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U.S. Citizenship  
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FILE: [REDACTED]  
LIN 03 142 52563

Office: NEBRASKA SERVICE CENTER

Date: FEB 01 2007

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*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 foreign food 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 financial 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 further evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on 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). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$13.00 per hour, which amounts to \$27,040 per year. On Form ETA 750B, accompanying the petition, signed by the beneficiary on April 29, 2001, the beneficiary claims to have worked for the petitioner since February 2001.

On Part 5 of the preference petition, filed on March 26, 2003, the petitioner claims to have been established in 1998, have a gross annual income of \$450,000, and to currently employ twelve workers.

Because the petitioner did not submit evidence of its ability to pay the proffered wage with the petition, on July 21, 2003, the director requested that it provide documentation of its ability. He advised the petitioner that its evidence must demonstrate such ability beginning on the priority date and continuing until the present, and specifically instructed the petitioner that it must include copies of annual reports, audited financial statements or federal tax returns for 2001 and 2002. The director also instructed the petitioner to provide a copy of the beneficiary's Wage and Tax Statements (W-2s) for 2001 and 2002, as well as a copy of the beneficiary's most recent pay stub.

In response, the petitioner submits copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. The returns indicate that the petitioner files its taxes using a standard calendar year. They contain the following information:

	2001	2002
Gross receipts or sales	\$ 497,930	\$469,103
Gross Income	\$ 268,530	\$242,938
Compensation of Officers	none listed	\$ 23,230
Salaries and wages	\$ 73,672	\$ 65,447
Ordinary Income <sup>1</sup>	\$ 4,701	-\$ 11,778
Current Assets (Sched. L)	\$ 11,142	\$ 1,429
Current Liabilities (Sched. L)	-0-	\$ -0-
Net current assets	\$ 11,142	\$ 1,429

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a potentially readily available resource to pay a certified wage.<sup>2</sup> Besides net income, Citizenship and Immigration Services (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.

Additionally, the petitioner provided a copy of its articles of incorporation, a copy of a July 31, 2003, bank statement, and an affidavit signed by the petitioner's sole shareholder, ██████████ Mr. ██████████ states that the beneficiary worked in his restaurant intermittently during 2001 and 2002 but took time off without pay. He claims that although the beneficiary was paid \$13.00 per hour when he worked, his W-2s only reflect compensation for the time worked.

Included in the petitioner's response is a copy of a W-2 issued for the year 2001 showing that the petitioner paid the beneficiary \$19,858. Also provided is a copy of the beneficiary's individual tax return for 2002 showing wages claimed of \$16,240, but not accompanied by any W-2 for that year showing the origin of the wages. The petitioner further provides a copy of a pay stub showing a month's worth of wages paid to the beneficiary by the petitioner in the gross amount of \$2,500 for the month of September 2003, and year-to-date wages of \$21,270.

An additional copy of a 2002 W-2 is contained in the record showing wages of \$13,390 paid to a different worker named "██████████"

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

<sup>2</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.

On January 9, 2004, the director denied the petition, concluding that although the financial documentation demonstrated the petitioner's ability to pay the proffered wage in 2001 and the 2003 pay stub suggested that the petitioner was currently paying wages equivalent to the proffered wage, he determined that the evidence did not support a finding that the petitioner had established its ability to pay the proffered wage in 2002. Although erroneously referring to the W-2 that did not correspond to the beneficiary, the director concluded that the petitioner's evidence failed to show that it could cover the difference between the actual wages paid and the proffered wage in 2002.

On appeal, counsel asserts that the owner performed the job that the beneficiary would have performed in 2002 but for taking several leaves of absence. Counsel argues that the owner's officer compensation of \$23,230 that the owner paid himself should be attributed to the corporate petitioner's ability to pay the beneficiary had he worked. In support of this assertion, a copy of Mr. [REDACTED]'s W-2 is provided showing the \$23,230 paid by the corporation. Mr. [REDACTED] affidavit is also submitted stating that the beneficiary was absent in 2002 due to personal reasons, but that when he was employed, he was paid \$13.00 per hour. Mr. [REDACTED] states that he had a difficult time replacing employees and finding qualified workers and had problems with other employees who cut back their hours. He claims that he doesn't terminate them, but steps in to perform their jobs.

This contention is not persuasive based on the documentation contained in the record. As noted above, no W-2 or other evidence has been provided that documents this petitioner's payment of wages to the beneficiary in 2002. Similarly, Mr. [REDACTED] describes his own performance of the beneficiary's and other workers duties, but does not specifically identify the periods and workers involved. The reliance on the suggestion that an unnamed portion of this officer's compensation may be considered funds available to pay the proffered wage is misplaced based on the evidence presented. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this individual which supports such a claim that any portion of officer compensation could have been foregone. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining a petitioner's ability to pay a certified wage, CIS will examine whether a petitioner may have employed and paid wages to a beneficiary during a given period. If a petitioner establishes by credible 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. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, the record reflects that the beneficiary was paid \$19,858 in 2001. It further suggests that as of September 2003, the petitioner was compensating the beneficiary at a level commensurate with the proffered salary during that year. As stated above, however, the petitioner failed to provide a W-2 or other verifiable documentation that shows how much it paid the beneficiary in 2002.

CIS will then examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. As noted above, it will also review a petitioner's current assets and current liabilities as reflected on Schedule L of the tax return as an alternative method of determining a petitioner's ability to pay the proffered wage. 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). 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.

In this case, the petitioner's ability to pay the proffered wage is demonstrated for 2001 because the petitioner's net current assets of \$11,142 could cover the \$7,182 difference between the actual wages of \$19,858 paid to the beneficiary and the certified wage of \$27,040. In 2003, the beneficiary's pay stub suggests that he was actually being paid the proffered wage. In 2002, however, neither the petitioner's net income of -\$11,778 nor its net current assets of \$1,429 could cover the proposed wage offer of \$27,040.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its *continuing* ability to pay the proffered wage beginning at the priority date of the petition as required by the regulation at 8 C.F.R. § 204.5(g)(2).

Beyond the decision of the director, it is noted that the beneficiary and the petitioner sole shareholder share the same last name. While this may not be uncommon, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, in future proceedings, this issue should merit further investigation, including consultation with the DOL.

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.