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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 11 2006  
SRC 03 144 51853

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.

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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 while the petitioner had established its ability to pay the proffered wage in tax year 2002 and 2003, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition. The director denied the petition accordingly.

On appeal, new counsel states that the petitioner did have the ability to pay the proffered wage in the 2001 priority year and onward. Counsel states that she needs 60 days to submit a brief and/or evidence to the AAO, however the record contains no further documentation. The AAO will review the petition based on the record as presently constituted.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.80 per hour, which amounts to \$22,464 annually for a 40-hour workweek.<sup>1</sup> The petitioner indicated the beneficiary would work a 45-hour a week work schedule, which amounts to \$27,242 annually. On Form ETA 750, the beneficiary did not indicate that he worked for the petitioner as of April 26, 2001, the date he signed the ETA 750, Part B.

On the petition, the petitioner stated it was established in 2001, has three employees, a gross annual income of \$111,449, and a net annual income of \$40,010. It appears the petitioner submitted its menu, along with two letters of work verification for the beneficiary with the instant petition.

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<sup>1</sup> The AAO calculates this yearly figure by multiplying the hourly wage of \$10.80 by 2080 work hours.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 10, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested the petitioner's last two federal tax returns that were available, the petitioner's W-2 forms for all employees, as well as the petitioner's W-3 Form and Forms 941, Employer's Quarterly Tax Report. In addition, the director stated that the petitioner could submit its annual report or an audited financial report.

In response, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for tax years 2002 and 2003. These documents indicated the petitioner had taxable income before net operating loss deduction and special deductions of \$40,010 in tax year 2002 and \$34,226 in tax year 2003. They also indicated the petitioner was incorporated on February 21, 2001. Counsel stated that the petitioner's net income in both years was sufficient to pay the proffered wage.

On December 7, 2004, the director issued a Notice of Intent to Deny (NOID) the instant petition. In her notice, the director stated that the petitioner in its I-140 petition indicated he had three employees as of the date of signing the petition, namely April 14, 2003. The director then noted that while the petitioner provided its Forms 1120 for tax year 2002 and 2003 these documents showed no evidence of any wages paid to the petitioner's claimed other employees. The director identified the following ways of identifying wages paid to other employees, officers, or contractors on the petitioner's tax returns: compensation of officers (line 12 of Form 1120), salaries or wages paid (line 13 of return), contract labor in the Other Deductions item (line 26 of return), or cost of labor on Schedule A, "Cost of Goods Sold." The director also stated that the Forms 1120 also indicated a sole shareholder/owner.<sup>2</sup> The director requested that the petitioner submit evidence to establish that the petitioner is able to pay the proffered wage along with the wages of other employees. The director suggested that the petitioner submit evidence of wages paid to the other employees, namely, W-2 forms, W-3 forms or Forms 941 for all employees during 2002 and 2003.

In response, the petitioner submitted copies of its Forms 941, Employer's Quarterly Federal Tax Return for all four quarters of tax years 2002 and 2003.<sup>3</sup> These documents indicated the petitioner had three employees in tax year 2002 and two employees in tax year 2003. The petitioner also submitted W-2 Forms for three employees for tax year 2002, including the beneficiary. The beneficiary's W-2 Form indicates that he earned \$12,500 in tax year 2002, while the petitioner's W-2 Form indicates it paid a total of \$18,500 in wages, tips and other compensation in tax year 2002.<sup>4</sup>

The petitioner also submitted Forms W-2 for three employees in tax year 2003, including the beneficiary. The beneficiary's W-2 Form indicates that he earned \$12,000 in tax year 2003. The accompanying W-3 form,

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<sup>2</sup> Only the petitioner's Form 1120 for tax year 2003 indicates a sole shareholder/owner.

<sup>3</sup> All final digits for the year identified on the petitioner's tax year 2002 Forms 941 appear to be altered. These alterations do not appear on the petitioner's 2003 Forms 941, nor does the petitioner provide any explanation for the alterations for the record.

<sup>4</sup> It should be noted that none of the petitioner's W-3 forms or Forms 941 are dated. Thus it is not possible to ascertain if the petitioner possessed these documents prior to the issuance of the NOID or created them in response to the NOID.

Transmittal of wage and Tax Statement, indicates that the petitioner paid \$24,000 in wages, tips and other compensation in tax year 2003.

