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U.S. Citizenship  
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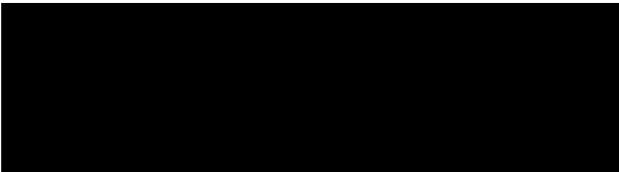
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 07 2005  
SRC-02-210-51827

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

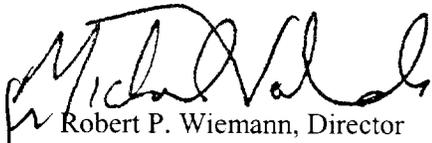
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a 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 July 17, 2000. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$122,831, and to currently employ two workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for the years 2000 and 2001.

The tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income <sup>1</sup>	\$19,143	\$22,210
Current Assets	\$3,811	\$13,423
Current Liabilities	\$215	\$362
Net current assets	\$3,596	\$13,061

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<sup>1</sup> Taxable income before net operating loss deduction & special deductions as reported on Line 28.

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 February 7, 2003, the director requested additional evidence pertinent to that ability. The director requested the beneficiary's W-2 forms for 2000 through 2002, the petitioner's quarterly tax reports for each quarter in 2002, and the petitioner's bank statements from July 2000 to the present to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner re-submitted its 2000 and 2001 Form 1120 Corporate tax returns along with proof it sought an extension of filing its 2002 taxes. In addition, counsel submitted copies of the petitioner's checking account statements for the period from April 30, 2002 through December 31, 2002; the petitioner's quarterly wage reports for the four quarters in 2002; and Form 1099 Miscellaneous Income statement the petitioner issued to the beneficiary in 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 and indicated that the petitioner only employed and paid one employee. The Form 1099 Miscellaneous Income statement reflects wages of \$25,000 paid to the beneficiary in 2002.

Counsel's accompanying letter states that the beneficiary was not employed by the petitioner as an employee, and only retained in an independent contractor status during 2002, for which he was compensated at a rate above the proffered wage. Counsel also states that there is only one employee reflected on the petitioner's quarterly wage reports because all of the cooks are independent contractors and unreliable and thus the petitioner wishes to permanently offer the proffered position to the beneficiary. Finally, counsel adds together the petitioner's net income and net current assets in 2001 and states sufficient combined resources to cover the proffered wage, and pro-rates the proffered wage for the year 2000 from the date of the priority date, and states there is sufficient net income to cover a pro-rated proffered wage.

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 13, 2003, denied the petition.

On appeal, counsel re-asserts arguments made in response to the director's request for evidence. The petitioner submits a letter from a certified public accountant [REDACTED] who states that it is his opinion that the petitioner has sufficient income to pay the proffered wage and notes that the combined net income and net current assets reflected by the petitioner's tax return for 2001 shows enough income to pay the proffered wage. Additionally, [REDACTED] states that the petitioner's carryover loss from 1999 and payment of a salary in 2000 is the reason for "0" in line 30 of the 2000 corporate tax return.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 full proffered wage in 2000 or 2001. However, it did establish that it paid the beneficiary more than the full proffered wage of \$24,960 in 2002 since it paid the beneficiary \$25,000. Thus, the petitioner has demonstrated its ability to pay the proffered wage in 2002.

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). 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.

The petitioner's net income of \$19,143 and \$22,210 in 2000 and 2001, respectively, are both less than the proffered wage of \$24,960. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income in 2000 or 2001.

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 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

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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.

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 years in question, 2000 and 2001, however, were only \$3,596 and \$13,061, respectively. As such, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets in 2000 or 2001.

Counsel requests that CIS prorate the proffered wage for the portion of the year of the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. Additionally, [REDACTED] attention to Line 30 of the petitioner's 2001 tax return is irrelevant to these proceedings as it focuses on taxable income, but not net taxable income. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Finally, counsel and [REDACTED] assertion that CIS add together the petitioner's net income and net cash assets in 2000 violates accounting principles and effectively double-counts the petitioner's resources. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner might anticipate receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage. Thus, the AAO will not combine the petitioner's net current assets and net income.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only \$19,143 and net current assets of only \$3,596 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 the salient portion of 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$22,210 and net current assets of only \$13,061 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 the salient portion of 2001.

The petitioner paid the beneficiary \$25,000 in 2002, which is greater than the proffered wage. Thus, the petitioner has shown the ability to pay the proffered wage during the salient portion of 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2000 or subsequently during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record of proceeding is unclear concerning the beneficiary's qualifications for the proffered position due to inconsistencies in the information provided on various immigration forms.<sup>3</sup> On the ETA 750B, signed by the beneficiary under a penalty of perjury, he indicates that his past employers were "The Falls" in Miami, Florida from August 1991 to the present time and "Sheraton San Cristobal Hotel and Towers," in Santiago, Chile from March 1983 through September 1988. On Form G-325A, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident, which the beneficiary also signed above a warning concerning severe penalties for knowingly and willfully falsifying or concealing a material fact, the beneficiary indicated that his only employment for the last five years was with "Johnny Rockets" from August 1990 to the present time. The only evidence submitted into the record of proceeding to verify the beneficiary's qualifications to perform the duties of the proffered position consists of a letter, in Spanish with an English translation, from "Shamal Cocina India," in Santiago, Chile, certifying that the beneficiary worked as a cook with their restaurant from September 1984 through December 1989. Notably, the English version of the letter lacks a certification of translation in violation of the regulations at 8 C.F.R. § 103.2(b)(3).<sup>4</sup> The employment experience verification letter is critical to establishing the beneficiary's qualifications for the proffered position.<sup>5</sup> If the beneficiary did in fact work for Shamal Cocina India, then it would have been prudent to indicate that on the immigration forms completed in pursuit of an immigration benefit since he submitted a letter from that entity to prove the material fact of his qualifications for the proffered position.<sup>6</sup> The inconsistencies of this information cast considerable doubt on the issue of the beneficiary's qualifications and any additional meaningful proceedings in this matter must address the inconsistencies.

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<sup>3</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

<sup>4</sup> The regulation at 8 C.F.R. § 103.2(b)(3) states the following: *Translations*. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

<sup>5</sup> 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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750A indicates that the beneficiary must have two years of experience as a cook of Indian dishes.

<sup>6</sup> 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

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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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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.