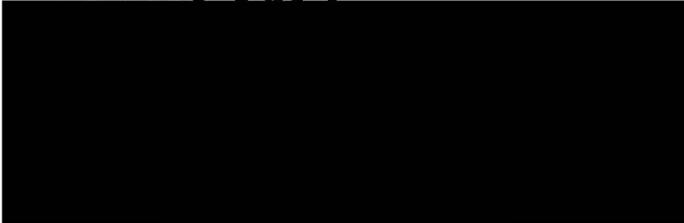




U.S. Citizenship
and Immigration
Services

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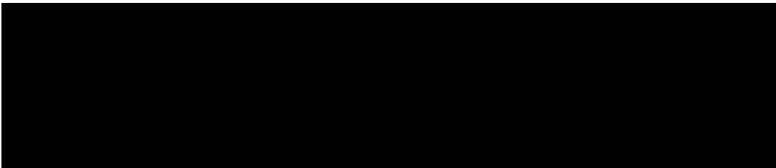
Petitioner:

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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 September 8, 2004 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 DOL. *See* 8 CFR § 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 DOL 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$24,627.20 per year. The Form ETA 750 states that the position requires two years of training as a Chinese chef or two years of experience in the job offered.

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.¹ Counsel submits a brief and previously submitted evidence on appeal. Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2001, 2002 and 2003, and the beneficiary's Form W-2 for 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in July 1997, to have a gross annual income of \$206,851.00, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.² On the Form ETA 750B, signed by the beneficiary on April 6, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director misread the petitioner's 2001 tax return, which resulted in incorrect conclusions regarding the petitioner's ability to pay the proffered wage. Specifically, counsel claims that the director miscalculated the petitioner's net current assets for 2001, that the director incorrectly read the balance sheet entries on the petitioner's 2001 tax return, that these errors caused the director to erroneously discredit the petitioner's 2002 and 2003 tax returns, and that the petitioner had the ability to pay the proffered wage in 2001, 2002 and 2003.

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 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. In the instant case, the beneficiary's Form W-2 for 2003 shows compensation received from the petitioner in the amount of \$8,800.00 in 2003. Since the proffered wage is \$24,627.20 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$15,827.00 in 2003. The petitioner has not established that it employed and paid the beneficiary any compensation in 2001 and 2002 and, therefore, the petitioner must show that it can pay the full proffered wage in 2001 and 2002.

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 counsel's 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,

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).

² The petitioner's tax returns list its date of incorporation as April 25, 2001.

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). The court in *Chi-Feng Chang* 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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 28, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). Therefore, the petitioner's 2003 income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income in 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$10,906.00.³
- In 2002, the Form 1120 stated net income of \$37,475.00.
- In 2003, the Form 1120 stated net income of \$33,175.00.

Therefore, in 2001, the petitioner did not have sufficient net income to pay the prorated proffered wage of \$15,392.00. The petitioner had sufficient net income to pay the proffered wage in 2002, and the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2003.⁴

³ Since the petitioner incorporated on April 25, 2001, the petitioner's 2001 federal income tax return represents income earned from April 25, 2001 to December 31, 2001. This period is nearly identical to the priority date of April 13, 2001. CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date. Since the two periods are almost the same and cover approximately 7 ½ months, we will prorate the proffered wage. The prorated proffered wage for a period of 7 ½ months is \$15,392.00.

⁴ CIS electronic records indicate that in 2003, the year in which the instant petition was filed, the petitioner also filed one other I-140 petition, which was approved in 2005. The priority date for the other petition was April 2, 2001. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. This office rejects counsel's idea 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. 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.⁵ 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 16 through 18. 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 2001 IRS Form 1120 stated year-end net current assets of \$12,406.00. Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the prorated proffered wage of \$15,392.00.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage as of the priority date in 2001 through an examination of wages paid to the beneficiary, or its net income or net current assets.

The director noted in her decision that there were no entries on the balance sheet of the petitioner's IRS Form 1120 for 2001. The director erroneously stated that the information was missing, when in fact, the 2001 tax return was the petitioner's initial return and the petitioner had no income or liabilities to report at the beginning of the year.⁶ However, the director's erroneous conclusion regarding the petitioner's 2001 balance sheet did not result in the director's discrediting of the petitioner's 2002 and 2003 tax returns as counsel suggests. The director ruled that the petitioner did not establish that it had the ability to pay the beneficiary the proffered wage as of the priority date in 2001. Based on the petitioner's net income and net current assets in 2001, the director's ruling is correct.

information about the proffered wage for the beneficiary of that petition, about the current immigration status of that beneficiary, whether that beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to that beneficiary. Furthermore, no information is provided about the current employment status of that beneficiary, the date of any hiring and any current wages of that beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner.

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

⁶ The petitioner listed its date of incorporation on its IRS Form 1120 for 2001 as April 25, 2001. The petitioner indicated on page 1 of its IRS Form 1120 for 2001 that the tax return was its initial return.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

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.