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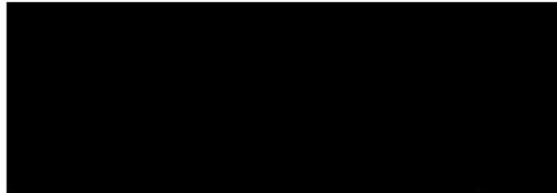
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 24 2006**
SRC 04 078 50949

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 Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. 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 brief 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 December 4, 2002. The proffered wage as stated on the Form ETA 750 is \$24,000 annually.

On the petition, the petitioner indicated it was established in February of 2001, has six employees, and a gross annual income of \$383,365. With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the years 2001 and 2002, along with a letter from the petitioner's certified public accountant as to how the petitioner's net income should be calculated. In his letter, [REDACTED] stated that the taxable income for the petitioner reflected the depreciation expense, amortization expenses, and net operating loss carryover from previous years that [REDACTED] described as non-cash deductions mandated by the IRS regulations. [REDACTED] stated that to calculate the petitioner's net income, the three items should be added back to the petitioner's taxable income. With regard to the petitioner's 2002 tax return, [REDACTED] further stated that the petitioner's actual net income was \$66,600.

In addition, the petitioner submitted a statement of revenues and expenses for the period January 1, 2003 to June 3, 2003. An accountant's compilation report accompanies this document. In an addendum to the I-140 petition, the petitioner identified its net annual income in 2001 as \$44,542; in 2002 as \$66,600, and for tax year 2003, the

petitioner indicated that based on the six-month financial statement, the petitioner's net income for 2003 would be more than \$24,293. The petitioner's federal income tax returns indicated that the petitioner had -\$46,720 in taxable income before net operating loss deduction and special deductions in 2001, and \$2,606 in taxable income before net operating loss deduction and special deductions in 2002.

On January 24, 2005, the director denied the petition. In her decision, the director examined the petitioner's taxable income and net current assets for 2001 and 2002. For tax year 2001, the director noted that the petitioner's taxable income was -\$46,720, and that the petitioner's net current assets were -\$394. With regard to the petitioner's 2002 tax return, the director noted that the petitioner's taxable income was \$2,606 and that the petitioner's net current assets were -\$1,085. The director then determined that the petitioner did not have the ability to pay the beneficiary the proffered wage as of the priority date and continuing.

On appeal, counsel notes that the director's decision was issued without submitting a Request for Further Evidence (RFE) to the petitioner, and that the petitioner was not provided the chance to supplement the original submitted evidence with current tax returns that were not available at the time of the filing the petition. Counsel also notes that the priority date for the instant petition is December 4, 2002, and that the petitioner needed to show ability to pay the proffered wage of \$24,000 as of December 2002, and continuing until the beneficiary obtains lawful permanent residence. Counsel states that when the I-140 petition was filed on January 22, 2004, the only available tax returns were for the years 2001 and 2002. Counsel states that even though the petitioner's tax return for tax year 2001 was not required since the priority date is December 4, 2002, the petitioner submitted it in good faith to aid Citizenship and Immigration Services (CIS) in its determination as to whether the petitioner had the ability to pay the proffered wage. Counsel then states that at the time of the denial of the petition, CIS only had information on the petitioner's financial resource for only one of the possible three applicable years. Counsel states that rather than rendering a decision on partial information based on only one of the three years, a more appropriate action would have been to issue an RFE or Notice of Intent to Deny (NOID) to request the tax returns for the years 2003 and 2004, if filed.

Counsel then asserts that as of the December 4, 2002 priority date, the petitioner only needed to establish its ability to pay for the one month of wages, namely, December 2002. Counsel maintains that the petitioner's ordinary income of \$2,606 more than covers the proffered wage during the month of December 2002. Counsel states that the petitioner was only established at the end of 2001, and that 2002 was the first full year of business operation. Counsel states that nevertheless the petitioner made sufficient ordinary income to cover the proffered wage for the month of December 2002. Counsel also states that the years 2003 and 2004 continue to show a steady and firm rise in the petitioner's income and that the petitioner was able to pay wages to all its employees in 2002. Counsel submits Form 941, Employer's Quarterly Federal Tax Return for the four quarters of 2002.

Counsel submits the petitioner's tax return for 2003 that indicates taxable income of \$26,343, and states that the petitioner's net income is sufficient to pay the proffered wage of \$24,000 in tax year 2003. With regard to tax year 2004, counsel submits the petitioner's tax return for tax year 2004 that indicates a taxable income of \$32,761. Counsel states that the petitioner has established it has the capability of paying the proffered wage in tax year 2004, based on its taxable income. Counsel asserts that the director did not consider the financial ability of the petitioner for all the years starting with the priority day and continuing, but rather denied the petition based on the petitioner's financial ability to pay the proffered wage during only one of the three applicable three years.

