necessarily means that not only does the petitioner have to submit its tax returns for 1997 and 2001, but also for tax years 1998, 1999, and 2000. In addition, the director's request for further evidence dated November 8, 2002 also outlines other documentation that would establish the petitioner's ability to pay the proffered wage from the priority date to the present, such as audited financial reports or annual reports. Furthermore, counsel, who has represented the petitioner in its prior I-140 petition for the same beneficiary, submitted the instant petition with the petitioner's 1996 federal income tax returns. However, since the priority date for the petition is April 8, 1997, the petitioner's federal income tax return for 1996 is not relevant or dispositive in this proceeding. Without the submission of the 1998, 1999, and 2000 federal income tax returns or similar documents of sufficient evidentiary weight, the petitioner cannot establish its ability to pay the proffered wage from 1997 to the present time. For this reason, the appeal will be denied, and the petition will be dismissed.

Nevertheless, for further clarification of this matter, the AAO will examine the petitioner's federal income tax returns for 1997 and 2001, and their ability to establish the petitioner's ability to pay the proffered wage for these two years. 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. Although the director requested any evidence as to the beneficiary's employment by the petitioner from 1997 to the present, the petitioner presented no such evidence. Therefore, the petitioner did not employ and paid the beneficiary the full proffered wage in 1997 and onward.

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. With regard to counsel's and [REDACTED] comments on depreciation expenses, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

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 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, now CIS, should have considered income before expenses were paid rather than net income.

With regard to the petitioner's net income for 1997, 2001, and 2002, the relevant years for which the petitioner submitted federal income tax returns, the petitioner's net or taxable income was as follows: \$1,565, \$226, and \$7,816. None of these figures are sufficient to cover the beneficiary's annual salary of \$18,928. Thus the petitioner cannot establish that it has the ability to pay the beneficiary's salary based on its net income for these years.

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. In addition, 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(d) through 6(d). Its year-end 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 tax returns reflect the following information for the following years:

---

<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.

	1997	2001	2002
Taxable income <sup>5</sup>	\$ -5,896	\$ 226	\$ 7,816
Current Assets	\$ 4,640	\$ 7,208	\$ 10,701
Current Liabilities	\$ 4,636	\$ 53,122	\$ 50,090
Net current assets	\$ 4	\$ -45,914	\$ -39,389

Contrary to the director's decision, an analysis of the petitioner's taxable income for 2001 does not establish that the petitioner had the ability to pay the proffered wage in 2001, based on net or taxable income, or net current assets. In addition, the petitioner did not establish its ability to pay the proffered wage in either 1997 or 2002 on the basis of the petitioner's net income or net current assets. In 1997, the petitioner has taxable income of -\$5,896 with net current assets of four dollars. In 2002, the petitioner has taxable income of \$7,816, with net current assets of -\$39,389. In addition, the petitioner's claimed accountant stated that the beneficiary would be replacing a cook who had left the petitioner's employ. However, neither counsel nor the petitioner provided any further substantiation of this assertion, such as the name of this employee, verification of their wages and full time employment, or other evidence that the worker had actually left the petitioner's employ. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage due to the departure of this employee.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997 and onward. Further, it has not established that it had the ability to pay the proffered wage as of the priority date of April 8, 1997. As previously stated, the petitioner submitted no federal income tax returns for the interim years of 1998, 1999, and 2000, and thus, no evaluation of these years can be made. With regard to the years 1997, 2001, and 2002, the petitioner has not established that it had the ability to pay the proffered wage. 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). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Although the director was remiss in not requesting the petitioner's federal income tax returns for the years 1998, 1999, and 2000, the fact remains that the petitioner did not have the ability to pay the proffered wage as of the priority date. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

<sup>5</sup> Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.