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U.S. Citizenship  
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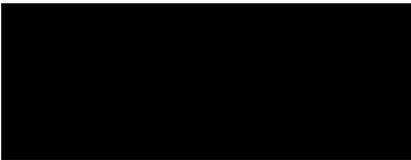
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FILE: LIN 02 255 52664 Office: NEBRASKA SERVICE CENTER Date: MAY 25 2005

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

The petitioner is a Chinese restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a Chinese specialty 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. 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 [Citizenship and Immigration Services].

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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$650 a week, which amounts to \$33,800 annually.

With the petition, the petitioner submitted its federal corporate income tax return, IRS Form 1120A for the year 2001 on the IRS Form 1120A for the tax year 2000. On this form, the petitioner indicated it was filing the return for a period from December 2000 to November 30, 2001. The petitioner also submitted the state of Ohio Form FT-1120, Corporation Franchise Tax Report, for tax year 2001, as well as a letter from BANK1ONE that stated the petitioner's balance as of June 11, 2002 was \$42,534.76. In addition, the petitioner submitted a letter of

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<sup>1</sup> The petitioner's IRS Forms 941 were filed in care of Cacpasinc, at 31-33A Market St, New York, New York. The petitioner does not clarify the relationship between itself and Cacpasinc in the instant petition.

employment verification for the beneficiary and the petitioner's menu. The petitioner stated it was established on December 27, 2000, that it had six employees, and its net annual income was \$8,419. Yong Zhu Chen, the owner of the petitioner, stated in the cover letter for the petition that he was going to pay the proffered wage, and stated that he had more than \$40,000 deposited in his savings account that he would use to invest in the business expansion. Although Mr. Chen stated that the statement for his savings account was attached to the petition, the only other letter submitted with the petition is the notarized statement from BANK1ONE, dated June 11, 2002, that stated the petitioner had a checking account with the bank since January 4, 2001, with a current balance of \$42,534.76.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 1, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, its 2001 federal tax return, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also stated that the petitioner could submit additional evidence such as profit/loss statements, bank account records, balance sheets, and personnel records including IRS Forms 1099 or W-2 for all employees. The director requested that the petitioner submit its Form 941 Employers Quarterly Federal Tax Form as well as State Unemployment Compensation Report Form or comparable form from the petitioner's state since February 2001, accompanied by the quarterly wage and withholding supplements which identify all employees by name, social security number, hours worked, and earnings.

In response, the petitioner resubmitted IRS Form 1120A, and the 2001 state of Ohio Corporation Franchise Tax Report for 2001. In addition, the petitioner submitted BANK1ONE checking account monthly statements for the petitioner from March 2001 to December 2002. The petitioner also submitted IRS Forms 941 from March 31, 2001 to September 30, 2002, as well as state of New York forms for unemployment compensation quarterly reports for quarters ending March 31, 2001, June 30, 2001, March 31, 2002, and June 30, 2002. These documents identified the petitioner but provided the petitioner's address as in care of Cacpasinc, in New York City. In addition, the petitioner submitted the Employer's Contribution Report for the third and fourth quarters of 2001 as well as the third quarter of 2002. These Employer's Contribution Reports provide the petitioner's Warren, Ohio address. The petitioner also provided W-2 forms for 2001. The petitioner paid the beneficiary \$15,000 in 2001. Based on the state documents, the petitioner paid the beneficiary \$13,590 in 2002. All the W-2 Forms identify the petitioner and provide the Cacpasinc address in New York City. Finally the petitioner submitted a copy of its ten-year building lease for a ground floor store in Warren, Ohio, effective as of December 15, 2000. Dian Dong Jiang, of Northeast, Pennsylvania, and Donald L. Guarnieri, President, Mahoning B-B Land, Inc, signed the lease.