On appeal, counsel correctly states that the petitioner's 2001 tax return is not dispositive of the petitioner's ability to pay the proffered wage, as the priority date was established on December 4, 2002. Counsel further states that based on the petitioner's taxable income in 2002 of \$2,606, the petitioner can establish its ability to pay prorated proffered wage for the month of December 2002. Thus, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the December priority date.¹, while he does not prorate the petitioner's taxable income for tax year 2002. Counsel's reasoning is erroneous. Twelve months of income will not be considered towards an ability to pay a lesser period of the proffered wage any more than 24 months of income would be considered towards paying the annual proffered wage. While 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 (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Thus, it cannot be established that the petitioner had \$2,000 of taxable income available in December 2002 to pay the prorated proffered wage. Furthermore the petitioner has provided no evidence to the record, such as W-2 Forms or Forms 1099-MISC, to establish that it paid any wages to the beneficiary in 2002. Thus, the petitioner has to establish that it has the ability to pay the entire proffered wage of \$24,000 out of its 2002 net income or net current assets, not just the pro-rated salary for December 2002.

In its original petition, the petitioner submitted a compiled financial statement for the first six months of tax year 2003 and extrapolated from the six months figures what the petitioner's net income would be in tax year 2003. This evidence is not given any weight in these proceedings. First, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Second, the petitioner provides no rationale for why the claimed six months figures, if doubled, would establish the petitioner's net income for the entire year of 2003.

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. The beneficiary did not claim to have worked for the petitioner as of the priority date. Nor has the petitioner submitted any evidentiary documentation to establish that the beneficiary received wages from the beneficiary as of December 2002 and continuing. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 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

¹ It is noted that counsel did not choose to also pro-rate the petitioner's taxable income for the year to see how much of the petitioner's taxable income would have been available to pay the proffered wage in December 2002. This sum would have been \$2,606 divided by 12 months, or \$21.71.

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 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.

In the petitioner's accountant letter submitted to the record, the accountant states that the petitioner's depreciation expenses, amortization expenses, and net operating loss carryover should be added to the taxable income figure to arrive at the petitioner's net income. Based on the precedent decisions listed above, the AAO does not consider adding back depreciation expenses, and other non-cash deductions such as amortization expenses or net operating loss carryover when determining the petitioner's taxable income.

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. In tax year 2002 the petitioner had taxable income before net operating loss deduction and special deductions of \$2,606. As stated previously, the AAO will not pro-rate the proffered wage for one month, and there is no evidence on the record that the petitioner employed the beneficiary in tax year 2002 or her monthly salary. Therefore the petitioner has to establish its ability to pay the entire proffered wage in priority year 2002. Based on the petitioner's taxable income for 2002, the petitioner did not establish its ability to pay the proffered wage.

In tax year 2003, the petitioner had taxable income before net operating loss deductions and special deductions of \$26,343. This sum is sufficient to pay the proffered wage of \$24,000. Thus the petitioner established its ability to pay the proffered wage in 2003. With regard to tax year 2004, the petitioner's tax return indicates taxable income before net operating loss deduction and special deductions of \$32,761, and thus the petitioner has also established its ability to pay the proffered wage in tax year 2004. Nevertheless, 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). Although the petitioner has established its ability to pay the proffered wage in 2003 and 2004, it still has to establish its ability to pay the proffered wage as of the priority year 2002.

The petitioner's net or taxable 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.² 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 petitioner's tax return for 2002 reflects the following information:

	2002
Taxable income ³	\$ 2,606
Current Assets	\$ 4,667
Current Liabilities	\$ 5,752
Net current assets	\$ -1,085

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 \$2,606, and negative net current assets of \$1,085, and has not, therefore, demonstrated the ability to pay the proffered wage.

With regard to the petitioner's submission of Forms 941 for tax year 2002, this documentation does not establish the petitioner's ability to pay the proffered wage to the beneficiary. Since the Form ETA 750 does not indicate the beneficiary worked for the petitioner as of the 2002 priority date, the beneficiary is considered a new employee, rather than an employee whose wages are reflected in the aggregate salary amounts documented in the Forms 941. Furthermore, although the I-140 petition indicates that the proffered position is not a new position, the record is not clear as to whether any worker to be replaced by the beneficiary was employed at the same proposed salary.

² 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.

³ 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.

While the Forms 941 establish that the petitioner paid employees and reported their wages to the IRS, it does not establish that the petitioner would have been able to pay the beneficiary's prorated salary of \$2,000 for the month of December 2002.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the 2002 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.