

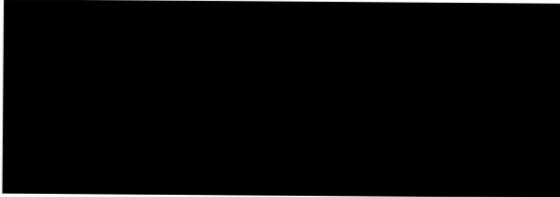


U.S. Citizenship  
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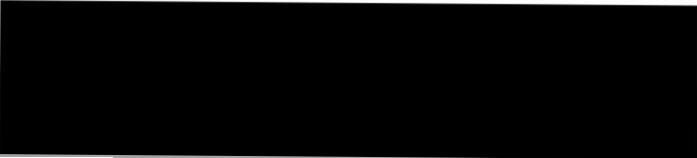
FILE: EAC-03-220-52207 Office: VERMONT SERVICE CENTER Date: MAR 24 2006

IN RE: Petitioner:  
Beneficiary:



PETITION: 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director  
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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$465.00 per week, which amounts to \$24,180.00 annually.<sup>1</sup> On the Form ETA 750B, signed by the beneficiary on June 20, 2003, the beneficiary did not claim to have worked for the petitioner.<sup>2</sup> The ETA 750 was certified by the Department of Labor on November 26, 2002.

The I-140 petition was submitted on July 24, 2003. On the petition, the petitioner claimed to have been established on January 1, 1991, to currently have 5 employees, to have a gross annual income of

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<sup>1</sup> The proffered wage, as calculated, is based on the assumption that the beneficiary is employed for 52 weeks. No evidence in the record contradicts this assumption. A letter submitted by counsel on July 20, 2004 also lists \$24,180.00 as the proffered wage. Thus, counsel in his appeal erred in using a proffered wage of \$22,500.00.

<sup>2</sup> On the certified Form ETA 750, the name of the beneficiary is [REDACTED]. The record contains a letter from counsel requesting for the substitution of the original beneficiary with the current beneficiary, [REDACTED]. Thus, the current beneficiary signed the form after the priority date and the date of certification.

\$1,370,064.00, and to have a net annual income of \$13,633.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 1, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 also specifically requested copies of any of the following types of evidence: the beneficiary's Form W-2 Wage and Tax Statements for 2001, 2002, and 2003; the petitioner's federal corporate income tax returns for 2001, 2002, and 2003; and audited or reviewed financial statements for 2001, 2002, and 2003.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on August 9, 2004.

In a decision dated September 16, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date, and denied the petition.

On appeal, counsel submits additional evidence.

Counsel states on appeal that the petitioner's bank statements for 2001 show a monthly balance in excess of the proffered wage and the petitioner's tax returns for 2000, 2001, and 2002 show positive net assets. Evidence submitted on appeal includes the petitioner's bank statements for 2001.<sup>3</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 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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

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<sup>3</sup> On the Form ETA 750 and the I-140 petition, the petitioner's name is [REDACTED]. On the evidence submitted along with the I-140 petition and on appeal, the petitioner's name is "[REDACTED]". The record includes bank to [REDACTED]. Thus, [REDACTED] is doing business under the name [REDACTED].

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on June 20, 2003, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000, 2001, and 2002. The record before the director closed on August 9, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. The petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2003 does not appear in the record even though it is one of the evidence specifically requested by the director in the RFE. Moreover, even though the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2000 appears in the record, it is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is April 24, 2001.<sup>4</sup>

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income as shown in the table below:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$11,243.00	\$24,180.00*	-\$12,937.00
2002	-\$21,661.00	\$24,180.00*	-\$45,841.00
2003	No Information	\$24,180.00*	No Information

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

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<sup>4</sup> The petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2000 shows an ordinary income of \$13,633.00 and net current assets of -\$58,397.00. Thus, even if CIS does consider the petitioner's ability to pay in 2000, based on the record, the petitioner had not established its ability to pay the proffered wage in 2000.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-\$43,189.00	\$24,180.00*
2002	\$109,847.00	\$24,180.00*
2003	No Information	\$24,180.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2003.

Counsel states that "the tax returns for 2000, 2001 [and] 2002 (provided in the July 20 response) shows positive net assets of \$47,275, \$34,747 and \$145,297 even after subtracting the proffered wage." The record contains a letter counsel submitted along with other evidence in response to the RFE. In the letter, counsel calculated the petitioner's net assets for 2000 by combining the taxable income, cash on hand, and retained earnings, and subtracting current liabilities and the proffered wage. He calculated the petitioner's net assets for 2001 by combining taxable income and retained earnings, and subtracting current liabilities and the proffered wage. He calculated the petitioner's net assets for 2002 by combining wages paid, cash on hand, and retained earnings. As shown above, CIS will look at the petitioner's net income or, alternatively, the petitioner's net current assets to determine whether the petitioner has the ability to pay the proffered wage. CIS will not look at net assets nor will CIS calculate net assets based on counsel's formula. In addition, counsel's method would result in duplicative counting of certain funds.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net

income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel likewise urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income

Counsel also states that the petitioner's bank statements for 2001 "show that the business had a monthly balance in excess of the yearly salary offered to the beneficiary. The record contains copies of bank statements for 2001. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel's assertion that the petitioner's bank statements for 2001 show a monthly balance in excess of the yearly salary offered is also inaccurate because for the month of June, September, and October, the monthly balances are less than the proffered wage of \$24,180.00. Additionally, the record does not contain the petitioner's bank statement for July 2001.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.