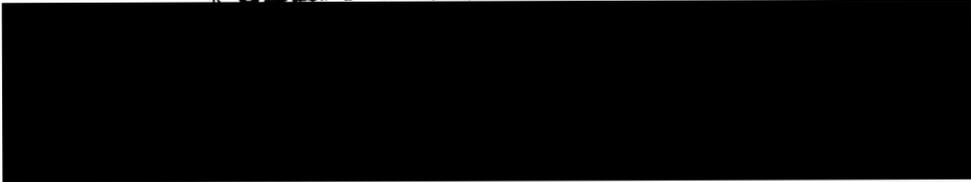




U.S. Citizenship
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Services

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Office: VERMONT SERVICE CENTER

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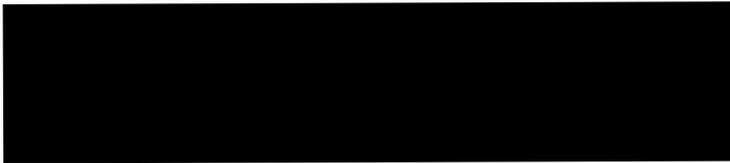
Petitioner:

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 3, 2005 denial, the single 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)(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 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, 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. *See* 8 C.F.R. § 204.5(d). 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 appeal¹. Relevant evidence in the record includes the petitioner's Form 1065 federal income tax returns for 2000 through 2003, the petitioner's payroll records for 2001 through 2003, the beneficiary's W-2 forms for 2001 through 2003 and a statement from the petitioner's owner and an appraisal report on real estate owned by the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$2 million, and to currently employ twenty workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since August 1999.

On appeal, counsel asserts that the petitioner paid over \$36,000 in overtime payments to employees, which could have been used to pay the beneficiary the proffered wage.

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, Citizenship and Immigration Services (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 during a given period, 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. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2003. These W-2 forms show that the petitioner paid the beneficiary \$11,254.41 in 2001, which is \$9,545.59 less than the proffered wage that year; that the petitioner paid the beneficiary \$8,726.39 in 2002, which is \$12,073.61 less than the proffered wage that year; and that the petitioner paid the beneficiary \$19,684.40 in 2003, which is \$1,115.60 less than the proffered wage that year. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage for these relevant years. The petitioner is obligated to demonstrate that it could pay the differences of \$9,545.59 in 2001, \$12,073.61 in 2002 and \$1,115.60 in 2003 between the wages it actually paid to the beneficiary and the proffered wage in each relevant year.

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 contrary to the petitioner's

¹ 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 of Soriano*, 19 I&N Dec. 764 (BIA 1988).

assertions. 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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 tax returns² demonstrate the following financial information concerning the petitioner's ability to pay the differences of \$9,545.59 in 2001, \$12,073.61 in 2002 and \$1,115.60 in 2003:

- In 2001, the Form 1065 stated net income³ of \$(85,561).
- In 2002, the Form 1065 stated net income of \$(122,452).
- In 2003, the Form 1065 stated net income of \$(151,548).

² The record contains a copy of the petitioner's tax return for 2000. However, the petitioner's 2000 tax return is not necessarily dispositive in the instant case since the priority date is April 27, 2001. Therefore, the AAO will review the petitioner's tax returns for 2001 through 2003 only in determining the petitioner's ability to pay the proffered wage.

³ Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the difference between the wages it actually paid to the beneficiary and the 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. We reject, however, the idea 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. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17 of the Form 1065. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$(286,355).
- The petitioner's net current assets during 2002 were \$(344,772).
- The petitioner's net current assets during 2003 were \$(398,385).

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the difference between the wages it actually paid to the beneficiary and the proffered wage.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income; or net current assets in 2001 through 2003.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner claimed that it owns the real estate located at 188 Broadway, Providence, RI valued at \$214,000 with \$100,000 in equity which could be used to pay wages and submitted an appraisal report to support its assertion. The petitioner's reliance on real estate in determining its ability to pay the proffered wage is misplaced. Businesses do not typically rely upon, liquidate, or encumber real property to pay wages. In any event, the mortgage on the real property is already accounted for under the net current assets analysis since mortgages and lines of credit pursuant there to are reported on either line 16 or 19 of the liabilities schedule on Schedule L.

⁴According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel also submitted the petitioner's payroll records showing that the petitioner paid overtime pay of \$52,559 in 2001, \$38,403.09 in 2002 and \$36,970.72 in 2003 and asserted that the overtime payment to another baker could be used to pay the beneficiary the proffered wage. However, the payroll records do not indicate how much of the total overtime pay went to the beneficiary and how much were paid to the baker whose overtime time pay would be used to pay the beneficiary's proffered wage. The record does not provide evidence that the petitioner has replaced or will replace another baker with the beneficiary. Counsel does not explain how the beneficiary will replace another baker while he has been working as a full time baker for the petitioner. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's argument concerning 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1996 and employs approximately twenty employees. Their gross income has always been above \$1 million since 2001 and they pay salaries and wages each year of over \$700,000. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability to pay the difference of \$9,545.59 in 2001, \$12,073.61 in 2002 and \$1,115.60 in 2003 between the wages it actually paid to the beneficiary and the proffered wage in each relevant year, and further has proven its ability to pay the proffered wage.

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. The decision of the director is withdrawn. The petition is approved.