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 2001 priority date, and, on March 28, 2005, denied the petition. The director examined the petitioner's 2002 income tax return and noted the petitioner's net income of \$40,010. The director noted that although the petitioner did not claim any salaries and wages on its tax return it did submit two W-2 forms and a Form W-3 for tax year 2002 that indicated the petitioner paid \$18,500 in wages that year. The director then subtracted the total wages paid in 2002 from the petitioner's net income for tax year 2002 and stated that the petitioner's actual net income was actually \$25,510. The director also appeared to examine the petitioner's net current assets when she examined the petitioner's assets and stated that these assets included the liquidation of sale price locked up in building or land and the petitioner's write off of amortization. Based on this review, the director stated the petitioner's assets were \$23,337, while the petitioner's liabilities excluding future liabilities paid out in over more than one year, were \$8,423. The director stated the difference between the petitioner's assets and liabilities was \$14,914.<sup>5</sup>

The director then examined the petitioner's tax return for tax year 2003 and noted that the petitioner had a net income of \$34,226. The director noted again that the petitioner had not claimed any salaries and wages in its tax return but had submitted three W-2 forms and a Form W-3 for tax year 2003 with total salaries of \$24,000. The director stated that the beneficiary's W-2 form indicated he received \$12,000 in tax year 2003. The director again examined the petitioner's assets and liabilities and stated that subtracting the petitioner's liabilities from its assets, the petitioner had a balance of \$47,505.

The director examined the beneficiary's W-2 forms for 2002 and 2003, and stated that the beneficiary's wages in 2002 equaled approximately 50 per cent of the proffered wage stipulated in the Form ETA 750, while the beneficiary's W-2 form equaled less than 50 per cent of the proffered wage. The director stated that the petitioner must still show the ability to generate the more than remaining 50 per cent of the proffered wage in tax year 2003.

Finally the director stated that the priority date established on the Form ETA 750 is April 30, 2001, and that the petitioner had not established its ability to pay the proffered wage based on its net income or its net current assets for the 2001 priority year. Thus, the director determined that the petitioner had failed to establish its ability to pay the proffered wages as of the 2001 priority date year and onward.

On appeal, counsel asserts that while the director stated that the petitioner had not established its ability to pay the proffered wage in 2001, based on the director's analysis of the petitioner's net income and net current assets in 2002 and 2003, the petitioner has established its ability to pay the proffered wage in tax years 2002 and 2003. Counsel also notes that the director never requested the petitioner's 2001 tax return, but in its request for further evidence and in her NOID, only asked for the petitioner's 2002 and 2003 financial documentation. Counsel states that the petitioner complied in its responses to both the director's request for further evidence and to the NOID.

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<sup>5</sup> The director appears to be examining the petitioner's net current assets, although she includes some items in the petitioner's assets and liabilities that the AAO does not consider the petitioner's current assets or liabilities. The AAO will examine the petitioner's net current assets more fully further in these proceedings.

Counsel submits two Forms 1120X, Amended U.S. Corporation Income Tax Return, for tax year 2002 and 2003. Although the Form 1120X for 2002 does not indicate any reason for the amended return, the Form 1120X for tax year 2003 states the amendment is requested because "catering income, salary and wages, and payroll taxes were not reported in the original return." Counsel provides no evidence that the forms were filed with IRS.<sup>6</sup> Counsel then requests an additional 60 days to gather the necessary evidence to establish that in the 2001 priority date year, the petitioner had the ability to pay the proffered wage.

In her decision, the director examined the petitioner's net income and also its assets and liabilities. As stated previously, the director examined items on the petitioner's Schedules L that the AAO does not consider when establishing the petitioner's net current assets. The AAO will further examine this issue further in these proceedings. With regard to counsel's assertion on appeal that the director found that the petitioner had the ability to pay the proffered wage in tax years 2002 and 2003, the AAO does not find the director's comments conclusive as to whether the petitioner established its ability to pay the proffered wage in tax years 2002 and 2003. This issue will also be examined further in these proceedings.

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. Although the beneficiary indicated on ETA Form 750 that he had not worked fulltime for the petitioner as of the April 2001 signing of the Form ETA 750, the petitioner submitted two W-2 Forms for the beneficiary for the years 2002 and 2003.<sup>7</sup> These documents established that the beneficiary was paid \$12,500 in 2002 and \$12,000 in 2003. Since the proffered wage for the chef position is \$25,272, the petitioner has not established that it paid the beneficiary the full proffered wage in 2001, 2002, or 2003. Since the petitioner submitted no evidence of wages paid to the beneficiary in tax year 2001, it has to establish its ability to pay the entire proffered wage of \$25,272 in tax year 2001 and the difference between the proffered wage and the beneficiary's actual wages in tax years 2002 and 2003, namely, \$14,742 in 2002 and \$15,242 in 2003.

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). Reliance on the petitioner's

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<sup>6</sup> It is also noted that the requested amendment for 2003 changed the petitioner's taxable income, or net income only slightly, going from the originally reported \$34,226 to \$34,252. If the petitioner established that the IRS accepted the amended return, this figure would not alter the outcome of the AAO calculations of either the petitioner's net income or net current assets, as will be discussed further in these proceedings.

<sup>7</sup> It is noted that the director's ambiguous language in her request for further evidence did not request the petitioner submit evidence of wages, or its financial information, for the priority year 2001, but rather requested the "last two federal income returns available." Although the petitioner has the burden of establishing its ability to pay the proffered wage as of the priority date, pursuant to 8 C.F.R. §204.5(g)(2), the director's imprecise language did not clarify the missing relevant information.

gross receipts and wage expense is misplaced. 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 the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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 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.

