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U.S. Citizenship  
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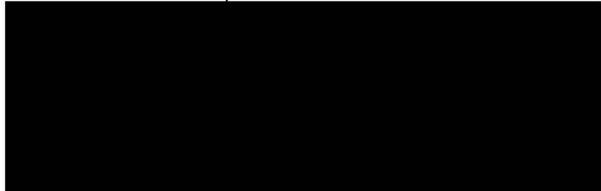
Petitioner:



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:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Mexican 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 a brief and additional evidence.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$14.64 per hour, which amounts to \$30,451.20 annually.<sup>1 2</sup>

On the petition, the petitioner indicated it was established in 1983, has 65 employees and a gross annual income of \$1,915,886. With the petition, the petitioner submitted IRS Form 1120S, federal corporate income tax return, for the years 1999, 2000, and 2001. These documents indicated the petitioner had ordinary income of -\$50,045 in 1999, of \$57,355 in 2000, and of -\$36,319 in 2001. The petitioner also submitted three of the beneficiary's paychecks for the weeks beginning in January 1, 2001, December 17, 2000 and December 3, 2000, along with an

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<sup>1</sup> Although the petitioner submitted a letter to the record stating that it would pay the beneficiary a higher hourly salary of \$14.75, for purposes of these proceedings, the actual wage approved by the Department of Labor (DOL) on the Form ETA 750 is the sum utilized in calculating the annual salary.

<sup>2</sup> Although the petitioner in its cover letter stated that the original "Form ETA 705&B" was submitted, the record only contains Part A of this document.

additional bonus paycheck dated December 8, 2000. These paychecks indicated an hourly salary of either \$9.60 or \$10.25.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 8, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal income tax returns for the years 1998 to 2002, or annual reports, or audited financial statements for the same years. The director also requested evidence that the beneficiary possessed the experience listed on Form ETA 750. The director stated that evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information, as well as state the beneficiary's title, duties and dates of employment/experience and number of hours worked each week. Finally the director requested that the petitioner submit all IRS Forms W-2 for the beneficiary that relates to all applicable work experience while in the United States.

In response, the petitioner submitted Form 1120 corporate tax returns for the years 1999 to 2002, a letter of employment verification for the beneficiary, and the beneficiary's W-2 Forms from tax years 1999 to 2002. The letter of employment verification is written by the proprietor of a restaurant, [REDACTED] in Durango, Mexico. It is dated June 14, 1999 and states that the beneficiary worked for the restaurant from 1985 to May 1987. The W-2 Forms submitted to the record indicate that the petitioner paid the beneficiary the following wages: in 1999, \$13,035; in 2000, \$17,835; in 2001, \$10,813;<sup>3</sup> and in 2002, \$18,391.24.

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 November 24, 2004, denied the petition. The director examined the beneficiary's actual wages and then calculated the difference between the beneficiary's actual wages and the proffered wage for the years 1999 to 2002. The director then examined the petitioner's Forms 1120S to establish the petitioner's ordinary income for each year. The director determined that the petitioner had never paid the beneficiary the proffered wage, and that in four of the five years, the petitioner showed negative ordinary income ranging from \$11,000 to \$50,000. The director determined that based on these negative figures, the petitioner could not have paid the difference in four years between the beneficiary's actual wages and the proffered wage. The director also examined the petitioner's net current assets, and determined that in 1998, 1999, 2000 and 2002, the petitioner had negative net current assets in the amounts of \$8,213, \$58,376, \$12,694 and \$38,186 respectively. Thus, the director determined that the petitioner did not have the ability to pay the proffered wage as of the 1998 priority date and continuing.

On appeal, counsel asserts that present CIS guidance provides for three methods of analyzing whether the petitioner has the ability to pay the proffered wage, namely, when the petitioner's net income is above the proffered wage; the petitioner's net current assets are above the proffered wage; and whether the beneficiary has been paid the proffered wage.<sup>4</sup> Counsel states that in the instant petition, the director only applied two of these methods; namely, whether the beneficiary was paid the proffered wage, and whether the petitioner had sufficient

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<sup>3</sup> This W-2 Form is only partially legible. The beneficiary's wages appear to be \$10,813.

<sup>4</sup> Counsel refers to the memorandum, "Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)," written by William Yates, former CIS Associate Commissioner.

net income to pay the proffered wage. Counsel notes that the total sum of monies lacking between the beneficiary's actual wages and the proffered wage during the years 1998 to 2002 would be \$74,456. Counsel states that with regard to the examination of the petitioner's net income, the petitioner's 2003 federal corporate income tax return indicates that the petitioner has returned to profitability. Counsel states that the reasons for the net operating losses in 2001 and 2002 were tied to the initial capitalization and operation of the petitioner's third restaurant that opened in 2000.

