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U.S. Citizenship
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Services

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MAR 08 2005

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC-01-086-53667

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

PETITION: 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]

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center, but the approval was later revoked. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef, Mexican cuisine. 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 at the priority date and continuing until the beneficiary obtains permanent residence, while at the same time paying the proffered wages to the beneficiaries of other petitions submitted by the petitioner. On appeal, counsel states that the evidence establishes the petitioner's ability to pay the proffered wages to each of the beneficiaries of the petitions it has filed, including the instant petition.

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 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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is March 12, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024.00 annually. On the Form ETA 750B, signed by the beneficiary on March 6, 1998, the beneficiary claimed to have worked for the petitioner from November 1994 through the date of the ETA 750B.

On the petition, the petitioner claimed to have been established on July 1, 1995, to have a gross annual income of \$3,160,244.00, to have a net annual income of \$86,200.00, and to currently have 26 employees.

In support of the petition, the petitioner initially submitted the Form ETA 750 and no additional evidence.

In a request for evidence (RFE) dated February 22, 2001 the director requested additional evidence pertinent to the beneficiary's experience and to the petitioner's ability to pay the proffered wage. In accordance with

the regulation at 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter dated March 2, 2001 and the following documents: a letter from Salsa's El General, a restaurant in Culiacan, Sinaloa, Mexico, stating the beneficiary's experience as a cook with that restaurant from 1991 to 1994; and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998 and 1999.

On March 28, 2001 the director approved the petition.

On April 17, 2001 the beneficiary filed a Form I-485 Application to Register Permanent Residence or Adjust Status, based on the approved I-140 petition.

In adjudicating the I-485 application, the director determined that the approval of the I-140 petition had been in error. In a decision dated March 26, 2003 the director found that the evidence failed to establish the petitioner's ability to pay the proffered wage while also paying the proffered wages to the beneficiaries of five other I-140 petitions which had been submitted by the petitioner. The director accordingly revoked the petition.

Counsel then filed a Form I-290B Notice of Appeal dated April 8, 2003, which was received by CIS on April 11, 2003. With the Notice of Appeal counsel submitted a letter dated April 8, 2003 and the following documents: a copy of an unaudited profit and loss statement for the petitioner for July through December 2002; copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the second, third and fourth quarters of 2002; copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for the second, third and fourth quarters of 2002; copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999, 2000 and 2001; and copies of the petitioner's Form 100 California Corporation Franchise or Income Tax Returns for 2000 and 2001.

In a decision dated February 2, 2004 the AAO found that the director had failed to follow the proper procedure in revoking the petition, since prior to his revocation decision the director had not issued a notice of intent to revoke informing the petitioner of that intention and giving the petitioner an opportunity to submit evidence in rebuttal, as required by the regulation at 8 C.F.R. § 205.2. The AAO accordingly remanded the petition to the director.

The director issued a Notice of Intent to Revoke (ITR) dated April 30, 2004, citing the insufficiency of the evidence to establish the petitioner's ability to pay the proffered wages to each of the six beneficiaries of the petitions submitted by the petitioner as of that date.

In response, counsel submitted a brief and the following documents: copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998, 1999, 2000, 2001 and 2002 and copies of the petitioners Form 100 California Corporation Franchise or Income Tax Returns for 2000 and 2001. Counsel's submissions in response to the ITR were received by CIS on June 9, 2004.

In a decision dated June 24, 2004, the director found that the evidence failed to establish the petitioner's ability to pay the proffered wages to each of the beneficiaries of the petitions submitted by the petitioner, which the director found to then number ten, including the instant petition. The director accordingly revoked the petition.

Counsel then filed another Form I-290B Notice of Appeal which was received by CIS on July 9, 2004. That Notice of Appeal is the one which is now before the AAO. On the Notice of Appeal, counsel stated that a brief and/or additional evidence would be submitted within thirty days.

On August 6, 2004 CIS received counsel's brief and the following documents: additional copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998, 1999, 2000, 2001 and 2002; a copy of an unaudited profit and loss statement of the petitioner for July 2003 through February 2004; additional copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for the last two quarters of 2002; and a copy of the petitioner's business license from the City of Lynwood, California for the period January 1, 2003 to January 1, 2004.

