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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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DEC 6 2005

FILE: WAC 02 167 51420 Office: CALIFORNIA SERVICE CENTER Date:

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:

[Redacted signature block]

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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 states that the petitioner has been in business since 1946, has more than one hundred employees, and has the ability to pay the proffered wage. Counsel submits new documentation.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$11.55, or an annual salary of \$24,024. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from January 1997 to the date that ETA 750 was signed, namely January 19, 1998.¹

On the petition, the petitioner claimed to have been established in 1987, to have 135 employees, and to have a gross annual income of eight million dollars. In support of the petition, the petitioner submitted a letter from [REDACTED] Continental Bakery, [REDACTED] that stated the beneficiary had worked for the business from January 1994 to December 1996. The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 1998, 1999, and 2000, and a state of California Fictitious Business Name statement.

¹ The petitioner also submitted a W-2 form for 1998, and indicated the beneficiary had worked for the petitioner through 1998.

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 July 5, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. The director noted that the tax documents already submitted by the petitioner were unsigned and incomplete. In addition, the director requested evidence to establish that the beneficiary possessed the requisite two years of work experience prior to the 1998 priority date. The director specifically requested that the petitioner provide a description of the beneficiary's duties as well as W-2 forms, or pay stubs from his previous work experience. In response, counsel submitted a new letter of work experience from [REDACTED] Continental Bakery, and submitted the beneficiary's W-2 forms for 1994 and 1995, as well as signed federal corporate income tax forms from 1998 to 2001.

On May 8, 2003, the director sent a second request for further evidence to the petitioner. The director noted that the Form ETA-750 indicated that the beneficiary was already working for the petitioner, and if this was correct, the petitioner needed to submit copies of the beneficiary's W-2 Forms for 1998, 1999, 2000, 2001, and 2002. In response, counsel stated that the beneficiary worked for the petitioner in 1997 and 1998, and submitted the beneficiary's W-2 Forms for these two years. Counsel stated that since 1999, the beneficiary did not work for the petitioner. Counsel noted that the beneficiary's W-2 Forms for 1997 and 1998 listed [REDACTED] Continental And Bailey's Bakery and stated that the petitioner did business under the name [REDACTED] Distribution Company. Counsel resubmitted the petitioner's Fictitious Business Name documentation.

In his denial of the petition, the director examined the federal income tax returns submitted by the petitioner for the tax years 1998 to 2001, and determined that in the years 1998 and 2001, the petitioner did not have sufficient ordinary income to pay the proffered wage. In addition, the director noted that the petitioner had not submitted its 2002 federal income tax return. While the director examined the beneficiary's actual wages earned in 1998, he did not find that the petitioner had sufficient ordinary income to pay the difference between the actual wages and the proffered salary. The director then determined that the petitioner had not established that it had sufficient resources to pay the proffered wage from the 1998 priority date to the present.

On appeal, counsel states that the petitioner has existed since 1946, and currently operates in twelve locations throughout southern California. Counsel further states that the company has had more than one hundred employees during all tax years in question. Counsel submits an Internet excerpt from the petitioner's website, and a letter from Ugo Mamolo, the petitioner's chief financial officer that stated the petitioner has had a combined work force of over 100 employees from 1998 to 2003. Counsel also reviews the total cost of labor from the years 1998 to 2002, and states based on the petitioner's 58 years of business operations, the petitioner's gross sales, and the total labor costs, the proposed wage of \$24,025 would be less than five percent of the total labor costs and one hundredth of the petitioner's gross sales. Counsel states that these facts alone demonstrate beyond a reasonable doubt that the petitioner has the ability to pay the proffered wage. Counsel further states that the petitioner had sufficient ordinary income in both 1999 and 2000 to pay the proffered wage. Counsel also stated that the petitioner in the years 1998, 2001, and 2002 had sufficient accounts receivable and trade notes to pay the proffered wage. Finally counsel notes that the director's second request for further evidence that requested the petitioner's tax returns was issued on July 5, 2002, and that the

petitioner's tax returns for 2002 were unavailable as they would have been filed in 2003. On appeal, counsel submits the petitioner's signed and dated 2002 Form 1120S.

With regard to counsel's assertion that the petitioner has over 100 employees, this number relates to the regulation at 8 C.F.R. § 204.5(g)(2) stating that, in such a case, the statement of a financial officer may suffice to show the ability to pay the proffered wage. Although the petitioner or counsel could have raised this issue at any time during the initial adjudication of the petition, counsel only addresses this issue on appeal by submitting a letter from the petitioner's chief financial officer that states the petitioner had over 100 employees from 1998 to 2003. Although the I-140 petition does indicate that the petitioner has 135 employees, neither the letter from the petitioner's officer, nor the I-140 statement, without more substantive documentation, is sufficient to establish that the petitioner had over 100 employees from the priority date to the present. The petitioner will be obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

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. Although the petitioner submitted W-2 salary statements for the beneficiary for the years 1997 and 1998, the salary statement for 1997 is not dispositive in these proceedings, as the priority date is January 14, 1998. Furthermore the petitioner stated that it had not employed the beneficiary from 1999 to the present. With regard to the beneficiary's wage statement for 1998, this document only establishes that the petitioner paid the beneficiary \$11,256 for the year, which is \$12,768 less than the proffered wage of \$24,024. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 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. 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As correctly noted by the director, the petitioner's tax returns for 1998 through 2001 show the following amounts of ordinary income: in 1998, -\$47,575; in 1999, \$111,305; in 2000, \$151,704, and in 2001, -\$119,244. In addition, the petitioner's corporate income tax return for 2002, submitted on appeal, shows the following

amount of ordinary income: -\$188,301. Therefore as correctly noted by the director, the petitioner did not establish its ability to pay the proffered wage of \$24,024 from 1998 to the present, based on its ordinary income. Nevertheless, as correctly noted by counsel on appeal, the petitioner did establish its ability to pay the proffered wage in the years 1999 and 2000.

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.² 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 petitioner submitted the following information for tax years 1998 and 2002:

	1998	2001	2002
Ordinary Income	\$ -47,575	\$ -119,244	\$ -188,301
Current Assets	\$ 532,109	\$ 485,113	\$ 438,294
Current Liabilities	\$ 254,840	\$ 131,012	\$ 207,913
Net current assets	\$ 277,269	\$ 354,101	\$ 230,381

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in any year from 1998 to the present. As previously stated, however, it did establish that it had sufficient ordinary income to pay the proffered wage in both 1999 and 2000. With regard to the year 1998, the petitioner shows a net income of -\$47,575; however, it also shows net current assets of \$277,269, which is sufficient to pay the proffered wage in 1998. With regard to tax year 2001, the petitioners shows ordinary income of -\$119,244; however, it shows net current assets of \$354,101. With regard to tax year 2002, the petitioner shows ordinary income of -\$188,301; however, it also shows net current assets of \$230,381. This figure is sufficient to pay the proffered wage of \$24,024 in tax year 2002. Therefore, based on the petitioner's net income, the petitioner established it had sufficient financial resources to pay the proffered wage in 1999 and 2000. With regard to 1998, 2001, and 2002, the petitioner established that it had sufficient net current assets to pay the proffered

² 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.

wage. Therefore, the petitioner has shown the ability to pay the proffered wage beginning on the 1998 priority date and continuing to the present 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 met that burden. The director's decision of December 17, 2003 will be withdrawn. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained.