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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

EAC 04 066 50170

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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center. The director also denied a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner produces bean sprouts and agricultural products. It seeks to employ the beneficiary permanently in the United States as an operations manager. 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, the petitioner submits additional evidence and asserts that it has established its continuing financial ability to pay the proffered 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) 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 \$35,000 per annum. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary does not claim to have worked for the petitioner.

Part 5 of the preference petition, filed on January 2, 2004, indicates that the petitioner was established in 1982, currently employs fourteen workers, has a gross annual income of \$2,650,420, and an annual net income of \$23,714.

In support of its continuing ability to pay the proffered wage, the petitioner initially submitted a partial copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2002. All statements referenced in the tax

return are missing. It reflects that the petitioner uses a standard calendar year to file its taxes. In 2002, the petitioner reported \$23,714 in taxable income before the net operating loss (NOL) deduction. Schedule L of the tax return shows that the petitioner had \$289,976 in current assets and \$329,197 in current liabilities, resulting in net current assets of -\$39,221. Besides net income, 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 to demonstrate its ability to pay the certified 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 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.

On August 16, 2004, the director denied the petition. She determined that neither the petitioner's 2002 net taxable income nor its net current assets demonstrated the level of financial resources necessary to pay the proffered wage.

On appeal, counsel resubmits an incomplete copy of the petitioner's 2002 corporate tax return and additionally provides a partial copy of its 2003 tax return. This tax return shows that the petitioner declared \$47,931 in taxable income before the NOL deduction. Schedule L reflects that the petitioner had \$348,553 in current assets and \$553,391 in current liabilities, yielding -\$204,838 in net current assets.

Counsel also provides, on appeal, partial copies of the 2002 and 2003 individual tax return of one of the three principal shareholders of the corporate petitioner, as well as a partial copy of the 2002 individual tax return of another principal shareholder. An unsigned letter from one of these shareholders is also submitted. He states that the corporate tax returns would have reflected additional net income but for the amounts claimed as wages, rents, and pensions paid to himself and his family in order to minimize the corporate tax liability.

Counsel further supplies a letter, dated August 20, 2004, from the petitioner's accountant, [REDACTED] CPA. Mr. [REDACTED] restates the claim made by the unsigned letter noted above regarding the minimization of corporate tax liability and adds that the non-cash deduction of depreciation should be added back to the petitioner's available funds to pay the proffered wage. He also states that the \$191,238 claimed as other assets on Schedule L of the 2002 tax return should be added back to current assets as it represents "marketable securities," which can be turned into cash. Counsel adopts by reference Mr. [REDACTED]'s assertions and maintains that if these adjustments to the petitioner's net income and net current assets were made to the figures shown on the 2002 tax return, the petitioner's financial ability to pay the proffered wage would be established.

Counsel's assertions are not persuasive. 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 credible documentary evidence that it employed the beneficiary at a

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

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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner's ability to pay the proffered wage will be deemed to be established for that period. In this matter, no evidence that the petitioner has employed the beneficiary has been provided with the preference petition.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, as discussed above, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses such as wages or pensions paid<sup>2</sup> that are already shown as allocated on the tax return. Counsel cites no legal authority in support of the contention that the revision of such figures should be considered by adding designated amounts back to the net income or to the asset allocation shown on Schedule L of the petitioner's 2002 tax return. While minimizing tax liability may be a motive of every taxpayer, it remains that in examining a petitioner's ability to pay a beneficiary, as well established by judicial precedent, CIS may rely on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. *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). 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 taxable 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. It is noted that the depreciation expense taken by a taxpayer recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. The court in *Chi-Feng Chang* 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

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<sup>2</sup> It is further noted that CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). The *Sitar* court considered whether the personal assets of one of the corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of the director's affidavit offering to pay the alien's proffered wage, the court stated, "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."

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.

In this case, while the petitioner's tax return submitted on appeal suggests that the petitioner's reported net income of \$47,931 could cover the proffered wage of \$35,000 in 2003, the record does not demonstrate that either the petitioner's net income of \$23,714 or its net current assets of -\$39,221 could cover the proffered wage in 2002. The petitioner's ability to pay the proffered wage has not been established for this year. It is further noted that the petitioner submitted no evidence demonstrating its ability to pay the proffered wage in 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay a certified wage beginning at the priority date. In this case, as earlier mentioned, that date is April 30, 2001.

Based on a review of the evidence contained in the underlying record and the evidence and argument offered on appeal, the petitioner has failed to demonstrate that it has had the continuing ability to pay the proffered wage beginning on the priority date of April 30, 2001.

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.