The only evidentiary documents which are submitted for the first time on appeal are an unaudited profit and loss statement of the petitioner for July 2003 through February 2004 and a copy of the petitioner's business license from the City of Lynwood, California for the period January 1, 2003 to January 1, 2004.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS first examines 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. On the Form ETA 750B, signed by the beneficiary on March 6, 1998, the beneficiary claimed to have worked for the petitioner from November 1994 through the date of the ETA 750B.

The record contains copies of the petitioner's Form DE 6 California Wage and Withholding Reports for the second, third and fourth quarters of 2002. The non-record side of the beneficiary's A-file also contains a copy of the petitioner's Form DE 6 California Wage and Withholding Report for the fourth quarter of 2001, apparently copied by the director from the file of another petition submitted by the petitioner. Each of those DE 6 forms shows payment of wages to the beneficiary in the amount of \$6,006.00, equivalent to an annual rate of \$24,024.00, which is the annual proffered wage. The payments to the beneficiary are under a different surname, but the DE 6 forms include the beneficiary's social security number, and CIS records confirm that the beneficiary has used the surname which appears on the I-140 petition as well as the surname which appears on the DE 6 forms. The same surname on the DE 6 forms is used by the beneficiary on her I-485 application to adjust status, and it is apparently the beneficiary's married surname.

The DE6 records do not include a report for the first quarter of 2002. Nonetheless, the DE 6 forms in the record and the copy of the DE 6 form apparently made by the director from another file could be sufficient to support an inference that the beneficiary was employed by the petitioner at the proffered wage from the last quarter of 2001 through the end of 2002. The evidence therefore would be sufficient to establish the petitioner's ability to pay the proffered wage during 2002 if that were the only year at issue. However, the priority date in this petition is March 12, 1998, and the DE 6 forms fail to establish the petitioner's ability to pay the proffered wage beginning on that date and continuing until the beneficiary obtains lawful permanent residence.

If the instant petition were the only one filed by the petitioner, the petitioner's evidence would have to establish its ability to pay the proffered wage of \$24,024.00 as of the priority date and continuing until the beneficiary obtains lawful permanent residence. However, CIS records show that the petitioner has filed multiple petitions. In his revocation decision, the director referred to a total of ten petitions submitted by the

petitioner, including the instant petition. The director apparently relied on electronic searches of CIS records under two alternate forms of the petitioner's name. However, CIS records also show one additional petition submitted by this same petitioner under a third form of its name. CIS electronic records therefore show that a total of eleven I-140 petitions have been filed by the petitioner under various forms of its name.

Of the total of eleven petitions filed by the petitioner, two petitions are no longer relevant because they were denied without being appealed, on March 13, 2003 and July 4, 2004. This leaves a total of nine petitions, including the instant petition, which were pending on or after the priority date.

The evidence in the record in the instant case contains information about the proffered wage for the beneficiary, but no direct information about the proffered wages for the beneficiaries of the other eight relevant petitions. However, the record contains evidence which can support a reasonable inference about the proffered wages for the other beneficiaries.

The record contains copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for the last three quarters of 2002. Those reports show that the petitioner paid compensation at the rate of \$24,024.00 that year (\$6,006.00 per quarter) to each of five beneficiaries of the relevant petitions, including the beneficiary of the instant petition. In addition, the director's decision contains a list of the petitions filed by the petitioner, with the proffered wages stated for six petitions, three at \$11.55 per hour, equivalent to \$24,024.00 per year, and three at \$10.00 per hour, equivalent to \$20,800.00 per year. The figures in the director's decision are presumably taken from the records in each of those petitions. For only one of the nine relevant petitions is no proffered wage information found in the DE 6 reports or in the director's decision. For that petition, it will be assumed that the proffered wage is at the higher level of \$24,024.00.

Therefore, of the nine relevant petitions, the proffered wage in six petitions is \$24,024.00, and the proffered wage in the other three petitions, including the instant petition, is \$20,800.00.

Not all nine petitions were pending in each year since the priority date of the instant petition, which is March 12, 1998.

In 1998 no other petition was pending. Therefore, for 1998 the evidence must establish the petitioner's ability to pay the proffered wage of \$24,024.00.

In 1999 an I-140 petition of the petitioner for another beneficiary was pending with CIS, at a proffered wage of \$24,024.00. Therefore, for 1999 the evidence must establish the petitioner's ability to pay that amount in addition to the instant petition's proffered wage, for a total of \$48,048.00.

