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FILE: LIN 06 111 53839 Office: NEBRASKA SERVICE CENTER Date: NOV 06 2007

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, Nebraska 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 a foreign specialty food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director 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 and is accompanied by new evidence. 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 acting director's decision of denial the issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the employment experience that the approved Form ETA 750 labor certification states is a prerequisite for the proffered 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 either 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)(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.

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

Here, the Form ETA 750 was accepted on July 25, 2003. The proffered wage as stated on the Form ETA 750 is \$11 per hour, which equals \$22,880 per year. The Form ETA 750 states that the position requires three years of experience in the job offered. The duties of the proffered position as stated on the approved Form ETA 750 labor certification are,

Prepare, season, and cook soups, meats, vegetables, desserts, or other foodstuff according to Chinese methods and manner; plan menus; estimate food consumption and requisitions or purchase supplies.

The Form I-140 petition in this matter was submitted on March 6, 2006. On the petition, the petitioner stated that it was established on April 2, 1986 and that it employs 15 workers. The petition states that the petitioner's gross annual income is \$974,795 and that its net annual income is \$0.0. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in St. Louis, Missouri. On the Form ETA 750B the beneficiary did not claim to have worked for the petitioner.

The beneficiary claimed to have been employed as a "Chinese Style Food Specialist" at the Beijing Western Suburb Nursery, a horticultural nursery in Beijing, China from March 1995 through June 2, 2003, the date the beneficiary signed that form.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary, however, listed no other employment.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. 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.² In the instant case the record contains (1) the petitioner's 2002, 2003, 2004, and 2005 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2005, (3) the petitioner's MODES 41S Missouri Quarterly Contribution and Wage Reports for all four quarters of 2005, and (4) monthly statements pertinent to the petitioner's checking accounts. 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.

In addition, pertinent to the beneficiary's employment history, the record contains (1) an Occupational Qualification Certificate in Chinese and an English translation, (2) the beneficiary's employment history and an English translation, and (3) a certification in Chinese dated September 8, 2002 from the Beijing Western Suburb Nursery and an English translation. The record does not contain any additional evidence pertinent to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on April 2, 1986, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$18,024. At the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date of the instant petition is July 25, 2003, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions³ of \$4,698. At the end of that year the petitioner's current liabilities exceeded its current assets.

² 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).

³ The taxable income before net operating loss deduction and special deductions of a taxpayer reporting on a Form 1120, U.S. Corporation Income Tax Return is the statistic that most closely corresponds to its net income, and this office uses that figure as net income in the context of the calculations pertinent to a petitioner's ability to pay the proffered wage.

During 2004 the petitioner declared a loss of \$20,710 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2005 the petitioner taxable income before net operating loss deduction and special deductions of \$33,658. At the end of that year the petitioner's current liabilities exceeded its current assets.

Addendums to the petitioner's quarterly wage reports show that during the four quarters of 2005 the petitioner employed 16, 15, 13, and 14 employees, respectively, but that it did not employ the beneficiary during any of those quarters.

The April 19, 2002 Occupational Qualification Certificate was issued to the beneficiary by a Chinese governmental body. It states that the beneficiary is qualified as a Chinese Cuisine Cook. The beneficiary's employment history was also issued to the beneficiary by a Chinese regulatory agency on April 19, 2002. It states that the beneficiary worked for the Beijing Western Suburb Nursery, first as a generic worker, and from March 1995 to the date that certification was issued as a Chinese-Style Food Specialist.

The September 8, 2002 certification from the Beijing Western Suburb University states that the beneficiary "has been working for our Nursery as a Chinese Styled Food Specialist since 1995." The certification does not otherwise enumerate the beneficiary's duties in that position.

The acting director denied the petition on June 23, 2006.

On appeal, counsel asserted that the acting director did not adequately consider the evidence provided, which counsel asserted demonstrates that the petitioner's is able to pay the proffered wage and that the beneficiary is qualified for the proffered position.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, counsel specifically cited the petitioner's bank accounts, personnel records, total wage expense, gross receipts, expenses and bank statements. Counsel offered no argument pertinent to how those items might demonstrate the petitioner's ability to pay the proffered wage.

As to the beneficiary's qualifications, counsel stated that the duties of a cook are generic, and that an employment verification, therefore, need not specifically enumerate the duties of the position. Counsel cited no authority for that position.

This office notes that 8 C.F.R. § 204.5(l)(3)(ii), set out in pertinent part above, states that the petitioner must provide an employment verification letter from the petitioner's previous employer that describes the beneficiary's experience. Typically, this would necessarily involve a description of duties. In the instant case, however, this office concurs with counsel.

The Form ETA 750 states, in effect, that the beneficiary, in order to be qualified for the proffered position, must be able to prepare Chinese food and command a commercial kitchen. The beneficiary's employment verification letter states that he worked as a specialist in Chinese foods. Although one might question

whether the beneficiary's duties at the nursery included planning menus; estimating consumption and ordering groceries in appropriate amounts, which the Form ETA 750 indicates are requirements of the proffered position, this office finds, on the balance, that the beneficiary's employment verification letter demonstrates that his employment experience qualifies him for the proffered position. The petitioner has overcome that basis of the decision of denial.

The remaining issue is whether the evidence in the record demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the petitioner's gross receipts, total wage expense, and other expenses as indices of its ability to pay additional wages is similarly misplaced. Showing that the petitioner had wage expense or other expenses in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ 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. 1080, 1084 (S.D.N.Y. 1985), 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

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁵ 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.

⁶ 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.

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 petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 that 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 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).

The petitioner's net income, however, 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 the 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, those expected to be 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 net of 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

typically⁷ 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 \$22,880 per year. The priority date is July 25, 2003.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$4,698. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner declared taxable income before net operating loss deduction and special deductions of \$33,658. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on March 6, 2006. On that date the petitioner's 2006 tax return was unavailable. Evidence pertinent to the petitioner's ability to pay the proffered wage was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

The evidence submitted does not establish that the petitioner was able to pay the proffered wage during 2003 and 2004. Therefore the evidence does not show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

Although the petitioner overcame the finding that the evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience, the petitioner has not sustained the burden placed upon it by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may not be approved.

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.

⁷ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.