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**U.S. Citizenship
and Immigration
Services**

Ble

NOV 28 2005

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 04 018 51729

IN RE:

Petitioner:

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:

[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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to request additional evidence and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner's continuing ability to pay the proffered wage has been established.

Section 203(b)(3)(A)(i) of 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) also provides 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . 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 the [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification \$18.23 per hour, which amounts to \$33,178.60 per year based on a 35-hour workweek as set forth on the ETA 750. On Part B of the ETA-750, signed by the beneficiary on April 30, 2001, the beneficiary claims that he has worked for the petitioner since June 1998.

On Part 5 of the visa petition, the petitioner claims that it was established on January 29, 1998, employs fourteen workers, and has a gross annual income of \$541,002.

The petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. In 2001, the petitioner reported ordinary income¹ of \$32,622. Schedule L of the tax returns shows the petitioner's net current assets. Besides net income, CIS will examine net current assets as a method of

¹ For the purpose of this review, ordinary income will be treated as net income.

determining a petitioner's ability to pay the proffered wage. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.² 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 proffered wage out of those net current assets. Schedule L of the petitioner's 2001 tax return shows that it had \$24,346 in current assets and \$7,034 in current liabilities, yielding \$17,312 in net current assets.

The director denied the petition on July 19, 2004, finding that the petitioner had failed to show either the necessary net income or net current assets to pay the proposed wage of \$33,178.60.

On appeal, counsel asserts that the depreciation expense should have been taken into consideration. Counsel also contends that "net income" can be defined as net "cash flow" income in that depreciation is a non-cash expense.

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 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. Consideration will be given to lesser amounts of wages paid if supported by credible documentation. If the shortfall between the actual wages paid and the proffered wage can be covered by either a petitioner's net income or net current assets during a given period, the petitioner is deemed to have established the ability to pay during the relevant period. In the instant case, it is noted that the ETA 750B reflects that the beneficiary claims to have worked for the petitioner since 1998. Because the 2001 net income as shown on the tax return was only \$556.60 less than the proffered wage, we believe the director should request additional evidence of wages paid by the petitioner to the beneficiary.

Counsel asserts that the depreciation expense taken by the petitioner should be added back to the petitioner's net income because it is a non-cash deduction. No legal authority is cited in support of this proposition other than an extracted copy from an unknown treatise and an Internet article discussing a cash flow statement and its allowance of factoring in a depreciation expense. The AAO does not find this assertion persuasive. Depreciation represents a decrease in value of a given asset due to wear and tear and is relevant to the overall consideration of a petitioner's ongoing ability to pay a proffered salary.

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 review 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 the petitioner's gross receipts exceeded the proffered wage is insufficient. It is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. With respect to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that *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. (Original emphasis.) *Chi-Feng* at 537.

As noted above, we will remand this matter to allow the director to request additional evidence related to the petitioner's payment of wages to the beneficiary during any of the relevant period and to the petitioner's ability to pay the proffered wage. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.