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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAY 3 0 2007
EAC 05 202 52919

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 acting director, Vermont Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, 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, based on the petitioner's net income or net current assets and that the petitioner could not use the funds identified as officers' compensation to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 December 7, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal 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.

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 C.F.R. § 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). In the instant case, this date is April 30, 2001. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 750 is \$485 a week, or \$25,220. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of the petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly

submitted on appeal.¹ Relevant evidence submitted on appeal includes counsel's brief. Other relevant evidence includes the petitioner's 2001, 2002, and 2003 Forms 1120, corporate tax returns, with Schedules L. In response to the director's request for further evidence, counsel also submitted a statement on the use of alternate methods to determine the petitioner's ability to pay the proffered wage. Counsel stated that the petitioner, like many small companies, paid its surplus as officer compensation to reduce its corporate income taxes. Counsel then added up the petitioner's net income, net assets, and compensation to officers for tax years 2001, 2002, and 2003 to demonstrate that sufficient funds were available to pay the proffered wage. Counsel also noted that the petitioner submitted its 2000 tax return for comparative purposes.²

The evidence in the record of proceeding indicates that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in April 1987, and to currently employ ten workers. On the Form ETA 750, unsigned by the beneficiary and undated, the beneficiary claimed that he had worked for the petitioner since August of 1997.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) should base its denial of the instant petition on more than a determination that the petitioner uses the officer compensation arbitrarily.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, 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).

The AAO notes that counsel, in her response to the director's request for further evidence, appears to suggest that the petitioner's net income and net current assets can be combined when calculating the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the

¹ 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).

² The AAO notes that the priority year for the instant petition is 2001. Therefore the petitioner's tax return for tax year 2000 is not dispositive. However, the AAO will examine this tax return further when analyzing the totality of the petitioner's circumstances in these proceedings.

proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although the beneficiary on Part B of the Form ETA 750 indicated that he worked for the petitioner since August 1, 1997, the petitioner provided no further evidentiary documentation of the beneficiary's employment, such as W-2 Forms or IRS Forms 1099-MISC. Thus, the record does not establish that the beneficiary is receiving a salary equal to or greater than the proffered wage. Thus, the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority date and until the beneficiary receives lawful permanent residence.

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 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). Reliance on the petitioner's gross receipts and 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$25,220 per year from the priority date:

- In 2001, the Form 1120 stated a net income³ of \$958.
- In 2002, the Form 1120 stated a net income of -\$26,372.
- In 2003, the Form 1120 stated a net income of -\$130,816.

Therefore, for the years 2001, 2002, and 2003, the petitioner did not have sufficient net income to pay the proffered wage.

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, including real property that counsel asserts should be considered. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 net current assets during 2001 were \$9,817.
- The petitioner's net current assets during 2002 were -\$55,787.
- The petitioner's net current assets during 2003 were \$96,140.

Therefore, while the petitioner had sufficient net current assets to pay the entire proffered wage of \$25,220 in tax year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage either in the 2001 priority year or during tax year 2002. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus the petitioner has not established its ability to pay the proffered wage from the priority date to the present time.

In response to the director's request for further evidence and on appeal, counsel asserts that the compensation provided to the petitioner's officers can be utilized as a source of additional funds with which to pay the proffered wage. Counsel is correct that such compensation can be considered in certain petitions. As previously stated, the AAO will consider the totality of the circumstances affecting the petitioning business if the evidence warrants

³The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Among other issues to be considered with regard to the petitioner's overall circumstances are issues such as the longevity of the petitioner, number of employees, and its reputation within the industry. The AAO notes that the petitioner indicated that it had been in operation since 1987, and that it operates in a large discount shopping mall outside of New York City. The AAO also notes that in 2000, the year prior to the 2001 priority date, the petitioner had net income of \$10,442, officer compensation of \$220,000 and net current assets of \$36,371. Thus, the year prior to the priority date, the petitioner had sufficient net current assets to pay the proffered wage.

With regard to officer compensation, counsel asserts that the petitioner's officer compensation is available to pay the proffered wage. In the instant petition, the petitioner has four officers receiving compensation in tax year 2001, with one officer holding 63 and a half percent of the petitioner's stock. The combined officer compensation is \$208,500, with the majority shareholder receiving \$109,000 in compensation. In tax year 2002, three officers received compensation totaling \$160,000, with the majority shareholder receiving \$81,600. The fact that the amounts of officer compensation vary both in the aggregate amount and for individual officers from tax year to tax year suggests that the officer compensation is discretionary, as opposed to a fixed salary amount or contractually based compensation for any of the officers. Thus, the director's comment with regard to the arbitrariness of the petitioner's officer compensation is misplaced. The AAO also notes that the aggregate amount of officer compensation for tax years 2001 and 2002 is significantly greater than the proffered wage of \$25,220 in either tax year 2001 or 2002. The fact that the majority shareholder received three times the proffered wage in both tax year 2001 and 2002 suggests that the petitioner's officer compensation could have been adjusted to pay the proffered wage. Thus, assessing the totality of circumstances in this individual case, including the petitioner's business location, longevity, and officer compensation, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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.

ORDER: The appeal is sustained.