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U.S. Citizenship  
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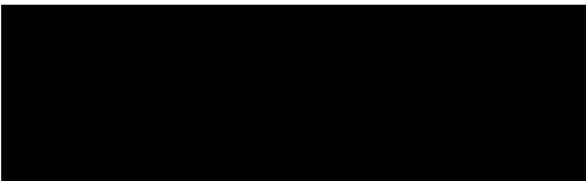


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**  
SRC 06 121 50946

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 Director, Texas Service Center, denied the preference visa petition that 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 an executive chef. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 28, 2001. The proffered wage as stated on the Form ETA 750 is \$38,000 per year.

The Form I-140 petition in this matter was submitted on March 8, 2006. On the petition, the petitioner stated that it was established during 1997 and that it employs eight workers. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Duluth, Georgia.

The instant beneficiary is not the beneficiary for whom the petitioner originally petitioned on the Form ETA 750. The petitioner substituted the instant beneficiary when it filed the visa petition. An employer is permitted to substitute a beneficiary on the visa petition for the beneficiary originally named on the Form ETA 750.

An employer initiates the substitution process by filing a Form I-140 petition on behalf of the alien to be substituted. An employer must submit Part B of the Form ETA 750, signed by the substituted alien. Memo. From Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96_28-96a.pdf) (March 7, 1996). In the instant case, the petitioner did not file a new Form ETA 750 for the substituted beneficiary.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup>

In the instant case the record contains the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return and a letter dated May 25, 2006 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax return shows that it is a corporation, that it incorporated on January 1, 1997, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,913. At the end of that year the petitioner had current assets of \$13,557 and current liabilities of \$3,608, which yields net current assets of \$9,949.

The petitioner's accountant's May 25, 2006 letter states that the petitioner's gross receipts have been stable for several years, ranging between \$600,000 and \$700,000. The accountant further stated that during 2004, in an unsuccessful attempt to increase its revenue, the petitioner spent \$72,542 on advertising, promotions, and live musical entertainment. The accountant notes that if those expenditures had not been made, or had been reduced, the petitioner's profits would have been higher.

The accountant also stated that the petitioner had recently made improvements to its menu and raised its prices, which the accountant asserted had raised its gross revenue and improved its cash flow. The accountant stated that the petitioner "is continuing to pursue additional improvements in its food preparation area." The accountant noted that the petitioner's 2005 tax return, which might have demonstrated its improved finances during that year, was not yet available.

The director denied the petition on March 28, 2006.<sup>2</sup> In the appeal brief counsel cited the petitioner's gross receipts, total income, and the anticipated improvement in gross income as indices of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The accountant's letter was submitted on appeal.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts or its total income exceeded the proffered wage, or greatly exceeded the proffered wage, or are anticipated to improve, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>3</sup> or otherwise increased its net income,<sup>4</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The accountant asserts that, had the petitioner not spent heavily on advertising and promotions during 2004 its net income during that year would have been much higher, and sufficient to pay the proffered wage. This office notes, however, that the expenditures on advertising and promotions did, in fact, occur, and reduced the petitioner's net income to an amount less than the proffered wage. Further, the record contains no evidence that, had it been able to employ the beneficiary, the petitioner would have made better business decisions during that year. This office will consider the petitioner's net income as shown on its tax return, rather than what it would have been if the petitioner had spent less on its advertising, promotions, or other expenses.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may

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<sup>3</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>4</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2). 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>5</sup> shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$38,000 per year. The priority date is November 28, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) required the petitioner to submit copies of annual reports, federal tax returns, or audited financial statements pertinent to each of the years since 2001, inclusive. The petitioner submitted no such evidence, nor any other reliable evidence of its ability to pay the proffered wage, for 2001, 2002, and 2003, and has not demonstrated its ability to pay the proffered wage during those years.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$6,913. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$9,949. That amount is insufficient to pay the proffered wage. The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on March 8, 2006. On that date the petitioner's 2005 tax return was unavailable. The petitioner's 2005 tax return was never subsequently requested. For the purpose of today's

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<sup>5</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.