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U.S. Citizenship  
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Services

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BC

FILE: LIN 03 221 50057 Office: NEBRASKA SERVICE CENTER Date: SEP 22 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Nebraska 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 foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief.

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) 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on May 31, 2000. The proffered salary as stated on the labor certification is \$403.85 a week or \$21,000.20 per year.

With the petition, the petitioner, through counsel, failed to submit any evidence of its ability to pay the proffered wage. On February 11, 2004, the director requested evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present to be in the form of audited profit/loss statements, bank account records, and/or personnel records.

In response, counsel provided copies of its 2000 through 2002 Forms 1120, U.S. Corporation Income Tax Returns, copies of its 2003 Forms 941, Employer's Quarterly Federal Tax Return, and copies of bank statements for the period June 30, 2001 through December 31, 2002. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$2,695 and net current assets of \$7,673. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$24,438 and net current assets of \$53,542. The 2002 tax return reflected a taxable income

before net operating loss deduction and special deductions of \$5,452 and net current assets of \$70,600. The Forms 941 did not show that the petitioner employed the beneficiary in 2003. The bank statements reflected balances ranging from a low of \$13,932.37 to a high of \$52,910.49.

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. On April 23, 2004, the director denied the petition.

On appeal, counsel states:

The denial by the Service Center is incorrect on several grounds.

A company's profit for a taxable year is an incomplete source for determining whether a company has the financial ability to pay the wages offered to a beneficiary.

One factor alone, which is a mere accounting technique, shows enough depreciation and other tax deductions reflected to show ability to pay the wages of \$21,000 per year. This was a significant amount reducing the taxable income, but not resulting from an actual expenditure of cash funds.

For each year, amounts were: [see returns attached Exhibit A]

YEAR	DEPRECIATION	OTHER DEDUCTIONS
2000	\$12,215	\$74,883
2001	\$18,160	\$68,778
2002	\$ 8,584	\$78,138

In evaluating a company's financial ability to pay, the Service should look at various sources apart from the corporate tax return.

\* \* \*

To indicate that the Petitioner/Appellant had sufficient funds to pay the proffered wage at the time of the establishment of the priority date, we are attaching bank statements. The bank statements were included with the I-140 petition but the Service failed to consider them. [See Exhibit B] It can be seen that the bank account had a balance for year-end 2001 in the amount of \$23,584.10 and year-end 2002 in the amount of \$50,994.61.

**Specifically, please note the following:**

Year	Prevailing Wage	Depreciation & Other Deducts.	Bank Balance
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2000	\$21,000	\$12,215+\$74,883	\$12,618
2001	\$21,000	\$18,160+\$68,778	\$23,584.10
2002	\$21,000	\$ 8,584+\$78,138	\$50,444.61
2003	\$21,000	\$	\$26,392.93

It is clear from this evidence that the Petitioner, taking net profit and depreciation into account, plus the cash bank balances shown, had the continuing capability of paying the prevailing rate to the beneficiary in accordance with regulations.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 through 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 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>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The petitioner's net current assets during 2000 to 2002 were \$7,673, \$53,542 and \$70,600, respectively. The petitioner could not have paid the proffered wage in 2000 from its net current assets.

Counsel points to the petitioner's depreciation and other deductions as proof of the petitioner's ability to pay the proffered wage. However, as stated above, the depreciation cannot be added back to net cash at the end of the year. In addition, counsel has not listed the other deductions that should be added back nor has she provided a published citation that allow the use of the other deductions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel states that the petitioner's bank statements is evidence of its ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 cash specified on Schedule L.

Counsel argues that "profitable companies have undergone periods where they are not profitable or only moderately profitable for a particular year and yet their financial ability to pay employees is well established." If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial

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<sup>1</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation or historical growth. In addition, the petitioner has not demonstrated that any unusual circumstances existed in this case to parallel those in *Sonogawa*, nor has it been established that 2000 was an uncharacteristically unprofitable year for the petitioner.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of -\$2,695 and net current assets of \$7,673. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$24,438 and net current assets of \$53,542. The petitioner could have paid the proffered wage from either its taxable income or its net current assets in 2001.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$5,452 and net current assets of \$70,600. The petitioner could have paid the proffered wage from either its taxable income or its net current assets in 2002.

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.