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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2005  
WAC-00-258-53461

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 preference visa petition was initially approved and subsequently revoked by the Director, California Service 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 the beneficiary qualified for the classification sought because it had failed to establish that it had the ability to pay the beneficiary's proffered wage as required on the approved Form ETA 750 labor certification. The director revoked the petition accordingly.

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.

Section 205 of the Act, 8 U.S.C. § 1155, provides the Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.

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 March 18, 1996. The proffered wage as stated on the Form ETA 750 is \$11.29 per hour (\$23,483 per year). The Form ETA 750 states that the position requires 2 years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner was established on January 16, 1990 as a C corporation and was elected as a S corporation on January 1, 2002. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the Form ETA 750B, signed by the beneficiary on February 1, 1996, the beneficiary claimed to have worked for the petitioner since October 1990.

With the petition, the petitioner submitted the following documents: the petitioner's supporting letter, experience letter from the beneficiary's previous employer and the first page of Form 1120 U.S. Corporation Income Tax Return for 1999.

On November 9, 2000, 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 latest Internal Revenue Service (IRS) certified Corporation Tax Return Form 1120 signed by an authorized official or copies of latest audited corporate financial statements, including: Balance Sheets, Statements of Income and Expenses.

In response, the petitioner submitted a copy of the first page of Form 1120 for 1999. The director approved the petitioner on January 17, 2001.

On October 4, 2002, the director issued a Notice of Intent to Revoke (NOIR), finding the petition was approved in error as documentation submitted with the petition indicates that the beneficiary will not be employed in a permanent, full-time position. In response, the petitioner submitted a letter from the petitioner confirming the beneficiary commenced working on a full time basis and will continue to work full time, and paycheck stub showing the beneficiary was working full time. On June 9, 2004, the director issued an addendum to initial NOIR for issues that were overlooked in the first NOIR, determining that the petitioner had not established that it had continuously had the ability to pay the beneficiary's proffered wage from the time the priority date was established up to the present. In response, the petitioner submitted a letter from CPA, tax transcripts for returns of 2000 and 2001, line of credit reports, bank statements and tax returns from 1996 through 2003. On July 29, 2004, the director revoked the petition, finding that the petitioner did not establish that the beneficiary qualifies for the classification sought because it failed to establish that it had the ability to pay the beneficiary's proffered wage as required on the approved Form ETA 750 labor certification and the petitioner did not submit sufficient evidence in rebuttal to NOIR and did not overcome the grounds for revocation.

On appeal, counsel asserts that the petitioner had sufficient funds to pay the salary at the time the labor certification application was filed.

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.

In the instant case, the record of proceedings shows the following information on payments to the beneficiary from the petitioner in the years 1996 through 2003.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1996	\$0 <sup>1</sup>	\$23,483	\$23,483.00
1997	\$4,865.67	\$23,483	\$18,617.33
1998	\$5,670.48	\$23,483	\$17,812.52
1999	\$4,853.70	\$23,483	\$18,629.30
2000	\$5,179.74	\$23,483	\$18,303.26
2001	\$5,495.69 <sup>2</sup>	\$23,483	\$17,987.31
2002	\$5,707.81 <sup>3</sup>	\$23,483	\$17,775.19
2003	\$0 <sup>4</sup>	\$23,483	\$23,483.00

This information shows that the petitioner did not paid the beneficiary the full proffered wages in these years. The petitioner is obligated to demonstrate that it could pay the full proffered wages in 1996 and 2003, and pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1997 through 2002.

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). 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*

<sup>1</sup> The record does not contain any evidence on this issue for 1996.

<sup>2</sup> Shown on the beneficiary's W-2 forms for the years 1997 through 2001 respectively.

<sup>3</sup> The beneficiary's paycheck stub from the petitioner for the period from 10/17/2002 to 10/30/2002 shows that the beneficiary was paid \$927.20 for that period and \$5,707.81 to the date of the year 2002.

<sup>4</sup> The petitioner did not submit evidence of the beneficiary's compensation in 2003.

*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. (Original emphasis.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$23,483 per year from the priority date with net incomes.

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1996	\$(17,430)	\$23,483.00	\$(40,913.00)
1997	\$(52,461)	\$18,617.33	\$(71,078.33)
1998	\$(82,091)	\$17,812.52	\$(99,903.52)
1999	\$12,427	\$18,629.30	\$(620.23)
2000	\$54,140	\$18,303.26	\$35,836.74
2001	\$109,332 <sup>5</sup>	\$64,953.31 <sup>6</sup>	\$44,378.69
2002	\$53,048	\$64,741.19	\$(11,693.19)
2003	\$76,278	\$70,449.00	\$5829.00

Therefore, for the years 2000, 2001 and 2003, the petitioner demonstrated sufficient net income to pay the proffered wages for all prospective employees. However, the petitioner did not have sufficient net income to pay the proffered wages to all prospective employees for the years 1996 through 1999 and 2002.

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. 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>7</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

<sup>5</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of Form 1120US Corporation Income Tax Return for 1996 through 2001.

<sup>6</sup> CIS records show that the petitioner filed two other I-140 petitions in October 2001 with the priority date of April 16, 2001. The AAO presumes that the petitioner offered the same proffered wages to the other two beneficiaries as the instant beneficiary. Therefore, for the years 2001 through 2003 the proffered wages were based on two times of the proffered wage in the instant petition plus the difference between the wages actually paid to the instant beneficiary and the proffered wage.

<sup>7</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.

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 the years 1996 through 1999 and 2002, were as follows:

Tax Year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or deficit
1996	\$98,900	\$23,483.00	\$75,417.00
1997	\$101,659	\$18,617.33	\$83,041.67
1998	\$25,214	\$17,812.52	\$74,014.8
1999	\$(2,726)	\$18,629.30	\$(21,355.30)
2002	\$187,040	\$64,741.19	\$122,298.81

The above analyses show that the petitioner demonstrated that it had sufficient net current assets to pay the proffered wages to all prospective employees from the priority dates except for the year 1999.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the continuing ability to pay the beneficiary and all the prospective employees the proffered wage for 7 out of 8 years as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel submitted a letter from Jon Stein, CPA, Hinton, Kreditor & Gronroos, LLP, Certified Public Accountants that states in part: "the Company's loss in earlier years was apparently the result of a store in San Diego, California which was closed in 2000." *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. In the instant case, the petitioner demonstrates that it has been in business since 1990 and routinely earns a gross annual income of about \$1 million<sup>8</sup> and parallel to those in *Sonogawa*, the petitioner had difficulties during the years 1996 through 1999 in yielding profits from business because of a store in San Diego, California which was closed in 2000. The increasing net incomes reported on the petitioner's tax returns after the store closed in 2000 evidence that those years were just uncharacteristically unprofitable years in a framework of profitable or successful years. The petitioner's net income increased from \$12,427 in 1999 to \$54,140 in 2000 immediately after closing the store and to \$109,332 in 2001. Given that, in the unique facts of this case, the petitioner has shown its ability to pay in 7 of the 8 pertinent years, the AAO finds that petitioner has demonstrated that it has been a viable enterprise capable of paying the proffered wage.

Therefore, the AAO determined that counsel's assertions on appeal and evidence submitted have overcome the director's finding in his decision to revoke the petition. The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

<sup>8</sup> Total income on Line 11 of Form 1120 and Line 6 of Form 1120S reports \$904,719.00 in 1996, \$924,867.00 in 1997, 958,024.00 in 1998, \$1,132,157.00 in 1999, \$1,117,231 in 2000, \$1,075,162.00 in 2001, \$1,061,251 in 2002 and \$1,161,006 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.