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U.S. Citizenship  
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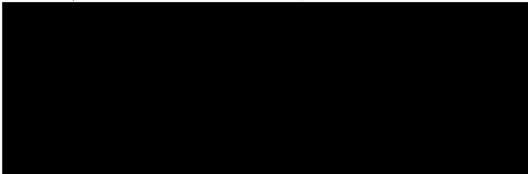
Office: VERMONT SERVICE CENTER

Date: FEB 03 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.

Robert P. Wiemann, Director  
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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 statement 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour, which amounts to \$36,400 annually. On Form ETA 750, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner indicated it was established in 1998, had twelve employees, and had a gross annual income of \$868,014. The petitioner did not submit any further documentation to demonstrate its ability to pay the proffered wage or to demonstrate the beneficiary's qualifications for the position.

On April 27, 2004, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage, and to the beneficiary's qualifications. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide evidence that the petitioner had the ability to pay the weekly salary of \$700 a week as of April 24, 2001, the priority date and continuing to the present date. The director specifically requested the petitioner's federal income tax returns for the years 2001, 2002, and, if available, 2003, with all schedules and attachments. The director also stated that if the petitioner had employed the beneficiary, to submit copies of the beneficiary's Form W-2 Wage and Tax Statements. The director also stated that the petitioner could also submit a

statement from the petitioner's financial officer, if the petitioner employed 100 or more workers, or annual reports for the years 2001 to 2003, accompanied by audited or reviewed financial statements. Finally the director stated that additional evidence such as accredited profit/loss statements, bank account records, or personnel records might be considered but only as supplementary evidence to establish the petitioner's ability to pay the proffered wage.

With regard to the beneficiary's qualifications for the position, the director noted that no evidence of the beneficiary's work experience was included in the record. The director requested that the petitioner submit evidence to establish that the beneficiary possessed the requisite two years of previous work experience as a baker prior to April 24, 2001, the priority date. The director stated that such evidence should be in the form of letters from a current or former employer or trainer and should include the name, address, and title of the writer, in addition to a specific description of the duties performed by the alien or of the training received. The director further stated that if such evidence was unavailable, other documentation relating to the beneficiary's experience would be considered.

In response, the petitioner submitted its Form 1120 corporate tax returns for the years 2001, 2002, and 2003. These documents indicated the petitioner had taxable income before net operating loss deduction and special deductions of \$18,487 in 2001, \$1,374 in 2002, and \$37,884 in 2003. The petitioner also submitted a Form W-2 for the beneficiary for tax year 2003, which indicated the beneficiary earned \$25,990 in 2003. Finally, the petitioner submitted a letter dated April 1, 2001, from [REDACTED] San Paulo, Brazil. The writer of the letter stated that the beneficiary had worked for the business as a baker, and recommended the beneficiary for further work based on his experience.

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 July 28, 2004, denied the petition. The director stated that while the petitioner's 2003 federal income tax return and the beneficiary's Form W-2 for 2003 together provided evidence that the petitioner had the ability to pay the proffered wage in 2003, the petitioner had not established that it had the ability to pay the proffered wage as of the 2001 priority date. With regard to the petitioner's 2001 tax return, the director stated the document showed a net income of \$18,487 and current liabilities of \$3,097 over current assets. With regard to the petitioner's 2002 tax return, the director stated that this document showed a net income of \$1,374 and current liabilities of \$4,534 over current assets. Thus, the director determined that the petitioner did not have the ability to pay the proffered wage as of the April 2001 priority date. The director further noted that the experience letter submitted by the petitioner did not state when the beneficiary worked for the Brazilian company. The director finally determined that the experience letter also did not establish the petitioner's ability to pay the proffered wage.<sup>1</sup>

On appeal, counsel submits amended tax returns for tax year 2001 and 2002. Counsel states that these returns establish the petitioner's ability to pay the proffered wage as of April 24, 2001, the priority date. Counsel also

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<sup>1</sup> It is noted that the letter of experience would not establish the petitioner's ability to pay the proffered wage, but rather whether the beneficiary had the requisite two years of previous work experience as a baker stipulated on Form ETA 750.

submits a second letter from the [REDACTED] ME business that states the beneficiary worked for the business from May of 1994 to March of 1998. This letter is also dated April 1, 2001.

With regard to the amended tax returns submitted by counsel, the amended tax return for 2001 indicates an increase in the petitioner's total gross income of \$200,000 and further states that the income previously reported was wrong as not all documentation was available prior to filing the original 2001 tax return. The petitioner's amended taxable income is \$95,631. The amended tax return for 2002 indicates an increase of \$273,397 in total gross income, and states that not all of the petitioner's 1099 income and expenses were listed on the original tax return. This document also indicates the petitioner's amended taxable income for 2002 is \$104,567.

It is noted that the amended tax return for 2001 is dated September 7, 2002, and the amended tax return for 2002 is dated February 6, 2003. Thus, both documents existed at the time the petitioner originally filed the instant petition on December 10, 2003. Neither the petitioner nor counsel provides any explanation for why these amended tax returns were not submitted with the original petition or in response to the director's request for further evidence. Furthermore, there is no evidence that the amended tax returns were filed with the Internal Revenue Service.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept, without further explanation, evidence that existed at the time of filing, but is offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the amended tax returns to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

With regard to the second letter of work experience submitted by the company identified as [REDACTED] ME, on Form ETA 750, the beneficiary indicated that he worked for Panificadora e Confeitaria, Sao Rafael, from May 1994 to March 1998 at the same address identified in both letters of work verification. The record is somewhat confused as whether the letters of work employment are from the same business identified on the Form ETA 750. It is also noted that the second letter is also dated April 1, 2001, which does not appear to be correct, as the director only requested additional information from the beneficiary's previous employer on April 24, 2004. Similar to the amended tax returns, if this letter existed at the time of the director's request for further evidence, the AAO will not considered its sufficiency.

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 for the petitioner as of the date he signed the Form ETA 750, the petitioner submitted a Form W-2 that establishes the beneficiary worked for the petitioner during tax year 2003. Based on this evidence, in 2003, the beneficiary

earned \$25,990, or \$6,410 less than the proffered wage of \$32,400. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 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.<sup>2</sup>

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. As previously stated, the amended tax returns submitted by the petitioner on appeal will not be considered in these proceedings. With regard to the original tax returns submitted, the petitioner's taxable income before net operating loss deduction and special deductions was \$18,487, in 2002, \$1,374, and in 2003, \$37,884. Thus, the petitioner had sufficient taxable income to pay the proffered wage, namely \$36,400, in 2003. Nevertheless, as correctly noted by the director, the petitioner had insufficient taxable income in 2001 and 2002 to pay the proffered wage.

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. 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>3</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 tax years 2001 and 2002:

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<sup>2</sup> 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.

<sup>3</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.

	2001	2002
Taxable income <sup>4</sup>	\$ 18,487	\$ 1,374
Current Assets	\$ 43,911	\$ 32,915
Current Liabilities	\$ 47,008	\$ 37,369
Net current assets	\$ -3,097	\$ -4,454

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$18,487 and negative net current assets of \$3,097, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, as previously illustrated, the petitioner shows a taxable income of \$1,374 and negative net current assets of \$4,454, and has not, therefore, demonstrated the ability to pay the proffered wage.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001, and in 2002. As previously stated, the petitioner had the ability to pay the proffered wage during 2003. However, 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). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, 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.

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<sup>4</sup> As stated previously, 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.