Counsel then states that the director failed to apply the net current assets method to the instant petition. Counsel examines the petitioner's net assets and net liabilities and calculates the following net current assets for the petitioner: in 1998, -\$16,213; in 1999, -\$66,376; in 2000, -\$20,694; in 2001, \$227,489, and in 2002, -\$46,186. Counsel acknowledges that in four of the five years examined, the petitioner had negative net current assets. Counsel identifies the aggregate amount of negative net current assets as \$149,469 and divides this sum from the positive net current assets of \$227,489 in tax year 2001. In doing so, counsel states that there is actually an aggregate surplus net current assets of \$77,780. Counsel concludes his analysis by stating that if these aggregate figures been measured against the beneficiary's employment analysis, the CIS would have found that the petitioner has the ability to pay the beneficiary's wages as \$77,780 net current assets is greater than \$74,456. Counsel states that such a hybrid application of the analysis methods would not appear to violate the spirit or intent of the Yates memo.

Counsel submits copies of newspaper article and reviews as well as awards given to the petitioner. Counsel states that this documentation is acceptable for consideration of the holdings in *Elatos Restaurant Corp. v. Sava* 632 F. Supp 1049. Counsel states that this decision allowed that in certain circumstances other evidence of financial viability may be considered. Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in which the petitioner submitted lists of clients, newspaper and magazine articles and professional accomplishments. Counsel submits a copy of an excerpt from *Sacramento*, dated October 1997, that identifies the petitioner as "Best Mexican Restaurant" based on a reader survey of 85 restaurants. Counsel also submits a copy of the *Sacramento News and Review* Readers' Choice Bets of Sacramento for the year 1999. The petitioner is identified as "Best Mexican Food." Finally counsel submits an excerpt from *Sacramento Magazine's* 2004 Subscriber's Choice dining awards. The petitioner is identified as the best Mexican "hole in the wall" restaurant..

Counsel also submits a copy of the petitioner's 2003 Form 1120S, as well as a copy of the beneficiary's 1998 W-2 form that indicates the petitioner paid the beneficiary \$17,722.19 in that year. Finally, counsel submits a letter from [REDACTED] the petitioner's certified public accountant who examines the petitioner's historical financial strength. In his letter dated November 10, 2003 [REDACTED] states that the letter is to provide documentation to support the appeal of [REDACTED] states that he has served as CPA for the petitioner for seven years, and that the family operated business opened its first restaurant in 1984. [REDACTED] states that although the petitioner had had a few years with net operating losses, most of their years in business have been profitable. [REDACTED] states that the recent net operating losses sustained by the petitioner is a direct result of opening their third restaurant three years ago. The initial expenses incurred in getting the new restaurant open, running, and profitable had a direct impact on the petitioner's bottom line. [REDACTED] then states that the new restaurant has

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<sup>5</sup> CIS records indicate that the petitioner submitted another employment-based petition with a beneficiary named Lorena Estrada that was denied and never appealed.

grown dramatically in the last two years in terms of annual sales and is now in 2003 producing a significant profit. [REDACTED] also states that the petitioner has always been well capitalized and that the petitioner possesses strong cash reserves in its investment savings bank account in excess of \$250,000 which shows up on the petitioner's 2001 corporate tax return balance sheet. [REDACTED] further states that in 2002, a short-term loan was made of these cash reserves and the petitioner's 2002 corporate tax return does not report this as a cash asset because it was a note/loan receivable asset at the end of 2002. [REDACTED] then states that this short-term loan was fully repaid to the petitioner in early 2003 and the funds are re-deposited in the petitioner's investment savings bank account. [REDACTED] states that he is submitting the petitioner's most recent investment savings bank statement; however this statement is not found in the record. [REDACTED] also states that [REDACTED] has been gainfully employed by the petitioner, although at a lower salary and the petitioner had never had a problem meeting their significant payroll, during the seven years that [REDACTED] has served as the petitioner's accountant.

Although counsel on appeal states that the director did not address the petitioner's net current assets in his decision, the record reflects that this issue was briefly addressed in the director's decision. The AAO will examine it more thoroughly in these proceedings.

Counsel then looks at aggregate numbers of items such as the difference between the beneficiary's actual wages and the proffered wage for the years 1998 to 2002, and the petitioner's aggregate net current assets for 1998 to 2002, and suggests that these aggregate figures can be utilized to establish the petitioner's ability to pay the proffered wage. The method of analysis has no basis in the regulatory or statutory guidance. The regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Using counsel's method of analysis, a petitioner would not have to establish its ability to pay the proffered wage during specific years, but could establish its ability based on whether the petitioner had sufficient cumulative net current assets to match any outstanding sums needed to pay the beneficiary the proffered wage. The regulatory guidance clearly establishes that the petitioner's ability must be established as of the priority year. In the instant petition, the priority year is 1998. Therefore the petitioner has to establish its ability to pay the proffered wage based on its financial assets in 1998, not in some future year. Or in other words, the petitioner's ability to pay the proffered wage cannot be established retroactively.

