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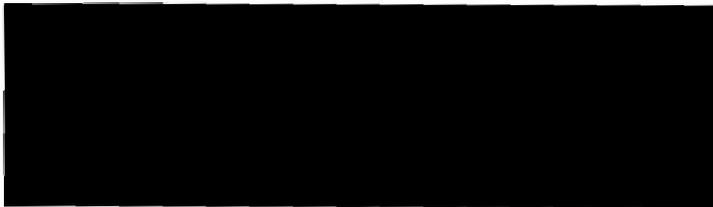
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Washington, DC 20529



U.S. Citizenship  
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FILE: [REDACTED]  
EAC 03 035 50175

Office: VERMONT SERVICE CENTER

Date: MAY 23 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 Acting Director, Vermont Service Center, denied the instant preference visa petition. The matter was reopened pursuant to the petitioner's motion and the petition was denied again. The matter is now before the Administrative Appeals Office 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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 granting 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$661.15 per week, which equals \$34,379.80 per year.

On the petition, the petitioner stated that it was established during November 2000 and that it employs six workers. The petition states that the petitioner's gross annual income is \$1,100,000 and that its net annual income is \$150,000.<sup>1</sup>

On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Little Neck, New York.

In support of the petition, counsel submitted a letter, dated March 15, 2002, from the petitioner's accountant.

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<sup>1</sup> The evidence subsequently submitted does not support that statement of the petitioner's net annual income.

The accountant's letter states that "[the petitioner] will have the ability to pay the proffered salary of \$34,379.20 based on the financial records," but offers no other explanation of how the accountant reached that conclusion.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 3, 2003, requested additional evidence pertinent to that ability.

Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested either copies of annual reports, federal tax returns, or audited financial statements for 2001 and, if it employed the beneficiary during 2001, Form W-2 Wage and Tax Statements showing the wages it paid him during that year.

In response, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel submitted no W-2 forms.

The 2001 tax return shows that the petitioner is a corporation, that it incorporated on July 14, 2000, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2001 the petitioner declared a loss of \$1,685. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The acting 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 March 17, 2004, denied the petition.

Counsel submitted a Form I-290B appeal in this matter on April 22, 2004. Because it was submitted after the 33-day period to file an appeal had lapsed, the acting director treated it as a motion to reopen.

With that motion counsel submitted (1) a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) copies of 14 of the petitioner's 2001 Form W-2 Wage and Tax Statements, and (3) a letter, dated April 5, 2004, from the petitioner's accountant.

The 2002 tax return shows that the petitioner declared ordinary income of \$1,187 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$83,973 and no current liabilities, which yields net current assets of \$83,973.

The W-2 forms submitted show that the petitioner employed 14 workers during 2001 but do not show that it employed the beneficiary.

The accountant's letter cites the petitioner's gross receipts and total wage expense as indices of the petitioner's ability to pay the proffered wage. The accountant also notes that the petitioner's 2001 wage expense was 8.75% of its gross receipts and that the proffered wage is equal to 42.5% of the petitioner's 2001

wage expense. The relationship between those percentages and the petitioner's continuing ability to pay the proffered wage beginning on the priority date was not stated in the accountant's letter and is unclear.

The accountant also stated that the petitioner is current on its federal and payroll tax obligations. Finally, the accountant noted that the petitioner had depreciation expense of \$21,755 during 2001.

On the motion counsel asserted that the accountant's letter "mathematically demonstrate[d] that wages, as a percentage of gross receipts evidences that the proffered salary could be met for 2001." This office notes that the accountant did not appear to draw the conclusion that the petitioner was able to pay the proffered wage during 2001.

Counsel observed that the total wages paid to the 14 employees shown on the W-2 forms submitted exceeds the proffered wage. Counsel stated that those 14 employees "were part-time, temporary workers whose jobs would be eliminated by the fulltime [sic] hiring of the beneficiary."

The acting director reopened the matter pursuant to that motion. The acting director noted that no precedent exists that would allow the petitioner to add its depreciation to its income in calculating the funds available to it to pay the proffered wage. The acting director also noted the beneficiary would be unlikely to replace all of the hours worked by all of the 14 employees for whom W-2 forms were submitted. The acting director observed that no evidence was submitted pertinent to the hours worked by those part-time workers or their job descriptions, but that they were likely not all cooks.

On appeal counsel submitted (1) a spreadsheet, (2) a letter, dated September 14, 2004 from the petitioner's accountant, and (3) a brief.

The spreadsheet submitted shows the number of hours worked by each of the 14 part-time employees for whom 2001 W-2 forms were submitted. That spreadsheet further indicates that all of the 14 employees for whom W-2 forms were submitted worked as cooks at the petitioning restaurant during 2001.

The accountant's letter states that the beneficiary, if hired, would replace "numerous part-time employees. The accountant further asserts that "the depreciation expense on the 2001 [Form] 1120S [U.S. Income Tax Return for an S Corporation] . . . does not represent an actual cash expense.

The argument that the petitioner's gross receipts and total wage expense during a given year shows its ability to pay the proffered wage is unconvincing. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup> or otherwise increased its net income,<sup>3</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it

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<sup>2</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage. The assertions of counsel and the accountant on that point are addressed below.

<sup>3</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute

actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>4</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

In the decision on the motion the acting director found that the petitioner's claim of employing 14 cooks during 2001 whom the petitioner could have replaced with the beneficiary was patently unlikely and contrary to the petitioner's assertion, made on the petition, that the beneficiary employs only six workers. On appeal counsel submits an unattributed spreadsheet stating that each of the 14 employees for whom W-2 forms were submitted worked as cooks.

Initially, this office notes that if any two of those alleged cooks worked at the same time then it is unlikely that the beneficiary could replace both of them.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any

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more to the petitioner's revenue than the amount of the proffered wage.

<sup>4</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner attempted to address the director's concerns with the accountant's letter and chart. Evidence that the petitioner creates after CIS points out deficiencies and inconsistencies will not be considered independent and objective evidence. Independent and objective evidence would necessarily be evidence that is produced contemporaneously with the event to be proved and that exists at the time of the (acting) director's notice.<sup>5</sup> The evidence submitted does not demonstrate, with sufficient reliability, that the petitioner employed a sequence of 14 cooks during 2001 whom it could have replaced with the beneficiary if it had been permitted to hire him.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

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<sup>5</sup> Contemporaneously-produced evidence would include, for instance, the posted schedule showing what days and hours particular cooks and other employees were expected to work or pay stubs documenting the dates that the 14 individuals worked.

typically<sup>6</sup> shown on lines 16(d) through 18(d). 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.

The proffered wage is \$34,379.80 per year. The priority date is April 18, 2001.

During 2001 the petitioner reported a loss. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net income. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$1,187. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$83,973. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The request for evidence in this matter was issued on September 3, 2003. On that date the petitioner's 2003 tax return was unavailable. The petitioner is excused from providing evidence pertinent to 2003 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon 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>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.