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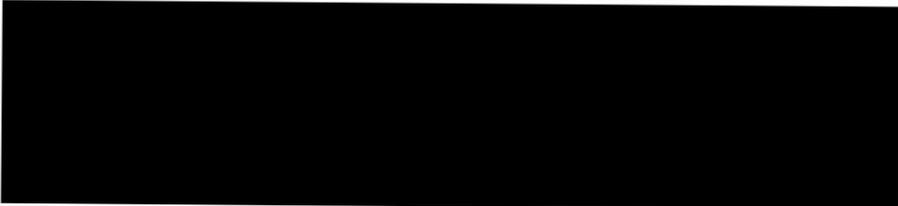
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
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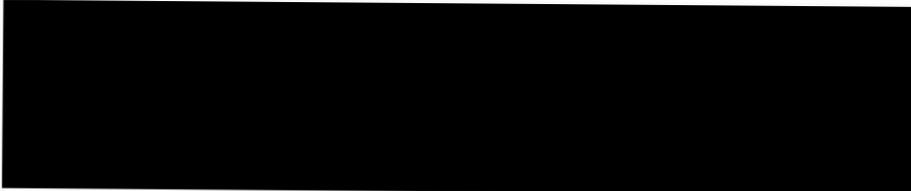
FILE: EAC 04 145 50738 Office: VERMONT SERVICE CENTER Date: NOV 06 2006

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

The petitioner is a meat and food market. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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. Therefore, the director denied the petition.

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 October 29, 2004 denial, the single issue in this case is whether 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 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, which is the date the Form ETA 750 is 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 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.14 per hour, 40 hours per week or \$50,211.20 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position and completion of high school.

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 on appeal.<sup>1</sup> Relevant evidence in the record includes: the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001, 2002 and 2003; and a copy of a portion of the petitioner's 2004 payroll record. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed that it was established in 1994. The petition does not state the number of workers currently employed by the petitioner. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the revised Form ETA 750B, which was signed by the substituted beneficiary on April 8, 2004, the beneficiary did not claim to have worked for the petitioner. It is noted that a Form I-140, Immigrant Petition for Alien Worker, filed for a substituted beneficiary retains the same priority date as the original Form ETA 750. See Memorandum from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

On appeal, the petitioner asserts that its tax returns demonstrate its ability to pay the proffered wage. The petitioner also indicates that the beneficiary will replace one of its employees who must quit because of ill health. In addition, the petitioner asserts that CIS should look to the fact that the petitioner has been able to pay all of its employees since it was established in 1994 and should find that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage. The petitioner submits copies of its payroll records for a portion of 2004 to support its claim that it is able to pay its employees.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that Form 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, Citizenship and Immigration Services (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 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. In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe from the priority date through the present.

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

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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 this 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).

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, documenting that the wages which the petitioner paid overall were more than the proffered wage is not sufficient, contrary to the petitioner's assertions.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered annual wage of \$50,211.20 from the priority date:

- In 2001, the Form 1120S states a net income<sup>2</sup> of \$7,968.
- In 2002, the Form 1120S states a net income of \$2,110.
- In 2003, the Form 1120S states a net income of \$24,609.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay 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 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 may not, therefore, be considered funds available to pay the proffered wage. Also the petitioner's liabilities must be subtracted from the petitioner's total assets, when analyzing the petitioner's ability to pay the proffered wage, contrary to the petitioner's assertions. Thus, 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>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

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<sup>2</sup>Ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S.

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 2001 were \$26,777.
- The petitioner's net current assets during 2002 were \$66,788.
- The petitioner's net current assets during 2003 were \$82,359.

Thus, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage. For the years 2002 and 2003, the petitioner did have sufficient net current assets to pay the proffered wage.

In sum, the petitioner has not established through wages paid to the beneficiary, net income, or net current assets that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date and through subsequent years.

In the alternative, where a petitioner has not demonstrated sufficient net income or personal assets to pay the proffered salary from the priority date onwards, CIS may consider the overall magnitude of the entity's business activities and the totality of the circumstances concerning a petitioner's financial performance, when determining its ability to pay the proffered wage, particularly where the petitioner's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this instance, the petitioner has already demonstrated the ability to pay the proffered wage in two of the three years in the relevant period of analysis. The record indicates: that the petitioner regularly grosses over \$1,000,000 annually; it employs five full-time workers and one part-time worker; and it compensates its officers between approximately \$55,000 and \$65,000 each year, in addition to paying combined annual wages as high as \$113,000. It has demonstrated the financial strength needed to remain in business for over twelve years and to continue as a financially sound enterprise. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and that it has the ability to pay the proffered wage.

It is noted that any suggestion that the petitioner will have the beneficiary replace an employee who currently holds the proffered position and who is leaving because of ill health, and that accordingly this employee's salary may be seen as funds available to pay the proffered wage is misplaced. The petitioner failed to provide any Form W-2, Wage and Tax Statement, or other documentation to identify the employee who is terminating or to verify what salary the petitioner paid this other employee from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary will replace this employee. In addition, there is no evidence in the record that this employee performed the duties of the proffered position. Moreover, according to the Form I-140 at part 6, the proffered position is a new position, not a position which the petitioner has already established.<sup>4</sup> There is no documentation in the record to refute this. Going on record without supporting documentary evidence is not sufficient for purposes

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<sup>3</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>4</sup> The petitioner concedes in his statement submitted on appeal that he indicated on the Form I-140 that the proffered position represented a new position rather than an established position within its business.

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 summary, the evidence in the record does establish that the petitioner had the ability to pay the proffered wage from the priority date onwards.

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 met that burden.

**ORDER:** The appeal is sustained. The petition will be approved.