

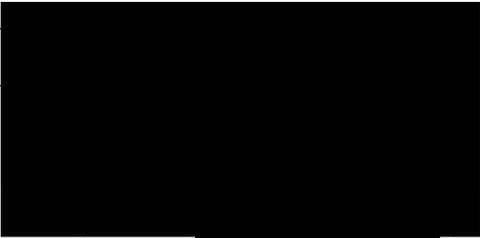
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**U.S. Citizenship
and Immigration
Services**

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FILE: [Redacted]
EAC 04 010 52634

Office: VERMONT SERVICE CENTER

Date: OCT 02 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 (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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 per annum. The ETA 750 B, signed by the beneficiary on February 6, 2001, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the visa petition, filed on October 8, 2003, the petitioner claims to have been established on June 28, 2001, to have a gross annual income of \$282,042, and to have a net annual income of \$172,421. In support of its ability to pay the beneficiary's proposed wage offer of \$39,291.20 per year, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They reflect that the petitioner

files its federal tax returns using a fiscal year running from June 1st to the following May 31st. Thus the 2001 and 2002 returns cover a period from June 1, 2001 to May 31, 2003. They contain the following information:

	2001	2002
Taxable Income before the net		
operating loss (NOL) deduction	-\$57,397	-\$88,334
Current Assets (Sched. L)	\$ 6,859	-\$ 534
Current Liabilities (Sched. L)	\$ -0-	\$ -0-
Net current assets	\$6,859	-\$ 534

The tax return for 2001 also reflects that \$3,200 was paid as officers' compensation and \$95,300 was paid as salaries and wages. The 2002 tax return indicates that \$20,800 was paid as officers' compensation and \$100,250 was paid as salaries and wages.

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.¹ Besides net 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 a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return. 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 a corporation'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.

The director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date of April 25, 2001 until the present. He also requested copies of the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner employed the beneficiary during this period.

In response, the petitioner submitted a letter, dated September 14, 2004, signed by the petitioner's president, [REDACTED]. He states that he is one of the petitioner's owners. He further states that he can afford to pay the beneficiary the proffered wage of \$18.89 per hour or \$39,921.20 per year "up to the extent of my salary and the salary of the other officers." He further states that business is growing and that "[w]e will be doing managerial works in this business and because our time is very limited to works also a Cook, [REDACTED] will replace us, as a Cook." "Enclosed is the copy of our Form W-2 for the year 2001 and 2003." [REDACTED] statement then lists himself and four other individuals under "Year 2001" and designates various amounts of cash for each individual to be contributed toward the beneficiary's certified wage, ranging from \$5,500 to \$12,5000; the total amounting to \$40,500. For "Year 2003," he lists himself and two other individuals with amounts ranging from \$14,450 to

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

\$30,000; the total being \$68,450. The accompanying W-2s for these persons disclose the same amounts as the wages paid during 2001 and 2002.

The director denied the petition on November 29, 2004, citing only the insufficiency of the petitioner's net income and net current assets to cover the proffered salary in 2001 as revealed by the 2001 tax return as failing to establish its continuing ability to pay the proposed wage offer beginning on the priority date.

On appeal, counsel resubmits [REDACTED] September 14, 2004 letter and accompanying W-2s and asserts that this evidence establishes the petitioner's ability to pay the proffered wage as of the priority date. We do not find this contention persuasive.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In reviewing a 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 the relevant period. If the petitioner establishes by documentary evidence that it 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. In this case, the record contains no evidence that the petitioner has employed the alien.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it 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 *Ubeda 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)).

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fails to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

In this case, as set forth above, neither the petitioner's -\$57,397 in net taxable income, nor its \$6,859 could meet the proffered wage of \$39,291.20 during the fiscal 2001. Similarly, in fiscal 2002, neither the -\$88,334 in net taxable income, nor the -\$534 in net current assets could meet the proposed wage offer in \$39,291.20.

With regard to the petitioner's president's willingness to have paid the certified wage from the reallocation of the entire salaries of himself and four other individuals in 2001 and himself and two other individuals in 2003, asserting that the beneficiary would have replaced all of their duties as cooks as they would have performed other managerial duties (apparently without compensation), is simply not credible and will not be considered. There is no persuasive evidence that the position of such individuals involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

It is further noted that as a corporation, the petitioner is a separate and distinct legal entity from its owners and shareholders and the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered beginning on the visa priority date of April 30, 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.