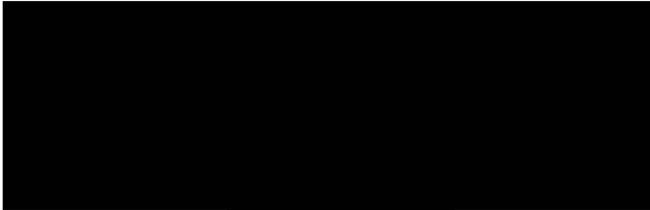


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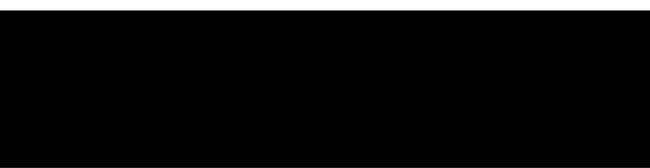
IN RE:

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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director found 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. The director also determined that the petitioner had failed to establish that the beneficiary possessed the requisite work experience specified on the labor certification.

On appeal, counsel contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on Form ETA 750 is \$18.23 per hour, which amounts to \$37,918.40 per year. On Form ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary does not claim to have worked for the petitioner. The only prior work experience listed is employment as an Italian specialty cook with [REDACTED] in Melville, New York from February 1996 to May 1998.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 states that an applicant must have two years of experience in the certified position of specialty cook. There are no other requirements.

On Part 5 of the petition, filed (according to the date stamp) on September 10, 2003, the petitioner claims to have been established in December 1996 and to currently employ fourteen workers.

In support of its ability to pay the proffered salary, the petitioner submitted copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002. They indicate that the petitioner files its taxes using a standard calendar year. These tax returns contain the following information:

Year	2001	2002
Ordinary Income <sup>1</sup>	\$ 6,752	\$26,122
Current Assets	\$68,848	\$60,555
Current Liabilities	\$71,558	\$45,271
Net Current Assets	-\$ 2,710	\$15,284

As shown above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown 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 petitioner did not provide any letters from trainers or employers corroborating that the beneficiary had accrued the requisite two years of experience as a specialty cook.

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<sup>1</sup> For the purpose of this review, ordinary income will be treated as net taxable income.

The director denied the petition on January 11, 2005. He concluded in part, that the petitioner failed to establish its continuing ability to pay the proposed wage offer of \$37,918.40 per year as of the priority date of April 25, 2001. Based on the figures contained in the petitioner's 2001 and 2002 tax returns, the director determined that in both years neither the petitioner's net taxable income nor its net current assets were sufficient to pay the proffered salary. The director also found that the record did not support the claim that the beneficiary had acquired the requisite two years of work experience.

On appeal, counsel suggests that CIS is bound by the DOL's approval of the labor certification on the issues of the petitioner's ability to pay the certified wage and the beneficiary's qualifying work experience. The AAO does not agree. The jurisdiction of CIS encompasses a review of whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the designated position. 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 (9<sup>th</sup> Cir. 1984). Moreover, the financial viability of the employer to pay the certified wage is well within the province of CIS to investigate. As stated by the court in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d at 1309 (citing *Ubeda v. Palmer*, 539 F.Supp. 647, 649-650 (N.D. Ill. 1982), *aff'd mem.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983):

In *Ubeda v. Palmer* [citation omitted] the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by the [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between the [CIS] and the DOL, see *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983), we conclude likewise. . .

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). Here, counsel asserts that the director ignored a letter of experience that was submitted to the DOL. This assertion is not persuasive as no copy of this letter was ever provided to the record for CIS review.

Regarding the petitioner's ability to pay the proffered wage, counsel asserts the combination of the cash assets of \$19,638 on Schedule L of the 2001 tax return together with the petitioner's net taxable income as shown on page 1 of the tax return, as well as consideration of the petitioner's total assets of \$214,589 (Schedule L) and its payment of substantial amounts in salaries to other employees collectively demonstrates the petitioner's ability to pay the proffered wage.

CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year. Moreover, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is not persuasive. 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, as explained above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

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 that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. 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 petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, there is no evidence indicating that the petitioner has employed the beneficiary.

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 also 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 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). Showing that wages paid to other employees reached a specified level or exceeded the proffered wage is not probative of a petitioner's ability to pay a certified wage to an additional new employee. 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.

As set forth above, in 2001, neither the \$26,122 in net taxable income, nor the \$15,284 in net current assets was sufficient to pay the proffered wage and demonstrate the petitioner's ability to pay during this period.

Similarly, in 2002, neither the petitioner's net taxable income of \$6,752, nor its net current assets of -\$2,710 could pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the certified salary beginning at the priority date of April 25, 2001. 8 C.F.R. § 204.5(g)(2).

Finally, counsel contends that the director should have requested additional evidence because the record did not contain the petitioner's 2003 taxes and because a CIS interoffice memo relating to the determination of the ability to pay had not yet been issued and was not applicable to the instant petition relevant to whether a request for additional evidence should have been solicited. This assertion is not convincing. First, the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), merely presents principles already

encompassed in 8 C.F.R. § 103.2(b)(8) relating to whether and when a request for additional evidence is appropriate. In this case, at the date of filing in September 2003, only the petitioner's 2001 and 2002 federal tax returns would have been available for review anyway. As they appeared to be complete and clearly showed evidence of the petitioner's inability to pay the proffered wage in both of those years commencing with the year of filing, the petition may be denied based on this evidence of ineligibility contained in the record. *See* 8 C.F.R. § 103.2 (b)(8). The director appropriately elected to review the evidence based on the record and concluded that the petitioner failed to establish its continuing ability to pay the certified wage beginning at the priority date. As noted above, the AAO concurs with this finding and with the determination that the petitioner failed to establish that the beneficiary had accrued two years of qualifying experience as a specialty cook as set forth in the ETA 750.

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.