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 July 23, 2003, denied the petition. The director first determined that the petitioner's ordinary income in 2000 was \$8,419. The director examined the checking account statements and while he determined that the statements indicated that there were some funds available to the petitioner, he stated that the bank statements combined with the tax return did not show an ability to pay the proffered wage. The director also stated that even though some of the petitioner's monthly balances were higher than the beneficiary's salary, this fact was not sufficient to establish that the petitioner had the ability to pay the proffered wage. He also noted that although the statements indicated positive balances each month, the statements had to show that the petitioner's ending balances for the year were greater than or equal to the

proffered wage or that the balances increased incrementally with the amount of funds needed to pay the wage. The director stated that the petitioner's payroll record established that that beneficiary was paid \$15,000 in 2001 and \$9,000 in 2002.<sup>2</sup> The director further stated that the petitioner had not established that it had sufficient funds to pay the difference between the wages actually paid and the proffered wage. Finally the director stated that the letter from the petitioner's owner that stated he would pay the proffered wage from his personal savings was not persuasive. The director stated that the assets of owners, stockholders of the petitioner or other enterprises cannot be considered in determining the petitioner's ability to pay the proffered wage unless the personal assets can be seized. The director also stated that a corporation is a distinct legal entity from its owners or stockholders.

On appeal, counsel states that the petitioner paid the beneficiary at the rate stated on the labor certificate in 2001 and thus the petitioner established that it had the ability to pay the proffered wage.<sup>3</sup> Counsel states that the salary the beneficiary received was based on the actual days he worked for the petitioner. Counsel states that the petitioner did pay the proffered wage as of 2001 and thus proved its ability to pay the proffered wage. Counsel submits an affidavit from the beneficiary that states he worked for the petitioner for 161 days in 2001 and earned \$15,000 at the rate of \$650 per week, and that he worked for the petitioner for 195 days in 2002 and earned \$18,180 at the rate of \$650 per week. Counsel also submits the beneficiary's 2002 individual income tax return that reflects an income of \$18,180, a computer printout of the petitioner's banking balance of \$34,240 as of October 3, 2003, and the state of Ohio State, County & Transit Sales Tax Returns that document the petitioner's monthly gross sales from February to December 2001.

Counsel states that the director relied on the petitioner's federal income tax return and ignored other evidence submitted to the record. Counsel states that the quarterly federal tax returns and the W-2 forms were sufficient to establish that the petitioner had the capability to pay the proffered wage. Counsel also stated that the director was mistaken in relying on the net income figure without considering that the wages of \$36,500 listed in the petitioner's tax return already included the wages paid to the beneficiary. Counsel states that the instant petition is distinguishable from *K.C.P Food Co., Inc V. Sava*, a precedent decision cited by the director. Unlike *KCP*, the petitioner in the instant petition offers sufficient evidence to prove that it actually paid the beneficiary's wage. According to counsel, CIS must consider this factor in determining the petitioner's ability to pay the proffered wage.

In addition, counsel states that the director's decision with regard to the petitioner's ending balances for the year was wrong. Counsel asserts that since the beneficiary actually received the earned wage, the monthly balances would not be used to pay the wages, and thus, the director was wrong in only considering the ending balances. Counsel states that if the beneficiary had worked for the petitioner through out the full year, the petitioner would have increased its gross sales, made more profits and the ending balances would have been sufficient to meet the difference. Counsel adds that evidence in the record indicates that the petitioners gross sales increased in 2002 when the beneficiary worked for more time for the petitioner.

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<sup>2</sup> The director did not appear to include the wages paid to the beneficiary in the third quarter of 2002 of \$4,590. As counsel correctly noted on appeal, the beneficiary was paid \$13,590 in 2002.

<sup>3</sup> The proffered salary on the ETA 750 is described as a weekly rate of \$650.

Counsel also asserts that case law does not support the director's classification of evidence into primary and secondary categories and the according of different weight to the evidence listed under 8 C.F.R. 1204.5(g)(2). Counsel states the Act in and by itself does not suggest classification of the types of evidence, and that the term "additional" does not denote superiority of other evidence.

Counsel states that the director was mistaken in relying principally on the petitioner's 2001 tax return and not giving adequate consideration to the gross profit reflected in the tax return. Counsel states that the petitioner's gross profit of \$114,458, or the combination of gross profit and depreciation was sufficient to pay the proffered wage as of February 2001, when the petitioner was established. Finally counsel states that there are reasonable prospects of continued increase in business and profits, which in turn establishes the petitioner's ability to pay the proffered wage. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967)

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statements for a period from March 2001 to December 2002. Both the director's and counsel's reliance on the monthly balances in the petitioner's bank account are 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, contrary to the director's statements with regard to increments in monthly balances being used to establish the petitioner's ability to pay the proffered wage, 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 for 2001 somehow reflect additional available funds that were not reflected on the petitioner's submission of 2001 tax information.