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. As previously stated, the W-2 Forms submitted to the record indicate that the petitioner paid the beneficiary the following wages: in 1999, \$13,035; in 2000, \$17,835; in 2001, \$10,813; and in 2002, \$18,391.24. In addition, on appeal, the petitioner submitted the beneficiary's W-2 form for 1998 that indicated she earned \$17,722.19 in 1998. All these wages are less than the proffered wage of \$30,451.20. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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). 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. Based on the petitioner's federal tax returns, its taxable income for 1998 to 2003 is as follows: -\$11,714 in 1998, -\$50,045 in 1999; \$57,355 in 2000, -\$36,319 in 2001, -\$15,813 in 2002, and \$760 in 2003. The petitioner's taxable income in tax year 2000 is greater than the proffered wage. Therefore the petitioner established its ability to pay the proffered wage in tax year 2000.

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. In addition, 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>6</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 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 tax returns reflect the following information for the years 1998, 1999, 2001, 2002 and 2003:

	1998	1999	2001
Taxable income <sup>7</sup>	\$ -11,714	\$ -50,045	\$ -36,319
Current Assets	\$ 78,568	\$ 85,843	\$ 334,948
Current Liabilities	\$ 86,781	\$ 144,219	\$ 99,459

<sup>6</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.

<sup>7</sup> As previously stated, taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

Net current assets	\$ -8,213	\$ -58,376	\$ 235,489
	2002	2003	
Taxable income	\$ -15,813	\$ 760	
Current Assets	\$ 78,620	\$ 400,982	
Current Liabilities	\$ 116,806	\$ 176,306	
Net current assets	\$ -38,186	\$ 224,676	

As illustrated above, the petitioner has \$235,489 in net current assets in 2001 which is sufficient to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$10,813.84. Furthermore, the petitioner did not establish that it paid the beneficiary any wages in tax year 2003; however, the petitioner has net current assets of \$224,676, which is clearly sufficient to pay the proffered wage of \$30,451. Therefore the petitioner established that it has the capability to pay the proffered wage in 2001 and 2003 based on its net current assets, and the capability to pay the proffered wage in 2000 based on its taxable income.

With regard to the years 1998, 1999, and 2002, the petitioner demonstrated that it paid wages to the beneficiary in these years. Based on the beneficiary's W-2 forms, the petitioner paid the beneficiary \$17,722.19 in 1998, \$13,035.68 in 1999, and \$18,391.24 in 2002. Thus, the petitioner has to establish that it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage in these years, namely \$12,728.81 in 1998, \$17,415.32 in 1999, and \$12,059.76. In 1998, as previously illustrated, the petitioner shows a taxable income of -\$11,714, and negative net current assets of -\$8,213 and has not, therefore, demonstrated the ability to pay the proffered wage. In 1999, the petitioner shows a taxable income of -\$50,045 and net current assets of -\$58,376, and, thus, has not demonstrated the ability to pay the proffered wage. In 2002, the petitioner shows a taxable income of -\$15,813 and net current assets of -\$38,186, and has not, therefore, demonstrated the ability to pay the proffered wage in 2002. Therefore, although the petitioner has demonstrated its ability to pay the proffered wage in three of the six years analyzed, the petitioner has not established that it had the ability to pay the proffered wage from the 1998 priority date to the present.

On appeal, counsel states that other documents can be submitted to establish the petitioner's ability to pay the proffered wage in petitions in which the petitioner's net income or net current assets are not sufficient. Counsel cites to *Matter of Sonogawa* with regard to this issue. Counsel mentions newspaper articles, awards, and the petitioner's accountant mentions a savings account that is also available to pay the proffered wage. With regard to the claimed savings account, the petitioner would have to establish that the savings accounts had available funds in it as of the priority year that were sufficient to pay the proffered wage. However, with regard to newspaper articles and awards, the petitioner submits three examples of the restaurant awards won by the petitioner in the years 1997 to 2004.

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's

prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

It has not been established that 1998 was an uncharacteristically unprofitable year for the petitioner. The following year 1999 was also an unprofitable year for the petitioner prior to the opening of its third restaurant in 2000. Furthermore, as stated previously, counsel's analysis of aggregate amounts of shortfall in the beneficiary's wages and of the petitioner's net current assets are not considered viable methods of establishing the petitioner's ability to pay the proffered wage.

Nevertheless, the petitioner's accountant's statement with regard to the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1983 and employs approximately 65 employees. Since the 1998, the petitioner's gross income has always been above \$1 million, ranging from \$1.5 million in 1998 to \$2,102,297 in 2002. The petitioner also has paid salaries and wages each year since the 1998 priority year that range from \$648,939 to \$985,269. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Thus, the petitioner has established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision will be withdrawn, and the appeal will be sustained.

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 met that burden.

**ORDER:** The appeal is sustained.