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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC 03 108 52430

Office: TEXAS SERVICE CENTER Date: AUG 16 2006

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.

A handwritten signature in black ink, appearing to read "Michael Vel..." or similar, written over a white background.

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 on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 11, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$465.00 per week (\$24,180.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. With the I-485 petition, the petitioner's U.S. federal tax return was attached as well as a support letter and documentation concerning the beneficiary.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 15, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns, and audited financial statements for 2002 and 2003.

In response to the request for evidence, counsel on July 26, 2004, submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120-A tax returns² for years 2001, 2002 and 2003, and, a bank reference letter indicating a current account balance as of July 13, 2004, of \$7,005.47.

The director denied the petition on December 21, 2004, finding 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 appeal, counsel asserts improperly denied the petition, and, that the petitioner has been in business for ten years.

According to counsel, the total assets that the petitioner evidences on its tax returns demonstrates its ability to pay the proffered wage. Also, according to counsel, the beneficiary would replace the owner of the petitioner in his role as cook. Counsel also contends that the fact that the petitioner has suffered continued taxable income losses in no way detracts from its ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120-A tax returns for years 2001, 2002, 2003 and 2004; a Form W-3; W-2 Wage and Tax Statements; Form 941 statements; the State of Florida employer's quarterly report; a bank reference letter; corporate information; the beneficiary's 2004 personal tax return and W-2 statement; Forms I-797C; and a copy of the petition Form I-140.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² On the first two pages of the 2002 and 2003 return were submitted. For 2001, only one page was submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. In 2004, the petitioner paid the beneficiary \$20,450.00. A State of Florida Employers' Quarterly Report states a wage payment to the beneficiary in the 1st quarter of 2005 of \$4,950.00. In no year in which tax returns, payroll information reports, or, W-2 statements were provided did the petitioner pay the beneficiary \$24,180.00 per year which is the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,180 per year from the priority date of April 11, 2001:

- In 2001, the Form 1120-A stated taxable income loss³ of <\$5,456.00>⁴.
- In 2002, the Form 1120-A stated taxable income loss of <\$13,389.63>.
- In 2003, the Form 1120-A stated taxable income loss of <\$11,944.35>.
- In 2004, the Form 1120 stated taxable income of \$17,011.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.⁵ The

³ IRS Form 1120-A, Line 24.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁵ 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

petitioner's year-end current liabilities are shown on Part III of the 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.

Examining the Form 1120-A U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:⁶

- In 2001, petitioner's Form 1120-A return did not provide Part III data.
- In 2002, petitioner's Form 1120-A return stated current assets of \$5,326.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$5,326.00 in net current assets. Since the proffered wage is \$24,180 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120-A return stated current assets of \$7,897.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$7,897.00 in net current assets. Since the proffered wage is \$24,180 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

According to counsel, the total assets that the petitioner evidences on its tax returns demonstrates its ability to pay the proffered wage. We reject the assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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. And, as shown above, the net current assets stated were insufficient to pay the proffered wage.

Counsel also contends that the fact that the petitioner has suffered continued taxable income losses in no way detracts from its ability to pay the proffered wage. As already stated above, CIS will 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). Therefore, since the petitioner has suffered three years of taxable income losses, before it

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

⁶ The petitioner also submitted a Form 1120 for 2004 but without a Schedule L.

⁷ 8 C.F.R. § 204.5(g)(2).

returned to profitability in 2004, it has demonstrated its inability to pay the proffered wage from taxable income from the priority date.

According to counsel, the beneficiary would replace the owner of the petitioner in his role as cook. Since the beneficiary was also similarly employed there, the petitioner did not replace himself with the beneficiary. Since the owner's hours worked, or duties information was not provided, it is not possible to make the determination how the beneficiary could replace the owner of petitioner. There is no information stated what hours he actually worked as cook involving the same duties as those set forth in the Form ETA 750. The uncorroborated opinion of the petitioner's accountant on this issue is unsupported by the poor financial results evident in years 2001, 2002 and 2003. Both the beneficiary and owner worked as cooks in the business but the results were poor, and, there is very little evidence in the record of proceeding of how much money the owner received overall.

It is also not credible that the owner would be willing to relinquish any income from the business to pay the proffered wage since there is no information concerning other sources of income that he relies upon for his upkeep in the record of proceeding. While counsel contends that for corporate petitioners this is a non-issue, we point out that for years 2001, 2002, 2003 and 2004, the owner as officer derived no compensation as officer or employee except in the first quarter of 2005.

If the owner performed other kinds of work, then the beneficiary could not have replaced him or her in those duties, such as the daily overseeing of the restaurant. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an Italian cook will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel's reliance on the balances in the petitioner's bank account is misplaced if counsel intended to submit those for the money balances stated on the returns as proof of the ability to pay. 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 Part III that will be considered below in determining the petitioner's net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.