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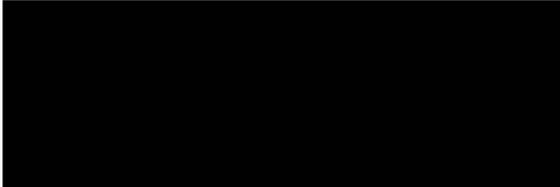
U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC 05 161 52561

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 15 2006**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, California Service Center. The petitioner appealed the director's decision. The petitioner's appeal will be dismissed.

The petitioner is an Italian market and restaurant. It seeks to employ the beneficiary permanently in the United States as a kitchen chef, Italian cuisine. 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. 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.

According to the tax return information submitted, the petitioner was incorporated on March 27, 1984. According to the petition dated May 19, 2005, the business was established in 1971, and, it employed 45 individuals at the time the petition was prepared. Subsequently, counsel stated in a cover letter dated March 3, 2006, that [REDACTED] and its predecessor corporation have operated Italian markets and restaurants since 1978, and at the time of the letter, had 75 full and part-time employees.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

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. 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.<sup>1</sup> *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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<sup>1</sup> The original labor certification is in the record of proceeding.

Here, the Form ETA 750 was accepted on August 29, 1994.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$14.25 per hour (\$29,640.00 per year). The Form ETA 750 states that the position requires 6 months of experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (the original labor certification is in the record of proceeding); diners' reviews of the restaurant; a recapitulation of the petitioner's gross receipts, total income, discretionary expenses (as defined by the petitioner's accountant), and depreciation for the years 1994 through 2004; U.S. Internal Revenue Service Form tax returns for 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on December 15, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 1994 through 2003, and California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees from March 31, 2005 through September 30, 2005; Form W-3 federal Transmittal of Wage and Tax Statements for the years 200, 2001, 2002, 2002, 2003, 2004 and 2005; and, California State sales tax reports.

The director denied the petition on April 15, 2006, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts regarding the director's finding that there was insufficient evidence to indicate that the petitioner had the ability to pay the proffered wage, "The Service reads that section ... [8 C.F.R. § 204.5(g)(2)] to mean that because ... [the petitioner] could have had negative taxable income for eight of the ten years, it (sic) precluded from approving the petition for the beneficiary."

Counsel goes on to contend that negative taxable income is the criteria for decision" but the petitioner's ability to pay the proffered wage<sup>3</sup> according to the case cited included the "employer's gross or adjusted income as the submitted documents show."

Counsel lists the petitioner's gross incomes for tax years 1994 through 2004 to prove the ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985) the court held that CIS

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<sup>2</sup> It has been approximately twelve years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>3</sup> Counsel asserts that a Board of Alien Labor Certification case referred to as "*Lowy*" or "*Lowry*" is determinative in this matter. Counsel provided no citation or reference.

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.

Counsel presents on appeal a list of expense deductions, one category he terms non-monetary expenses, footnoted as depreciation, as evidence of funds available to pay the proffered wage. No precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* 719 F.Supp. 532 (N.D. Texas 1989) at 537.

Also, with the above, counsel provides a listing of discretionary expenses (he indicates includes advertising, compensation to officers, salaries, wages, rent) as evidence of funds available to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985) the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Salaries, wages and rent paid by the petitioner represent real costs and the record of proceeding does not show the payments were discretionary. In the totality of all the evidence submitted in this case, there is no evidence to demonstrate that the petitioner's business was in a profitable period.

On the contrary, for the years 1994 through 2003, the average taxable income loss for the petitioner was <\$123,970.00> each year as is set forth below. At no time has petitioner pointed to expectations for increased earnings. No detail or documentation has been provided to explain how the beneficiary's employment as a kitchen chef, Italian cuisine will significantly increase petitioner's profits.

Counsel asserts that in 1995 and 1996 the petitioner opened another business location, and, "In a normal operation of business the assets/liability ratio has no bearing on the company's ability to absorb the costs of goods and labor." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 1994 through 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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), *affd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,640,00 per year from the priority date of August 29, 1994:

- In 1994, the Form 1120S stated taxable income of \$42,686.00.
- In 1995, the Form 1120S stated taxable income loss of <\$91,430.00><sup>4</sup>.
- In 1996, the Form 1120S stated taxable income loss of <\$91,036.00>.
- In 1997, the Form 1120S stated taxable income loss of <\$451,564.00>.
- In 1998, the Form 1120S stated taxable income loss of <\$319,593.00>.
- In 1999, the Form 1120S stated taxable income loss of <\$313,350.00>.
- In 2000, the Form 1120S stated taxable income loss of <\$7,904.00>.
- In 2001, the Form 1120S stated taxable income loss of <\$490.00>.
- In 2002, the Form 1120S stated taxable income loss of <\$200,331.00>.
- In 2003, the Form 1120S stated taxable income loss of <\$292.00>.
- In 2004, the Form 1120S stated taxable income of \$69,626.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 1995 through 2003 for which the petitioner's tax returns are offered for evidence.

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>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

- In 1996, petitioner's Form 1120S return stated current assets of \$212,535.00 and \$564,888.00 in current liabilities. Therefore, the petitioner had <\$352,353.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.

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<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>5</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.

- In 1997, petitioner's Form 1120S return stated current assets of \$284,418.00 and \$864,993.00 in current liabilities. Therefore, the petitioner had <\$580,575.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 1998, petitioner's Form 1120S return stated current assets of \$195,445.00 and \$918,621.00 in current liabilities. Therefore, the petitioner had <\$723,176.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120S return stated current assets of \$142,936.00 and \$232,098.00 in current liabilities. Therefore, the petitioner had <\$89,162.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120S return as submitted did not include a Schedule L.
- In 2001, petitioner's Form 1120S return stated current assets of \$72,370.00 and \$130,979.00 in current liabilities. Therefore, the petitioner had <\$58,609.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$107,013.00 and \$152,329.00 in current liabilities. Therefore, the petitioner had <\$45,316.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$184,067.00 and \$181,064.00 in current liabilities. Therefore, the petitioner had <\$3,003.00> in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120S return stated current assets of \$171,540.00 and \$132,830.00 in current liabilities. Therefore, the petitioner had \$38,710.00 in net current assets. Since the proffered wage is \$29,640,00 per year, this sum is more than the proffered wage.

Therefore, for the periods 1995 through 1999, and, 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) 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

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<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

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 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner for years 1995 to 2002 that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.