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20 Mass. Ave., N.W., Rm. A3042  
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U.S. Citizenship  
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FILE: [Redacted]  
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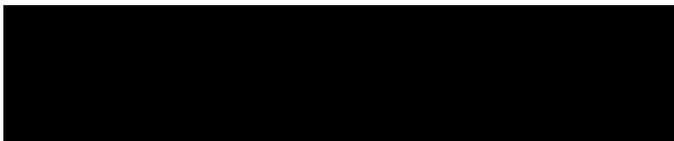
Office: VERMONT SERVICE CENTER

Date: JUN 28 2005

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

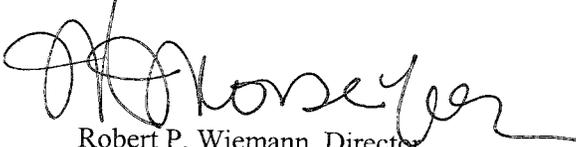
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a bagel shop and restaurant. 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 statement, along with subsequent additional 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$12.59 an hour, which amounts to \$26,187 annually.<sup>1</sup>

With the petition, the petitioner submitted IRS Form 1065, U.S. Return of Partnership Income for the year 2002, as well as a letter of employment verification for the beneficiary's work in Costa Rica. Although counsel's cover letter stated that the beneficiary's payroll record for 2002 was submitted to the record, no such documentation is found in the record. The record does contain a one-page document generated by [REDACTED], an accountant, that documents the beneficiary's earnings for a period of time from January 1 to February 28, 2003. Eight weeks of work are listed with a breakdown of federal and state taxes, as well as the gross and net wages of the beneficiary. Based on this document, the beneficiary appears to have earned \$260 a week during this period of time, or \$2,080. Counsel noted on the cover letter that the beneficiary's payroll record indicated that the salary currently payable per week was \$260, which amounted to a salary of \$13,520 a year. Counsel further noted that the petitioner's records indicated a net profit of \$20,581, and that out of the net profit sum, the additional sum of \$243 per work

<sup>1</sup> The petitioner also described the proffered wage as \$503.60 a week in its cover letter that accompanied the I-140 petition.

would be paid to complement the actual wage of \$503.60 a week. According to counsel, this assertion sufficed to establish the petitioner's ability to pay the prevailing wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 9, 2003, the director requested additional evidence pertinent to that ability. The director stated that the 2002 income tax return showed a net profit of \$20,581 and current liabilities of \$7,098 in excess of current assets. The director further stated that neither amount was sufficient to pay the proffered salary. The director further noted that the record indicated that the petitioner had employed the beneficiary since September 1995. The director requested that the petitioner submit a copy of the 2001 and 2002 Form W-2 Wage and Tax statements to establish how much the petitioner had paid the beneficiary in these years. The director also stated that the petitioner could submit its 2001 U.S. federal corporate income tax return, with all schedules and attachments to further establish the petitioner's ability to pay the proffered wage, or audited financial statements or annual reports.

In response, the petitioner submitted its IRS Form 1065 for 2001. The petitioner also submitted a letter from [REDACTED] Certified Public Accountant, Union, New Jersey. [REDACTED] examined the petitioner's 2001 income tax return and noted that the non-cash related depreciation and amortization deductions were the expenses and deductions that brought the petitioner's tax basis income to its profit for 2001. The accountant stated that the \$16,882 profit shown on the 2001 tax return should not be construed to indicate that the company was unable to meet expenses, of which payroll was the most important expense. The accountant further noted that the petitioner paid \$6,584 in wages in 2001, and the members of the partnership withdrew \$21,148, against their profits. The accountant also stated that the petitioner also deducted \$48,523 in depreciation and paid the petitioner's mortgage down in the amount of \$29,569. The accountant finally stated that the beneficiary was always paid his full salary when it was due to him.

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 January 21, 2004, denied the petition. The director stated that the petitioner's 2001 federal income tax document indicated a net income of \$16,882 and current liabilities of \$18,338 in excess of current assets. With regard to the petitioner's accountant's statement as to depreciation deductions, the director stated that CIS would examine the net income reflected on the petitioner's tax return or income statement, without adding any expenses back to the net income. The director further stated that this analysis approach was well established by precedent decisions, and that there is no precedent case law that allows the petitioner to add back the depreciation expenses to its net income. The director stated that since the petitioner is a partnership, the net income and net current assets of each general partner could be evaluated to determine the petitioner's ability to pay; however the petitioner had submitted no evidence of the partner's personal incomes or assets.