In addition, counsel's statements with regard to the weight given to primary or secondary evidence is not persuasive. The director made no reference to primary or secondary evidence, but simply listed evidence outlined in 8 C.F.R. § 204.5(g)(2). Given the fact that the petitioner submitted its 2001 tax information on a 2000 IRS form, it appears reasonable and to the petitioner's benefit, that the director would request additional evidence or clarification. While, as noted above, the AAO does not find the petitioner's bank account statements to be probative of the petitioner's ability to pay a proffered wage, the W-2 forms and state employment documentation submitted by the petitioner did present a more complete picture of the petitioner's employment of the beneficiary. The wages paid by the petitioner to the beneficiary, and how they are used to establish the petitioner's ability to pay, is examined below.

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 did not indicate on ETA Form 750 that he worked for the petitioner fulltime at any time, the petitioner's state employment records and W-2 forms establish that the beneficiary did work for the petitioner during 2001 and 2002. However, counsel's assertion that the beneficiary was paid at the weekly rate of \$650 and therefore the petitioner paid the proffered wage to the beneficiary is not persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Second, the affidavit submitted by the beneficiary simply states the number of days worked by the beneficiary and provides no evidentiary

documentation with regard to weekly wages. *Matter of Ramirez-Sanchez*. Third, the position as outlined in the ETA 750 is a fulltime position. Neither counsel nor the petitioner provide any clarification on why the beneficiary, as a Chinese specialty cook in a new business, would only be working 161 days in 2001 and 195 days in 2002. Accordingly, while the petitioner has established that it paid the beneficiary wages in 2001 and 2002, it did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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). Contrary to counsel's assertions, 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. Counsel's comments on *KCP Food Co, Inc.* and how the findings in that decision are distinguishable from the facts in the instant petition are not persuasive. With regard to the instant petition, the petitioner's net income in 2001 was \$8,419. While the beneficiary was paid \$15,000 in 2001, the petitioner's net income is not sufficient to pay the difference between the actual wages of \$15,000 and the proffered wage of \$33,800, namely, \$18,800. It is noted that there is no 2002 corporate income tax return in the record. Therefore the beneficiary's wages of \$13,590 can not be subtracted from the petitioner's ordinary income, to ascertain the difference between the actual wages paid and the proffered wage.

Nevertheless, counsel is correct that 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> On Form 1120A, a corporation's year-end current assets are shown on Part III, Balance Sheet Per Books, lines 1(b) through 6(b). Its year-end current liabilities are shown on lines 13(b) through 14(b). 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

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<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.

proffered wage out of those net current assets. The petitioner's 2001 tax information reflects the following information:

	2001
Taxable income <sup>5</sup>	\$ 8,419
Current Assets	\$ 6,768
Current Liabilities	\$ 7,603
Net current assets	\$ -835

The petitioner demonstrated that it paid \$15,000 to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$8,419, and negative net current assets of \$835, and has not, therefore, demonstrated the ability to pay the difference between the actual wage and the proffered wage, namely \$18,800. The petitioner would need additional assets of \$19,635 to have the ability to pay the proffered wage. Although counsel asserted that the petitioner's monthly checking balances were sufficient to meet the monthly wage, as previously stated, the AAO does not view such evidence as probative of whether the petitioner has the ability to pay the proffered wage. With regard to the owner of the petitioner providing his savings to pay the proffered wage, as correctly noted by the director, a corporation is a separate and distinct legal entity from its owners and shareholders, and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Without more persuasive evidence, 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.

As previously stated, the petitioner demonstrated that it paid wages to the beneficiary during 2002; however, the record does not contain sufficient documentation to analyze the petitioner's net current assets in 2002. Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the 2001 priority date and to the present.

Counsel also urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. In the instant petition, counsel asserts that the petitioner reasonably expects that beneficiary's ability to increase the petitioner's business profits. However, the assertions

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<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.

of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988).

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. 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.