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U.S. Citizenship  
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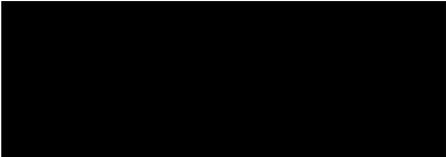
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FILE: EAC-03-054-50532 Office: VERMONT SERVICE CENTER Date: OCT 20 2005

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 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a Kosher cook. 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.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$17.61 per hour (\$36,628.80 per year). The Form ETA 750 states that the position requires two 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 1990, to have a gross annual income of \$376,000, and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents: counsel's cover letter stating that the beneficiary would be replacing the petitioner's former employee, [REDACTED]; a W-2 form issued to [REDACTED] reflecting wages paid in the amount of \$15,600 in 1998; and the petitioner's 1998 corporate tax return.

On September 22, 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 corporate tax returns, or annual reports with accompanied audited or reviewed financial statements, or W-2 forms issued from the petitioner to the beneficiary for 1999, 2000, 2001, and 2002.

In response, the petitioner submitted its bank statements and corporate tax returns for 1999 through 2002. Additionally, counsel submitted a letter stating that [REDACTED] retired in the middle of 2002 and the two shareholders of the petitioner assumed her duties until the instant petition is approved. Counsel stated that considering the amount of wages paid to [REDACTED] the petitioner's bank balances, and the petitioner's net profit and depreciation, it has demonstrated its ability to pay the proffered wage beginning on the priority date. Finally, the petitioner submitted a letter from [REDACTED] of [REDACTED] stating that she is one of the petitioner's owner and together with the other owner, they received \$89,000 as compensation for officers, which were wages earned while they assumed the responsibilities of [REDACTED] upon her retirement. [REDACTED] stated that those funds would be available for the beneficiary who would assume [REDACTED] job and the work performed by [REDACTED] and the other owner who are temporarily covering until the beneficiary can work for them. W-2 forms submitted into the record of proceeding issued by the petitioner to [REDACTED] reflect wages paid in the amounts of \$15,600, \$14,400, \$15,300, \$13,500, and \$9,000 in 1998, 1999, 2000, 2001, and 2002, respectively.

The director denied the petition on April 8, 2004, finding that the evidence submitted with the petition and in response to its 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 in failing to consider the petitioner's bank balances, wages paid to [REDACTED] [REDACTED] and the other owner of the petitioning entity, and certain expenses that result in paper losses on tax returns.

At the outset, Counsel's reliance on the balance in the petitioner's bank account is 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, 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 somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 petitioner has not established that it

employed and paid the beneficiary the full proffered wage during the period from the priority date 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 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 \$36,628.80 per year from the priority date.

In 1998, the Form 1120S stated net income<sup>1</sup> of \$8,344.

In 1999, the Form 1120S stated net income of -\$14,890.

In 2000, the Form 1120S stated net income of -\$4,939.

In 2001, the Form 1120S stated net income of \$4,134.

In 2002, the Form 1120S stated net income of \$1,927.

Therefore, for the years 1998 through 2002, the petitioner did not have sufficient net income to pay 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. The petitioner's total assets include depreciable assets that the petitioner

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<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

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>2</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 1998 were \$14,338.  
The petitioner's net current assets during 1999 were \$24,350.  
The petitioner's net current assets during 2000 were \$13,906.  
The petitioner's net current assets during 2001 were \$12,108.  
The petitioner's net current assets during 2002 were \$13,165.

The petitioner's net current assets are less than the proffered wage in every relevant year and cannot establish the petitioner's ability to pay the proffered wage. 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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel advised that the beneficiary would replace one worker and the petitioner's owner stated the same in a signed letter which is testimonial evidence. The evidence in the record names the worker, contains competent evidence of the wages paid and fulltime employment, verifies that her duties are those of the proffered position as set forth on the ETA 750, and contains evidence that the petitioner has replaced or will replace them with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Thus, contrary to the director's decision, the wages paid to ██████████ of \$15,600, \$14,400, \$15,300, \$13,500, and \$9,000 in 1998, 1999, 2000, 2001, and 2002, respectively, may be added to the petitioner's net income or net current assets to determine if the petitioner had sufficient funds in each year to pay the proffered wage.

Additionally, ██████████ and the other owner of the petitioning entity's wages may be considered for the portion of their duties that involved cooking during the remainder of 2002 after ██████████ retired. However, since the record of proceeding does not contain that level of detail, in other words, how much of Ms. ██████████ and the other owner's compensation was earned for cooking duties and how much for ownership

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<sup>2</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.

rights and or responsibilities, such a determination may not be made. Moreover, this would only affect the petitioner's ability to pay figures for 2002 and would not alter the petitioner's figures for 1998 through 2001.

The petitioner's net current assets are greater than the net income reported by the petitioner in each relevant year. Adding ██████████ wages to the petitioner's net current assets results in the following amounts: \$29,938, \$38,750, \$29,206, \$25,608, and \$22,165 for 1998, 1999, 2000, 2001, and 2002, respectively. With the exception of 1999, those amounts are still less than the proffered wage.

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.