On appeal, counsel examines the petitioner's depreciation deductions and states that according to the regulations, depreciation can be added to the taxable income and the sum of these two figures can be considered to show the petitioner's ability to pay. Counsel also stated that in 2001, the beneficiary was paid \$13,520. According to counsel, the difference between the beneficiary's actual wages and the proffered wage of \$26,187 could be deducted from the \$48,523 deducted for depreciation expenses. In subsequent correspondence, counsel submits a letter from James D. Cardillo, an attorney specializing in taxation and forensic accounting. Counsel resubmits the

petitioner's Form 1065 for 2001 and submits the petitioner's Form 1065 for 2004, along with the beneficiary's Form 1040 federal income tax return. In his letter, [REDACTED] examines the petitioner's 2001 federal corporate tax return, and states that the petitioner's true actual net income for 2001 was \$67,072. [REDACTED] arrived at this figure by adding the petitioner's profit, depreciation and amortization expenses. Counsel also resubmits the letter from [REDACTED] dated September 28, 2003, initially submitted in response to the director's request for further evidence. The petitioner also submitted the petitioner's Form 1065 for 2004, along with the beneficiary's Form 1040A for 2004, along with the beneficiary's W-2 Form for 2004. The beneficiary's tax documents establish that he earned \$23,994 in 2004.

Upon review of the record, it is noted that the director's decision dated January 21, 2004 examined the petitioner's ability to pay the proffered wage from the priority date of April 18, 2001 to late 2003. Thus the pertinent years to be examined in the instant petition are 2001 to the date that the director's decision closed the record, namely, January 21, 2004. Thus, the AAO will not give any weight to the 2004 tax documents submitted by counsel in subsequent correspondence. To the extent that [REDACTED] letter references the petitioner's 2001 tax return, it will be considered in these proceedings.

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 beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from September 1995 to the present, the initial documentation submitted by the petitioner as to the beneficiary's employment only indicates that the beneficiary worked for the petitioner for eight weeks in 2003. Contrary to counsel's assertion on the petitioner's cover letter, the record does not contain the beneficiary's 2002 payroll records. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage as of the priority date in 2001 and to the present.<sup>2</sup>

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. Contrary to the petitioner's accountant's statements and to counsel's assertion on appeal, CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in its analysis. Furthermore counsel's assertion that regulations exist that allow the petitioner's taxable income and depreciation deductions to be added to show the petitioner's ability to pay is not well founded. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

<sup>2</sup> Although the beneficiary's W-2 Form establishes that he was paid the proffered wage in 2004, as previously stated, this document is given no weight in these proceedings. In addition, the beneficiary's wages in 2004 do not establish that the petitioner paid the proffered wage as of the priority date.

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, it is structured as a partnership, and the net income of the partnership is identified on IRS Form 1065, on Line 22, net income or loss. With regard to the petitioner's partnership returns, they indicate that the petitioner had a net income of \$16,882 in 2001, and a net income of \$20,581 in 2002. As stated previously, the petitioner did not establish that it either employed or paid the beneficiary the proffered wage as of the priority date to the first two months of 2003. Therefore, the petitioner has to establish that it had sufficient net income to pay the entire proffered wage of \$26,187 in both 2001 and 2002. Based on the petitioner's income statements and returns for 2001 and 2002, the petitioner's net income for either year is not sufficient to pay the proffered wage.

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. 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>3</sup> A partnership's year-end current assets are shown on Form 1065 on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 tax returns reflect the following information for the following years:

	2001	2002
Taxable income <sup>4</sup>	\$ 16,882	\$ 20,581
Current Assets	\$ 14,043	\$ 25,552
Current Liabilities	\$ 32,381	\$ 32,650
Net current assets	\$ -18,338	\$ -7,098

As previously stated, the petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a taxable income of \$16,882, and negative net current assets of \$18,338. The petitioner

<sup>3</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.

<sup>4</sup> Taxable income is the sum shown on line 22, ordinary income (loss) from trade or business activities, IRS Form 1065, U.S. Return of Partnership Income.

has not demonstrated the ability to pay the proffered wage, either through the petitioner's net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$20,581 and negative net current assets of \$7,098. Thus, the petitioner has not established that it has the ability to pay the proffered wage during 2002, based on its net income or net current assets.

With regard to any additional sources of funds to pay the proffered wage, counsel, [REDACTED], and [REDACTED] submitted letters to the record that examined the depreciation figures contained in the petitioner's federal tax forms. Counsel and the accountants are correct that a depreciation deduction does not represent specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate, however, is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang Y. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. V. Sava*, 632 F. Supp. 1049 (S.D. N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. The analysis by counsel and two accountants of the applicability of the petitioner's depreciation figures toward the payment of the proffered wage is not persuasive. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.

Furthermore, in acknowledgement of the petitioner's and beneficiary's 2004 financial records submitted in subsequent correspondence by counsel, the AAO has considered the instant petition within the context of the totality of circumstances, as outlined in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). However, the record does not contain sufficient persuasive evidentiary documentation, including the petitioner's 2003 financial records, to warrant analysis of the petition, based on *Sonogawa*.

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.