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FILE: LIN 04 032 52260 Office: NEBRASKA SERVICE CENTER Date: **NOV 02 2005**

IN RE: Petitioner:  
Beneficiary:



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: SELF-REPRESENTED

### INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a Thai specialty cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found 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, the petitioner submits additional evidence and asserts that it has the financial ability to pay the proffered wage.

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 priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on May 3, 2001. The proffered wage as stated on Form ETA 750 is \$11.82 per hour or \$24,585.60 per year. On Form ETA 750B, signed by the beneficiary on July 5, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1991, have a gross annual income of \$360,000, and to currently employ seven workers. CIS electronic records reveal that the petitioner has filed two other petitions besides this one. LIN0403252232 was approved on February 2, 2004. LIN0403250939 was denied and is on appeal.

In support of its ability to pay the proffered salary, the petitioner initially submitted partial copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They indicate that the petitioner files its taxes using a standard calendar year. These tax returns consist of only page one of each return. The 2001 tax return shows that the petitioner reported net income of \$44,634 before the net operating loss (NOL) deduction. The tax return for 2002 reveals that the petitioner declared \$25,814 as net income before the NOL deduction. The

petitioner also initially provided copies of two unaudited financial statements consisting of profit and loss statements covering 2002 and January through June of 2003.

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 March 17, 2004, the director requested additional evidence pertinent to those issues.

In response, the petitioner resubmitted copies of the first page of its 2001 and 2002 federal tax returns. The petitioner also supplied a copy of an unaudited financial statement containing financial data for the year 2003 showing net income of \$4,621.64, and copies of bank statements from two checking accounts and one savings account. The savings account showed a balance of \$63,714.73 as of March 31, 2004, and the checking accounts revealed balances of \$9,163.11 and \$4,223.41, respectively, as of March 31, 2004.

The director denied the petition on May 17, 2004, noting the petition that had already been approved and concluding that the petitioner had failed to demonstrate that it had the continuing financial ability to cover the proffered wage of all three petitions.

On appeal, the petitioner submits a copy of a U.S. death certificate of the designated beneficiary for the approved petition LIN0403252232. The petitioner also provides more complete copies of its 2001 and 2002 federal tax returns, as well as a copy of its 2003 federal tax return and additional unaudited financial statements for 2004, consisting of a balance sheet and profit and loss statement covering the period between January and May 2004. The tax returns for 2001 and 2002 include an itemization of the petitioner's assets and liabilities shown on Schedule L. It reveals that in 2001, the petitioner had \$115,032 in current assets and \$11,519 in current liabilities, resulting in net current assets of \$103,513. The 2002 return shows that the petitioner had \$128,381 in current assets and \$4,190 in current liabilities, yielding net current assets of \$124,191. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible available resource to pay a certified wage.<sup>1</sup> Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end 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's 2003 federal tax return, submitted on appeal, shows that the petitioner reported -\$13,217 in net income before the NOL deduction. Schedule L of this tax return shows that the petitioner had \$87,655 in current assets and \$8,222 in current liabilities, resulting in net current assets of \$79,433.

The balance sheet, submitted on appeal, shows the petitioner's net current assets at \$78,092.22, as of May 31, 2004, and the profit and loss statement shows net income of \$5,168.84 for the same period.

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<sup>1</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 as accounts payable, short-term payables, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's president [REDACTED] submits a statement on appeal explaining that the beneficiary of LIN 0403252232 [REDACTED] passed away. He asserts that the two restaurants in the corporation need two experienced Thai cooks in order to improve the menus and generate more income for the company.

At the outset, it is noted that the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(B) provides that a petition shall be automatically revoked upon the death of the petitioner or beneficiary. Thus, LIN 0403252232 can be considered to be automatically revoked based on [REDACTED]

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 may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as noted above, there is no evidence to suggest that the petitioner has employed the beneficiary.

If a petitioner files for multiple beneficiaries, it must show that it has had sufficient financial ability to pay all the proffered wages beginning at the individual priority dates.

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 also 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 wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. 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.

Either the petitioner's 2001 net income of \$44,634 or its net current assets of \$103,513, as shown on its federal tax return, could cover the proposed wage offer of \$24,585.60 for this beneficiary and demonstrates the petitioner's ability to pay the proposed wage offer during this period.

In 2002, the petitioner's net income of \$25,814 was sufficient to meet the proffered wage. Alternatively, the petitioner's net current assets of \$124,191 was also well above the sum required to cover the proffered salary.

Either amount was sufficient to establish the petitioner's ability to pay the certified wage set forth in this preference petition.

In 2003, while the petitioner's reported net income of -\$13,217 was insufficient to pay the certified wage of \$24,585.60, its net current assets of \$79,433 adequately meets the obligation during this period.

Regarding the documentation submitted on appeal appearing to be unaudited, internally generated financial statements, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. That said, the figure representing the petitioner's net current assets derived from the balance sheet does not contradict the information contained on the previous years' tax returns, indicating that the petitioner has maintained sufficient net current assets to cover the certified wage offer. Further conclusions about additional beneficiaries' salaries cannot be made here, because the specific facts of LIN 0403250939 are not part of this record, however it would appear that the petitioner's financial information suggests the ability to pay more than one \$25,000 salary out of its net current assets during the 2001-2003 period.

Based on a review of the federal tax returns and other documentation submitted to the record, the petitioner has established that it has had the continuing financial ability to pay the proffered wage of \$24,585.60 out of either its net income or net current assets in 2001 and 2002, and out of its net current assets in 2003.

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.