(Emphasis in original.) *Chi-Feng* at 537.

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. As stated previously, the petitioner did not submit its 2001 federal income tax return with its initial petition nor did the director request that the petitioner submit its 2001 tax return. While the petitioner's ability to pay the proffered wage cannot be established without an examination of the petitioner's 2001 tax return, for further clarification of the petitioner's ability to pay the proffered wage during 2002 and 2003, the AAO will examine the petitioner's federal income tax returns for 2002 and 2003. In tax years 2002 and 2003, as correctly stated by counsel and the director, the petitioner had net income of \$40,010 in 2002 and \$34,226 in 2003. Both of these figures are sufficient to pay the difference between the beneficiary's wages in 2002 and 2003 and the actual proffered wage, namely, \$14,742 in 2002 and \$15,242 in 2003.

However, the director raised an interesting issue in her decision in noting that the petitioner had not accounted for its other employees' wages at any place in its federal income tax returns.<sup>8</sup> With no further explanation or clarification by the petitioner, it is reasonable to examine whether the petitioner has sufficient net income to both pay the difference between the beneficiary's actual wages and the proffered wages, and the other wages documented by the petitioner's W-2 and W-3 forms submitted in response to the director's NOID. When the remaining reported wages for 2002 and 2003, namely \$6,000 in 2002 and \$12,000 in 2003, are subtracted from the petitioner's net incomes for 2002 and 2003, namely \$40,010 and \$34,226, the following net incomes remain: \$34,010 in 2002 and \$22,226 in 2003. Thus, both net incomes, minus the salaries and wages paid indicated by the petitioner's W-2 forms for tax years 2002 and 2003, are sufficient to pay the difference between the beneficiary's

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<sup>8</sup> It is noted that the 2003 Form 1120X provides some explanation of the absence of such items as wages and salary and payroll taxes in the original 2003 federal income tax return. But neither the petitioner nor counsel provide any explanation as the absence of such items in the 2002 federal income tax return. As previously stated, there is no evidence that either the 2002 or 2003 Form 1120X was filed with the IRS.

actual wages and the proffered wage in both years. Thus, the petitioner has established that it had the ability to pay the proffered wage in both 2002 and 2003. However, as correctly noted by the director, the petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As stated previously, the priority date for the instant petition is April 30, 2001. Without an examination of the petitioner's 2001 federal income tax return, the petitioner cannot establish its ability to pay the proffered wage based on its net income in tax year 2001. Thus, the director's decision shall stand and the petition shall be denied.

Although the petitioner has established its ability to pay the difference between the beneficiary's stated wages and the proffered wage in 2002 and 2003 based on its net income, for illustrative purposes and to further clarify the director's comments with regard to the petitioner's assets and liabilities in 2002 and 2003, the AAO will examine the petitioner's net current assets for the same two tax years.

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>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6.<sup>10</sup> 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 tax years 2002 and 2003:

	2002	2003
Taxable income <sup>11</sup>	\$ 40,010	\$ 34,226
Current Assets	\$ 23,337	\$ 58,514
Current Liabilities	\$ 8,423	\$ 11,009

<sup>9</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>10</sup> Contrary to the director's comments, the petitioner's liquidation of sale price locked up in building or land and its write off of amortization are not included in the petitioner's assets, as outlined in Schedule L, lines one through six.

<sup>11</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                      \$ 13,914                      \$ 47,505

The petitioner demonstrated that it paid wages to the beneficiary during 2002 of \$12,500. In 2002, as previously illustrated, the petitioner shows a taxable income of \$40,010 and net current assets of \$13,914. As stated previously, the petitioner has sufficient net income in 2002 to pay the difference between the beneficiary's actual wages and the proffered wage in 2002, namely \$14,742. If the petitioner had to establish its ability to pay the difference based on its net current assets in tax year 2002, the petitioner's net current assets in 2002 is not sufficient to pay the difference between the beneficiary's actual wages and the proffered wage.

In 2003, the petitioner demonstrated that it paid wages to the beneficiary of \$12,000 in 2003. In 2003, the petitioner shows a taxable income of \$34,226 and net current assets of \$47,505. As previously stated, the petitioner's net income, minus the salaries documented in the petitioner's W-2 forms is sufficient to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$15,242. The petitioner's net current assets in 2003 are also sufficient to pay the difference between the beneficiary's actual wages and the proffered wage. Thus, the petitioner established that it had the ability to pay the difference between the beneficiary's actual wages and the proffered wage based on its net income in 2002 and 2003, and based on its net current assets in 2003.

However, as previously stated, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Although counsel on appeal states that she needs 60 additional days to submit the petitioner's 2001 financial records and tax documents from 2001, no such documentation has been submitted to the record. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present. Thus, the director's decision shall stand, and the petition shall be denied.

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.