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U.S. Citizenship  
and Immigration  
Services

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FILE: SRC 06 015 50385

Office: TEXAS SERVICE CENTER Date: **AUG 15 2006**

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 14, 2006 denial, the only issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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. 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, which is the date 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). The priority date in the instant petition is April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$8.14 per hour or \$16,931.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter*

appeal includes copies of the petitioner's 2001 through 2004 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2001 through 2004 Forms 1120X, Amended U.S. Corporation Income Tax Returns, and copies of the petitioner's 2001 through 2003 Forms 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2004 tax returns reflect a taxable income before net operating loss deduction and special deductions or net incomes of \$121,680, \$148,572, \$24,040, and \$108,786, respectively. The petitioner's 2001 through 2004 tax returns also reflect net current assets of \$159,740, \$125,703, \$182,504 and \$325,123, respectively.

The petitioner's Forms 1120X reflect total incomes of \$1,059,701 from \$998,349 in 2001, \$2,068,774 from \$1,686,470 in 2002, \$1,924,093 from \$1,936,982 in 2003, and \$2,077,401 from \$2,077,401 in 2004. The petitioner's 2001 through 2004 Forms 1120X also reflect taxable incomes of \$121,680 from \$62,845 in 2001, \$148,572 from \$137,035 in 2002, \$24,040 from -\$74,186 in 2003, and \$108,786 from \$137,768 in 2004, respectively.

The petitioner's 2001 through 2003 Forms 8027 reflect total tips reported of \$128,802, \$270,909, and \$244,469, respectively. The petitioner's 2001 through 2003 Forms 8027 also reflect tips granted by the Internal Revenue Service (IRS) of \$125,017, \$241,531, and \$233,413, respectively.

On appeal, the petitioner explains that while it did respond timely to the director's request for evidence, dated November 18, 2005, due to an error, it did not submit its 2001 through 2003 tax returns, but merely its 2004 return. The petitioner states that it has established its ability to pay the proffered wage of \$16,931.20 based on its 2001 through 2004 tax returns.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary, dated September 3, 2002, the beneficiary claims to have been employed by the petitioner from December 1998 to the present. However, the petitioner has not provided the beneficiary's Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 2001 through 2004. Therefore, CIS has no evidence that the petitioner compensated the

beneficiary for his employment in 2001 through 2004, and those funds cannot be used as evidence of the petitioner's ability to pay the proffered wage of \$16,931.20 during those years.

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>2</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 petitioner's net current assets in 2001 through 2004 were \$159,740, \$125,703, \$182,504, and \$325,123, respectively. The petitioner could have paid the proffered wage of \$16,931.20 in 2001 through 2004 from its net current assets.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$121,680 and net current assets of \$159,740. The petitioner could have paid the proffered wage of \$16,931.20 from either its net income or its net current assets in 2001.

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<sup>2</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.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$148,572 and net current assets of \$125,703. The petitioner could have paid the proffered wage of \$16,931.20 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$24,040 and net current assets of \$182,504. The petitioner could have paid the proffered wage of \$16,931.20 from either its net income or its net current assets in 2003.

The petitioner's 2004 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$108,786 and net current assets of \$325,123. The petitioner could have paid the proffered wage of \$16,931.20 from either its net income or its net current assets in 2004.

While it appears that the petitioner has established its ability to pay the proffered wage of \$16,931.20 from the priority date of April 4, 2001 and continuing to the present, all of the tax returns provided as evidence of the petitioner's ability to pay the proffered wage are amended tax returns completed in 2005. There is no evidence in the record that verifies that the Forms 1120X were actually filed with the Internal Revenue Service. Absent verification that the Forms 1120X were filed with the Internal Revenue Service as an amended return, they have simply been altered rather than amended.

After a review of the record, it is concluded that the petitioner has not clearly established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of having filed the amended tax returns with the IRS such as copies of original computer printouts from the Internal Revenue Service for the years 2001 through 2004. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's January 1, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.