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U.S. Citizenship and Immigration Services

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[redacted]

B6

FILE: LIN 03 242 50869 Office: NEBRASKA SERVICE CENTER Date: SEP 02 2005

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Spanish restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook of Spanish-style food. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its continuing financial ability to pay the certified 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 day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 2, 2002. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200 per annum. On Form ETA 750B, signed by the beneficiary on June 26, 2002, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed August 11, 2003, the petitioner states that it was established in 2001, has a gross annual income of over one million dollars and currently employs fifteen workers. Along with documentation establishing its change of name and corporate status beginning in 2001, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It shows that the petitioner files its taxes using a standard calendar year. For this year, the petitioner reported net income of -$6,547 before the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had $56,567 in current assets and $78,069 in current liabilities, resulting in -$21,502 in net current assets. Besides net income, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as a measure of a petitioner's liquidity

during a given period and as an alternative method of determining its ability to pay the certified wage.[1] Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on February 25, 2004, the director requested additional evidence pertinent to that ability based on his assumption that the petitioner was a sole proprietorship.

In response, the petitioner, through counsel, explained that the petitioner is a corporation. Counsel resubmitted a copy of the petitioner's 2002 corporate tax return and a copy of an Internal Revenue Service (IRS) form requesting an extension of time to file the petitioner's 2003 tax return. Counsel also supplied copies of the petitioner's February 29, 2004 bank statement showing an ending balance of $14,515.10. In her transmittal letter, counsel affirms the petitioner's need to hire the beneficiary because when two of the petitioner's older cooks leave, it will create a crisis situation. Counsel also contends that the petitioner's depreciation expense should be added back to its net income as presented on the 2002 tax return.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 14, 2004, denied the petition. The director noted that the petitioner's 2002 tax return failed to indicate that either the petitioner's net income or net current assets were sufficient to pay the proffered wage. He further noted that the petitioner had three pending petitions and that the petitioner must demonstrate the ability to pay the proffered wage in all four petitions.

On appeal, counsel renews the assertion that, once approved, two of the three pending petitions (not four) for the certified position of specialty cook of Spanish-style food would substitute for the duties (and wages) now borne by two older cooks who wish to retire. The other beneficiary's salary could be covered by the petitioner's net current assets of $56,567, which counsel asserts that CIS failed to consider. As mentioned above, $56,567 is the

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[1] Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. If a given net income is greater than the amount of the proffered wage, it suggests that a petitioner could have paid the wage during that year out of its income. Net current assets at the end of the year which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

sum of the petitioner's current assets as shown on Schedule L of its 2002 tax return. This must be offset by the petitioner's current liabilities. The resulting difference of -$21,502 between the current assets and current liabilities represents its *net current assets.* As this is not sufficient to pay the proffered wage of $31,200, the petitioner's ability to pay the proposed wage offer cannot be extrapolated from these figures.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 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 the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable 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). Contending that the petitioner's gross receipts reached a certain level or exceeded the proffered wage is insufficient as it is also necessary to consider the expenses generated in order to produce the gross receipts. 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. Noting that the depreciation, or the decreased value of the assets of a business to be a relevant factor in reviewing the financial viability in a business, 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 536.

On appeal, counsel submits a copy of the principal shareholder's individual passbook savings account covering the period between December 2002 and November 2003. Counsel's reliance on the balances in this bank account, whose entries begin six months after the visa priority date, is misplaced. It is noted that as a corporation, the petitioner is a separate and distinct legal entity from its owners and shareholders. As such, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "nothing

in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also offers a copy of an unaudited income statement, on appeal, covering the petitioner's financial data for 2003. The accompanying accountant's document indicates that it represents a compilation. 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. A compilation, by its own terms is restricted to information based upon the representations of management. *See also, Barron's Accounting Handbook*, 370-371 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented.

As noted above, counsel maintains that it has three, not four, pending petitions for alien workers. CIS electronic records and files submitted on appeal indicate that all three represent petitions for cooks at the same stated salary and with priority dates in 2002.[3] Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. Here, neither the petitioner's net income of -$6,547, nor its net current assets of -$21,502 as shown on its 2002 federal tax return demonstrates the petitioner's ability to pay the proffered wage during the period encompassing the priority date. Regarding counsel's contention that two beneficiaries are intended to replace cooks who have not yet departed the petitioner's employment, it is noted that the salaries paid to such employees represent funds already expended by the petitioner and do not constitute monies generally considered to be readily available to pay the proffered wage. To do so, the record must demonstrate that the beneficiary is being hired to replace another specific individual employed by the petitioner in the same position and that the other employee will leave or has left the business. It must also demonstrate that the wage paid to the other employee equaled or exceeded the proffered wage. If the wage was less than the proffered salary, then the evidence must demonstrate that the petitioner could have paid the additional amount. In this case, the record does not specifically name the workers, specify their compensation, or verify their full-time employment. It is noted that the assertions of counsel in this matter do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a continuing ability to pay the proffered wage beginning at the priority date. Based on a review of the evidence in the record and the evidence and argument offered on appeal, the AAO concludes that the petitioner's evidence has not demonstrated that it has 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.

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[3] The other two petitions are l[redacted]nd [redacted]