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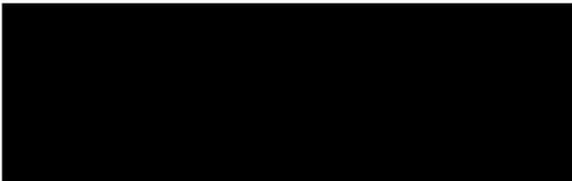
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FILE: EAC-04-155-50712 Office: VERMONT SERVICE CENTER Date: OCT 19 2006

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 sustained and the petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), approved by the Department of Labor. 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. The director denied the petition accordingly.

Counsel filed a timely appeal with additional evidence.<sup>1</sup>

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 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. 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.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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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 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 AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The instant petition is for a substituted beneficiary.<sup>2</sup> The I-140 petition was submitted on April 29, 2004. On the petition, the petitioner claimed to have been established in December 1965, to currently have 200 employees, and to have a gross annual income of \$15 million. The Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$510 per week (\$26,520 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered or as any cook. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner beginning in June 2001.

The petitioner did not submit any evidence to establish its ability to pay the proffered wage with the initial filing. Therefore, the director issued a request for additional evidence (RFE) on September 3, 2004 requesting the petitioner submit evidence to establish its ability to pay the proffered wage of \$26,520 per year from April 26, 2001 to the present as well as the beneficiary's W-2 forms from 2001. In response to the RFE, the petitioner submitted its audited financial statements for 2001 and 2002, and the beneficiary's W-2 forms for 2001 through 2003.

The director denied the petition on January 21, 2005, finding that for both 2001 and 2002 current liabilities were greater than current assets, and therefore, the record did not establish that the petitioner had the ability to pay the proffered wage at the time of filing beginning on the priority date.

On appeal, counsel submits the petitioner's audited Financial Statements for 2001 through 2004, Statement of Deposits and Filings for the second quarter of 2003, Employer's Quarterly Federal Tax Return – 2004 and the beneficiary's W-2 form for 2004, and asserts that the documentation clearly establishes the petitioner's ability to pay the proffered wage of \$26,520 from the April 26, 2001 filing date to the present.

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 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 the instant case, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2003 in response to the director's RFE. However, the director erred in failing to consider wages actually paid to the beneficiary in determining the petitioner's ability to pay the proffered wage. Counsel submits the beneficiary's W-2 form for 2004 on appeal.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001 through 2004. The beneficiary's Form W-2's show compensation received from the petitioner as follows:

Year	Beneficiary's actual compensation	Proffered wage	Difference need to increase
2001	\$9,527.95	\$26,520	\$16,992.05
2002	\$23,604.95	\$26,520	\$2,915.05
2003	\$20,540.24	\$26,520	\$5,979.76
2004	\$20,888.83	\$26,520	\$5,631.17

<sup>2</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED], Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at [REDACTED] (March 7, 1996).

The petitioner did not demonstrate that it paid the beneficiary the full proffered wage for these years, however, the petitioner is only obligated to demonstrate that it could pay the difference between wages actually paid to the beneficiary and the proffered wage for each of the years respectively.

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 annual reports, federal tax returns, or audited financial statements, without consideration of depreciation or other expenses. Reliance on the petitioner’s gross receipts, depreciation/amortization deduction or wage expense is misplaced. Showing that the petitioner’s gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 record of proceeding contains copies of the petitioner’s audited financial statements for 2001 through 2004. CIS considers taxable income before net operating loss deduction and special deductions as reported on Line 28 of Form 1120, U.S. Corporation Income Tax Return as net income in determining the petitioner’s ability to pay the proffered wage if the tax return is submitted as one of the three regulatory-prescribed forms of evidence. Similarly, income (loss) from operations reflected on Statements of Operations and Retained Earnings will be considered when audited financial statements are submitted as evidence to establish the petitioner’s ability to pay. The director erred in not considering the petitioner’s net income in his decision. The petitioner’s audited financial statements show net income as follows:

Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$144,496	\$16,992.05	\$127,503.95
2002	\$(104,650)	\$2,915.05	\$(107,565.05)
2003	\$72,822	\$5,979.76	\$66,842.24
2004	\$666,776	\$5,631.17	\$661,144.83

Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the difference of \$2,915.05 between wages actually paid to the beneficiary and the proffered wage while the petitioner’s net

income in 2001, 2003 and 2004 were sufficient to cover the difference between wages actually paid to the beneficiary and the proffered wage each year respectively.

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 will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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> 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 audited financial statements (Balance Sheets) for 2002 show that the petitioner has total current assets of \$383,108, but total current liabilities of 848,010, and thus net current assets at the end of 2002 were \$(464,902). Therefore, the petitioner had insufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2002.

The overall financial condition of the petitioner, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, the petitioner has established its ability to pay the proffered wage through wages paid and net income for the years 2001, 2003 and 2004. The petitioner needs only \$2,915.05 to demonstrate its ability to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2002. The petitioner was established in 1965 and had been in the business for more than 35 years at the time the Form ETA 750 was filed. The petitioner's gross income for most recent years has been above \$17 million and has a steady increase. The petitioner employs 200 workers and pays about \$4.5 million in salaries per year. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has established that it had the continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date based on the totality of circumstances.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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

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