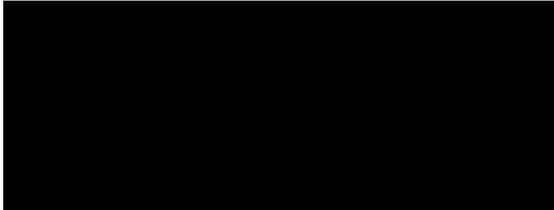


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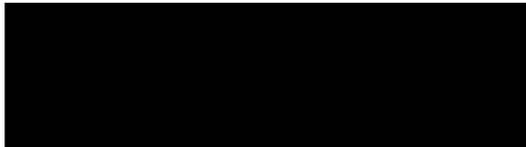
EAC-04-003-51010

Office: VERMONT SERVICE CENTER

Date: **JUL 25 2006**

IN RE:

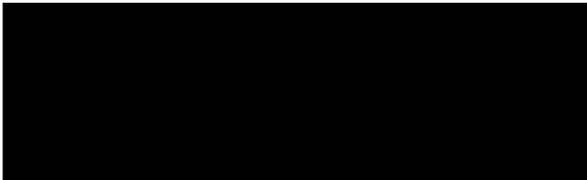
Petitioner:



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 Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of fresh and frozen Italian gourmet foods. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

On appeal, counsel submits a brief and additional evidence.<sup>1</sup>

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 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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17.61 per hour (\$36,628.80 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered.

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<sup>1</sup> 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner did not provide information on the date established, gross annual income, net annual income and current number of employees. According to the tax returns in the record, the petitioner's fiscal years lasts from July 1 to June 30. On the Form ETA 750B, signed by the beneficiary on March 7, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents pertinent to its ability to pay the proffered wage: Form 1120 tax returns for 1999 and 2000.

On June 17, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's tax returns for 2001, 2002 and 2003, and the beneficiary's W-2 forms for these years.

In response, counsel explained that the petitioner extended the deadline for filing its 2002 tax return and the 2003 tax return was not due yet, therefore, the petitioner's 2002 and 2003 tax returns were available at that time. Counsel submitted the petitioner's 2001 tax return, bank statements and payroll records, an accountant's letter, and the beneficiary's W-2 forms for 2001, 2002 and 2003.

The director denied the petition on December 6, 2004, finding that the evidence submitted with the petition and in response to the RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the wages paid to nine terminated employees in 2000 and 2001 provided the petitioner with the ability to pay the proffered wage to the beneficiary, and that the year-end balances of the petitioner's bank accounts in 2001, 2002 and 2003 were sufficient to cover the beneficiary's proffered wage.

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 petitioner submitted its payroll records and the beneficiary's W-2 forms. These documents indicate that the petitioner employed and paid the beneficiary \$4,268<sup>2</sup> in 2001, \$5,340 in 2002 and \$4,308 in 2003. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages, which is \$32,360.80 less than the proffered wage in 2001, \$31,288.80 less than the proffered wage in 2002 and \$32,320.80 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the differences between the wages actually paid to the beneficiary and the proffered wage.

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<sup>2</sup> According to the payroll records, the beneficiary received \$4,268 from the petitioner in 2001 while the beneficiary's W-2 form for 2001 in the record of proceeding shows \$322.88 only.

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). Counsel's reliance on the petitioner's gross receipts, depreciation/amortization deduction or 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 record of proceeding contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years (7/1-6/30) of 1999, 2000 and 2001. Since the priority date in the instant case is April 26, 2001, the tax return for the fiscal year 1999 covering July 1, 1999 to June 30, 2000 is not dispositive. The petitioner did not submit its 2002 and 2003 tax returns. The AAO will review and consider the petitioner's tax returns for its fiscal years of 2000 (covering from July 1, 2000 to June 30, 2001) and 2001 (covering from July 1, 2001 to June 30, 2002). The 2000 and 2001 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$32,360.80 and \$31,288.80 between wages actually paid to the beneficiary and the proffered wage in 2001 and 2002 (the corresponding calendar years of wage payments) respectively.

In 2000, the Form 1120 stated net income<sup>3</sup> of \$(185,873).

In 2001, the Form 1120 stated net income of \$(32,045).

Therefore, for the years 2000 and 2001, the petitioner did not have sufficient net income to pay the difference between the wage paid 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

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<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

will review the petitioner's assets. 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.<sup>4</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 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 the years in question, were \$(451,641) and \$(430,369) respectively. Therefore, the petitioner had insufficient net current assets to pay the beneficiary the difference between wages already 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 difference between the wage paid and 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.

Counsel asserts in his brief accompanying the appeal that there is another way to **determine the petitioner's** ability to pay the proffered wage from the priority date. Referring to a letter from [REDACTED] LLP, Certified Public Accountants, the petitioner's accountants, counsel states that the year-end balances of \$19,551.91 in 2001, \$10,924.36 in 2002 and \$1,673.60 in 2003 would be more than sufficient to pay the difference between wages paid to the beneficiary and the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also asserts that from 2000 to 2001, nine employees were terminated; from 2001 to 2002 another seven employees were terminated; and from 2002 to 2003, three employees were terminated. Counsel advises that the beneficiary will replace these workers and the petitioner's accountants also stated that the petitioner reduced its staff to provide the beneficiary a permanent job offer. Counsel named these workers and states their wages, however, the record does not contain any W-2 forms to document their wages paid, nor does the record verify their full-time employment, or provide evidence that the petitioner has replaced or will replace

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<sup>4</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.

them with the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, 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. Moreover, there is no evidence that the positions of these workers involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

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 any office within the employment system of the Department of Labor.

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.