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U.S. Citizenship
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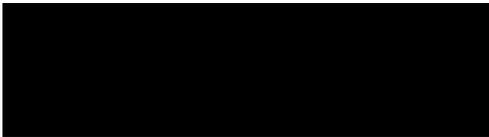
Office: VERMONT SERVICE CENTER

Date: **SEP 06 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 contends that the petitioner has demonstrated its continuing financial ability to pay the proffered salary

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.65 per hour, which amounts to \$26,312 per annum. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed in April 21, 2003, the petitioner states that it was first established in 1989, has a gross annual income of \$370,783, a net annual income of \$228,174, and currently employs five workers. In

support of its ability to pay the beneficiary's proposed wage offer of \$26,312 per year, the petitioner failed to initially offer any evidence with its petition.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On July 2, 2003, the director requested copies of the petitioner's federal income tax returns for 2001 and 2002. The director also requested the petitioner to provide a copy of the Wage and Tax Statement (W-2) or Form 1099-Misc issued to the beneficiary in 2001 and 2002 if it employed the beneficiary during that period.

In response the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. They reflect that the petitioner files its returns using a standard calendar year. They contain the following information:

	2001	2002
Ordinary income ¹	\$12,294	\$18,246
Current assets	\$14,002	\$16,062
Current liabilities	\$ 5,550	\$ 6,443
Net current assets	\$ 8,452	\$ 9,619

Besides net income, and as an alternative resource out of which a proffered salary may be paid, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets and current liabilities are shown on lines 1-6 and 16-18, respectively, of Schedule L of its federal tax return. 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.

In addition to its tax returns, the petitioner also submitted a letter, dated July 22, 2003, from its principal shareholder [REDACTED]. The letter is addressed to counsel [REDACTED] and states that the restaurant has been in business for fourteen years and has always met its payroll. She adds that the petitioner has employed the beneficiary part-time for three years and that he has been trained as a cook.

The director denied the petition on March 3, 2004. She reviewed the petitioner's net income and net current assets as shown on its two corporate tax returns and concluded that the evidence failed to demonstrate that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 30, 2001. She noted that although it was claimed that the petitioner had employed the beneficiary for three years, no evidence of any salary paid to the beneficiary was provided.

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

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.

On appeal, counsel submits a partial copy of the petitioner's 2003 corporate tax return. It shows that the petitioner reported \$29,559 in ordinary income that year. Schedule L indicates that the petitioner had \$26,640 in current assets and \$5,202 in current liabilities, resulting in \$21,438 in net current assets. Counsel also provides copies of some unaudited financial statements covering the period from January to December 2003, as well as a letter from [REDACTED] CPA [REDACTED] states that the petitioner has reported consistent profits since 1995 and that its cash flow is sufficient to support the beneficiary's salary.

Counsel supplies an additional letter from [REDACTED] on appeal. She asserts that the petitioner employs five year-round workers and eight seasonal workers, is a successful business, and has met its payroll since 1989.

Counsel asserts on appeal that the petitioner's intent is to replace an existing cook, Sarah Lebel, with the beneficiary. Counsel points to part 6 of the I-140, where the petitioner marked "no" in response to the question of "[I]s this a new petition?" [REDACTED] salary for 2003, as reflected by a W-2 provided with the appeal, was \$32,332.

Although the petitioner failed to offer any documentation of actual wages paid to the beneficiary, the record suggests that the petitioner has employed the beneficiary from at least the year 2000. This undercuts the petitioner's argument that the beneficiary could replace the existing employee as a cook since it appears that they already were working for the petitioner during the same period. Moreover, expenses already paid out to other employees are not generally available to prove the ability to pay the certified wage to the beneficiary as of the priority date of the petition. Although, even if we found that he was to replace Ms. Lebel, the evidence in the record of proceeding only demonstrates her wages for 2003, not 2001 or 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate continuing its ability to pay the proffered wage beginning as of the priority date.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As stated above, the record suggests that the petitioner has employed the beneficiary since 2000, but as noted by the director, the petitioner's response to the request for additional evidence failed to corroborate the any wages or compensation paid. Therefore such sums cannot be considered in determining the petitioner's ability to pay the certified wage.

CIS will also 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). Showing that the petitioner's gross receipts exceeded 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.

In this case, as reflected by the tax return submitted on appeal, the petitioner's net income of \$29,559 was sufficient to cover the beneficiary's wage offer of \$26,312. However, as mentioned above, the regulation requires that an ability to pay a proffered salary be demonstrated beginning at the priority date. In this case, as noted by the director, in 2001, the petitioner's ability to pay the proposed wage offer of \$26,312 could not be established during this period, as neither its reported net taxable income of \$12,294, nor its \$8,452 in net current assets was sufficient to meet the proffered wage. The record of proceeding contains no other evidence that would demonstrate the petitioner's ability to pay the certified wage in 2001.

Similarly, neither the petitioner's net taxable income of \$18,246, nor its net current assets of \$9,619 could pay the certified wage in 2002. The petitioner's evidence has not demonstrated its continuing ability to pay the proffered wage in either 2001 or 2002. The record of proceeding contains no other evidence that would demonstrate the petitioner's ability to pay the proffered salary in 2002.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.