In 2000 three petitions for other beneficiaries were pending with CIS, each at the proffered wage of \$24,024.00, for a total of \$72,072.00. Therefore, for 2000 the evidence must establish the petitioner's ability to pay that amount in addition to the instant petition's proffered wage, for a total of \$96,096.00.

In 2001, the instant I-140 petition was filed with CIS and two other petitions were also pending with CIS, each at the proffered wage of \$24,024.00. Two of the petitions which had been pending in 2000 were approved in that year, one in August 2000 and the other in December 2000. Although those two petitions were no longer pending in 2001, the proffered wages in those two petitions must be considered as still relevant to the instant petition for the year 2001, since the petitioner presumably intended to pay the beneficiaries of those petitions their proffered wages after the petitions were approved. Each of those two petitions also was for the proffered wage of

\$24,024.00. For 2001, the three pending petitions and the two recently approved petitions had total proffered wages of \$120,120.00.

In 2002, six petitions remained pending with CIS, including the instant petition. One of the petitions which was pending in 2001 was approved in that year, in March 2001. The proffered wage in that petition remains relevant to the instant petition for the year 2002 for the reasons mentioned above. The six pending petitions plus the one recently-approved petition comprise a total of seven relevant petitions in 2002. The proffered wage in four of those petitions was \$24,024.00 and the proffered wage in three of those petitions was \$20,800.00, for total proffered wages of \$158,496.00 in 2002.

In 2003, six petitions remained pending with CIS, including the instant petition. The proffered wage in three of those petitions was \$24,024.00 and the proffered wage in the other three petitions was \$20,800.00, for total proffered wages of \$134,472.00 in 2003.

In 2004, six petitions remained pending with CIS, including the instant petition. The record before the director closed with the petitioner's submissions in response to the ITR, which were received by CIS on June 9, 2004, a date on which the petitioner's 2003 tax year had not yet ended, which ran from July 1, 2003 to June 30, 2004. The petitioner is not required to submit financial information more recent than its latest tax year. Therefore it is not necessary to evaluate the petitioner's total proffered wages for 2004.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. In the record in the instant petition, the petitioner's Form 1120 U.S. Corporation Income Tax Return for its 1997 tax year of July 1, 1997 through June 30, 1998 shows

taxable income before the net operating loss deduction and special deductions, on line 28, as -\$11,887.00. Since that amount is negative it fails to establish the petitioner's ability to pay the proffered wage during calendar year 1998. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 1997 yield the figure for net current assets of \$106,396.00 for the end of the 1997 tax year (June 30, 1998). That amount is greater than the proffered wage of \$24,024.00 and is therefore sufficient to establish the petitioner's ability to pay the proffered wage during calendar year 1998.

The petitioner's tax return for its 1998 tax year, ending on June 30, 1999, shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$10,577.00. That amount is less than the petitioner's total proffered wages for 1999 of \$48,048.00. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 1998 yield the figure for net current assets of \$146,973.00 for the end of the 1998 tax year (June 30, 1999). That amount is greater than the total proffered wages of \$48,048.00 and it is therefore sufficient to establish the petitioner's ability to pay the proffered wages for the calendar year 1999.

The petitioner's tax return for its 1999 tax year, ending on June 30, 2000, shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$3,589.00. That amount is less than the petitioner's total proffered wages for 2000 of \$96,096.00. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 1999 yield the figure for net current assets of \$120,220.00 for the end of the 1999 tax year (June 30, 2000). That amount is greater than the total proffered wages of \$96,096.00 that year and it is therefore sufficient to establish the petitioner's ability to pay the proffered wages for the calendar year 2000.

The petitioner's tax return for its 2000 tax year, ending on June 30, 2001, shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$65,725.00. That amount is insufficient to establish the petitioner's ability to pay the total proffered wages of \$120,120.00 for that year. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2000 yield the figure for net current assets of \$185,945.00 for the end of the 2000 tax year (June 30, 2001). That amount is greater than the total proffered wages of \$120,120.00 and it is therefore sufficient to establish the petitioner's ability to pay the proffered wages for the calendar year 2001.

