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FILE:

[Redacted]  
EAC-03-205-51578

Office: VERMONT SERVICE CENTER

Date: NOV 17 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:



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

The petitioner is a hotel and restaurant. It seeks to employ the beneficiary permanently in the United States as a food and beverage manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.20 per hour (\$48,256 per year). The Form ETA 750 states that the position requires four years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$1,057,052, and to currently employ 17 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner<sup>1</sup>.

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<sup>1</sup> On a Form G-325, Biographic Information sheet, submitted by the beneficiary in connection with her application to adjust status to lawful permanent resident, the beneficiary represented that she began working

With the petition, the petitioner submitted the following documents: a pay stub for June 9 through June 15, 2003 and the petitioner's corporate income tax for 2001.

On December 15, 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, the director requested additional evidence pertinent to that ability. In accordance with 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. The director specifically requested the petitioner's 2002 corporate income tax return, any evidence of wages actually paid to the beneficiary in 2001 or 2002, information about the proffered position, and profit/loss statements, bank account records, or personnel records.

In response, the petitioner submitted bank statements, its corporate tax return for 2002, two pay stubs, and W-2 forms issued by petitioner to the beneficiary in 2001, 2002, and 2003, reflecting wages paid in the amounts of \$9,975, \$14,250, and \$3,850 in each year, respectively. Counsel's accompanying letter states that the beneficiary was paid "\$50,700 per year, which is \$975.00 per week. Please find attached copies of pay stubs . . . amounts to a rate of pay which is in excess of \$48,256.00 per year." The two pay stubs do reflect weekly payments of \$975 for the two weeks they covered, but the W-2 forms reflect aggregate wages of the amounts stated previously. Counsel's letter also asserted that depreciation expenses should be added to the petitioner's net income, and the combination of wages paid, depreciation, and the petitioner's bank balances reflected its continuing ability to pay the proffered wage beginning on the priority date.

The director denied the petition on April 28, 2004, finding that the evidence submitted with the petition and in response to her request for evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the director erred by failing to consider depreciation and amortization expenses, retained earnings, total assets, debt/equity ratio, and cites unpublished AAO decisions. The petitioner submits a letter from its accountant who explains that the petitioner has "100 room motel and is T/W Howard Johnson and an Indian Restaurant T/A Bombay Cuisine having a capacity of more than [sic] 150 people and banquet facility." The accountant also explains that depreciation as a non-cash expense should be added back to the petitioner's net income since the expenses "create reserve for future replacement that can be used for operating activities." Also, the accountant explains that "any lenders in lending on Real Estate look for income available before depreciation & amortization to establish loan coverage." The accountant also explains retained earnings as "cumulative number of losses claimed by [the petitioner]" and "is net income number after provision of depreciation, amortization and all . . . operating expenses from revenue," and that working capital ratio should be considered since the petitioner is involved in real estate so most of its assets employed to operate the business are classified as fixed assets.

At the outset, counsel refers to decisions issued by the AAO but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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for the petitioner in April 2001 until the date she signed those forms on August 27, 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner established that it employed and paid the beneficiary \$9,975, \$14,250, and \$3,850 in 2001, 2002, and 2003, respectively. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages in the amounts of \$9,975, \$14,250, and \$3,850 in each respective year, which is \$38,291 less than the proffered wage in 2001, \$34,006 less than the proffered wage in 2002, and \$44,406 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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 counsel's assertions to consider depreciation and amortization. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$48,256 per year from the priority date.

In 2001, the Form 1120S stated net income<sup>2</sup> of -\$4,376.

In 2002, the Form 1120S stated net income of \$24,726.

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<sup>2</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the 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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets during 2001 were -\$592,492.  
The petitioner's net current assets during 2002 were -\$661,616.

The petitioner could not pay the difference between the proffered wage and wages actually paid to the beneficiary out of its net current assets, which are negative in both 2001 and 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses.

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<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.

Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Additionally, counsel suggests consideration of the petitioner's working capital, or debt/equity ratio, because that is what is utilized by lenders to determine a lending amount. However, as noted above, CIS considers net current assets, not total assets, since the petitioner would likely not liquidate its fixed, long-term assets to pay employee wages. Additionally, the argument that the petitioner's debt-equity ratio would qualify it for a loan does not illustrate its continuing ability to pay the proffered wage since additional debt would seem to weaken and not augment the petitioner's position. Credit scores are not the types of evidence delineated by 8 C.F.R. § 204.5(g)(2), precedent, or policy to establish a petitioning entity's continuing ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority 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 not met that burden.

**ORDER:** The appeal is dismissed.