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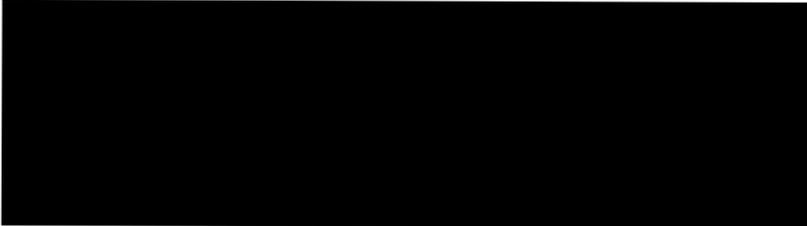
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: EAC 04 263 51854 Office: VERMONT SERVICE CENTER Date: **NOV 14 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a diner. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

*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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 5, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 per annum. On the Form ETA 750B, signed by the beneficiary on October 31, 2001, the beneficiary claims to have worked for the petitioner since January 2000.

On Part 5 of the visa petition, filed on September 23, 2004, the petitioner claims to have been established in February 1997, to currently employ thirteen workers, to have a gross annual income of \$392,659, and an annual net income of \$11,472. In support of its ability to pay the beneficiary's proposed wage offer of \$31,200 per year, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, and 2003.

They reflect that the petitioner files its returns using a standard calendar year. The returns contain the following information:

	2001	2002	2003
Taxable Income before Net Operating			
Loss (NOL) deduction	\$13,992	\$22,296	\$11,472
Current Assets (Sched. L)	\$ 22,063	\$20,975	\$17,028
Current Liabilities (Sched. L)	\$ 555	\$ -0-	\$ 5,497
Net current assets	\$ 21,508	\$20,975	\$11,531

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as possible readily available resource out of which a proffered wage may be paid. As reflected on corporate tax return the company's year-end current assets and current liabilities are shown Schedule L. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16 (d) through 18(d). If the petitioner's year-end 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.

Along with these tax returns, counsel's transmittal letter suggests that the petitioner's depreciation expense should be added back to the petitioner's net income because it represents a non-cash expenditure.

The director denied the petition on February 23, 2005. He reviewed the petitioner's financial data contained within its 2001, 2002, and 2003 corporate returns, and concluded that neither the petitioner's net income, nor its level of net current assets could support payment of the proffered salary in any of the three relevant years. He declined to add back such deductions as the petitioner's depreciation expense and concluded that the petitioner had failed to demonstrate its continuing ability to pay the certified wage of \$31,200.

On appeal, counsel merely asserts that additional evidence will be forthcoming in 30 days and that the director erred in denying the petition because he failed to consider taxable income before the NOL deduction and current cash assets.

Counsel subsequently submits an undated letter from the petitioner's corporate owner, [REDACTED] Mr. [REDACTED] states that he has "been paying my employee [the beneficiary] \$600 a week in cash, since 2001." Counsel's transmittal letter submitted with this Mr. [REDACTED] statement indicates that the beneficiary was paid in cash rather than by check because of the beneficiary's unlawful status in the United States.

<sup>1</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.

It is noted that on appeal, in the Mr. [REDACTED] acknowledgment of the issue of the beneficiary's employment with the petitioner and the form of compensation it may have taken, it is not necessary to remand the case to the director to conduct further investigation. See 8 C.F.R. § 103.2(b)(8).

That said, the statement from Mr. [REDACTED], however, standing alone, is insufficient to establish the beneficiary's specific dates of employment and amount of wages paid. It is further noted that the beneficiary's statement on the ETA 750B pegs his employment as beginning in January 2000, thus raising a question as to the reliability of the specific facts asserted. 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 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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As stated above, the unsupported assertion that the petitioner was paid \$600 per week in cash since 2001, does not sufficiently establish, without further documentation as to dates and amounts of wages paid, that the petitioner has demonstrated its ability to pay the certified wage during this period of time.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. It is noted that the depreciation expense reported on a tax return does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost 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. However, 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.

If a petitioner's net taxable income equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubada v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts or the level of payroll is misplaced.

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 that 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. In this case, it is noted that the director did use the figure given on the tax returns representing the taxable income before the NOL deduction. It is further noted that the director appropriately considered net current assets rather than only current assets as set forth on counsel's cover letter submitted with the petition. The current assets figure is a portion of the equation, but must be balanced against a petitioner's current liabilities in order to present a more accurate portrait of a petitioner's financial status.

In this case, as set forth above, neither the petitioner's net income of \$13,992, nor its net current assets of \$21,508 could cover the proffered salary of \$31,200 and demonstrate its ability to pay in 2001.

Similarly in 2002, neither the petitioner's net income of \$22,296, nor its net current assets of \$20,975 were enough to pay the certified wage offer. The petitioner did not establish its ability to pay the proposed wage offer in 2002.

Finally, in 2003, both the petitioner's net income of \$11,472 and its net current assets of \$11,531 were each insufficient to pay the proffered salary of \$31,200, and failed to establish its ability to pay the proffered wage in this year.

As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered wage beginning on the visa priority date of November 5, 2001, the petition may not be approved.

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.