For calendar year 2002 the relevant evidence in the record includes not only the petitioner's tax return for its 2001 tax year, ending on June 30, 2002, but also copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for the last three quarters of 2002. Those DE 6 reports show that the petitioner paid compensation at the rate of \$24,024.00 per year (\$6,006.00 per quarter) to each of three beneficiaries of petitions which are relevant for the year 2002, including to the beneficiary of the instant petition. The three quarterly reports in the record establish that each of those three beneficiaries received at least \$18,018.00 from the petitioner in 2002, for total compensation of at least \$54,024.00 paid to those three beneficiaries in 2002. That amount must be credited against the total proffered wage obligation of \$158,496.00 for that year, leaving the amount of \$104,472.00 as the amount of the additional proffered wages for 2002.

The petitioner's tax return for its 2001 tax year, ending on June 30, 2002, shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$98,285.00. That amount is less than the additional proffered wages of \$104,472.00 that year. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2001 yield figures for net current assets of \$233,437.00 for the end of the 2001 tax year (June 30, 2002). That amount is greater than the additional

proffered wages of \$104,472.00 and is therefore sufficient to establish the petitioner's ability to pay the proffered wages for the calendar year 2002.

The petitioner's tax return for the 2002 tax year, ending June 30, 2003, shows taxable income before the net operating loss deduction and special deductions, on line 28, as \$107,819.00. No Form DE 6 wage and withholding reports were submitted for calendar year 2003. The petitioner's taxable income on line 28 of \$107,819.00 is less than the total proffered wages of \$134,472.00. However, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2002 yield figures for net current assets of \$179,699.00 for the end of the 2002 tax year (June 30, 2003). That figure is greater than the total proffered wages of \$134,472.00 and it is therefore sufficient to establish the petitioner's ability to pay the total proffered wages in calendar year 2003.

The evidence in the record prior to the director's revocation decision was therefore sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, while also paying the proffered wages to each of the beneficiaries of the petitions which were relevant during each of those years.

In his revocation decision, the director cited figures on the proffered wages for the beneficiaries of other petitions submitted by the petitioner, information apparently obtained from the files in those petitions. In considering those petitions, the director failed to specify the years in which those petitions had been filed or the decisions on those petitions. Although it is reasonable for the director to consider all petitions filed by a single petitioner when evaluating the petitioner's ability to pay the proffered wage to any particular beneficiary, any such consideration must also take into account the dates such petitions were filed and the results and dates of any decisions. A simple adding of the proffered wages in all petitions filed by a petitioner is an incomplete analysis, since the cost to the petitioner of paying multiple beneficiaries will vary, depending on the number of petitions which are pending each year. As the above analysis indicates, although the petitioner has filed a total of eleven petitions, only nine of those petitions remain relevant to the instant petition. Moreover, not all of those nine petitions are relevant to each year at issue in the instant case, as discussed above.

In his revocation decision, the director relied only on the taxable income information shown on the petitioner's Form 1120 U.S. Corporation Income Tax Returns. The director failed to analyze the net current assets of the petitioner in each of the relevant years. As shown above, when the figures for the petitioner's net current assets are taken into account, and when only the petitions pending or recently approved in a given year are considered, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the total proffered wages of the relevant petitions for each of the years at issue in the instant petition, including the instant petition.

On appeal the petitioner submits additional evidence. The documents submitted for the first time on appeal are an unaudited profit and loss statement of the petitioner for July 2003 through February 2004 and a copy of the petitioner's business license from the City of Lynwood, California for the period January 1, 2003 to January 1, 2004. The unaudited profit and loss statement is for a period more recent than the petitioner's latest tax return. The record before the director closed with the petitioner's submissions in response to the ITR, which were received by CIS on June 9, 2004, a date on which the petitioner's 2003 tax year had not yet ended. The petitioner was not required to submit financial information more recent than its latest tax year. Moreover, unaudited financial statements are not among the types of acceptable evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2). In any event, however, the unaudited profit and loss statement submitted for the first time on appeal appears to contain no information which is inconsistent with the petitioner's other financial evidence submitted previously.

The other evidence submitted for the first time on appeal is a copy of the petitioner's business license from the City of Lynwood, California for the period January 1, 2003 to January 1, 2004. That document provides further corroboration that the petitioner is an ongoing business, and it contains no information inconsistent with the analysis above of the evidence submitted prior to the director's decision.

For the foregoing reasons, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition and also to pay the proffered wages to the beneficiaries of the petitions submitted by the petitioner which were either pending or which were approved during the relevant time period. The appeal therefore will be sustained.

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.

ORDER: The appeal is sustained. The petition is approved.