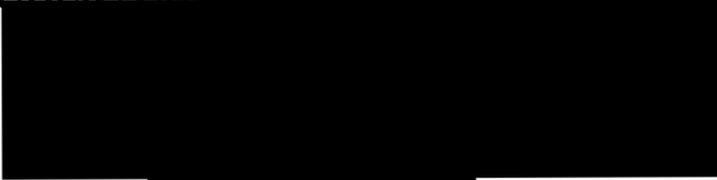


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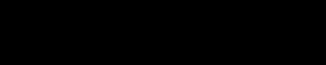
**U.S. Citizenship
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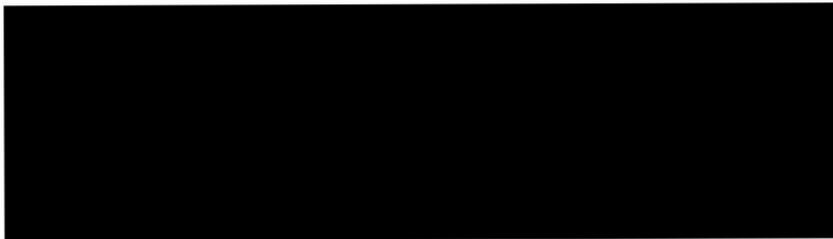
Petitioner:

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, 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 a foreign foods specialty 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 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 either 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$15.33 per hour, which equals \$31,886.40 per year.

The Form I-140 petition in this matter was submitted on March 16, 2006. On the petition, the petitioner stated that it was established on November 20, 1993 and that it employs six workers. The petition states that the petitioner's gross annual income is \$163,884 and that its net annual income is \$36,000.¹ On the Form ETA 750, Part B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since January 2001. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Slidell, Louisiana.

¹ The source of those figures is unclear to this office.

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 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) monthly statements pertinent to the petitioner's bank accounts, (3) the petitioner's unaudited financial statement for the last three quarters of 2003, and (4) a letter dated March 24, 2006 from an 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.³

The petitioner's tax returns show that it is a corporation, that it incorporated on February 1, 1991, and that it reports taxes pursuant to cash convention accounting and a fiscal year that runs from April 1 of the nominal year to March 31 of the following year. The priority date of the petition, November 13, 2001, fell within the petitioner's 2001 fiscal year.

The petitioner's 2001 tax return, which covers the fiscal year from April 1, 2001 to March 31, 2002, indicates that during that fiscal year the petitioner declared a loss of \$73,016 as its taxable income before net operating loss deduction and special deductions. At the end of that fiscal year the petitioner had current assets of \$30,490 and current liabilities of \$3,052, which yields net current assets of \$27,438.

The petitioner's 2002 tax return, which covers the fiscal year from April 1, 2002 to March 31, 2003, indicates that during that fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,658. At the end of that fiscal year the petitioner had current assets of \$18,918 and current liabilities of \$3,569, which yields net current assets of \$15,349.

The petitioner's 2003 tax return, which covers the fiscal year from April 1, 2003 to March 31, 2004, indicates that during that fiscal year the petitioner declared a loss of \$8,138 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.

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 record also contains the 1998 and 1999 Form 1120, U.S. Corporation Income Tax Returns of [REDACTED], which operates the Kowloon Restaurant in Mandeville, Louisiana. In the decision of denial, the director assumed that restaurant and the petitioning restaurant are commonly owned. In his appeal brief counsel noted that they are not commonly owned. Those tax returns, therefore, have no relevance to the continuing ability of the instant petitioner to pay the proffered wage.

The petitioner's 2004 tax return, which covers the fiscal year from April 1, 2004 to March 31, 2005, indicates that during that fiscal year the petitioner declared a loss of \$8,607 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.

The petitioner's accountant's March 24, 2006 letter states that, based on the figures from the petitioner's unaudited financial statements, it should be able to pay its employees' wages.

The director denied the petition on May 15, 2006.

On appeal, counsel cited a portion of a May 4, 2004 memorandum from Citizenship and Immigration Service's (CIS) Associate Director for Operations [REDACTED] for the proposition that a petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date if its net current assets at the end of each of the salient years are sufficient to pay the proffered wage. Counsel then cited the bank statements submitted as evidence of the petitioner's net current assets. The calculation of net current assets is not based exclusively on bank balances, however, and is explained thoroughly below.

[REDACTED] also asserted that, because at the end of most months the petitioner had a bank balance sufficient to pay the monthly amount of the proffered wage, the petitioner has demonstrated its ability to pay the proffered wage. The use of bank statements to show ability to pay the proffered wage is also addressed below.

Finally, counsel noted that the petitioner has been in business for 13 years and argued that the fact that it is seeking to hire an additional cook shows that it reasonably expects its business to grow.

If merely filing an employment-based visa petition were sufficient to demonstrate a petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the strictures of 8 C.F.R. § 204.5(g)(2) would be unnecessary. This office does not perceive that filing the visa petition satisfies the requirements of 8 C.F.R. § 204.5(g)(2). Further, although the petitioner has demonstrated continuity of operations during the previous 13 years, that is insufficient to show the ability to sustain the additional expense that would be occasioned by hiring an additional employee. Although this office will consider the petitioner's longevity, it is insufficient, in itself, to show the petitioner's ability to pay the proffered wage.

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 generally 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.

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

Counsel's reliance on the unaudited financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Further, the accountant's opinion, as stated in his March 24, 2006 letter, purports to be based entirely on the figures from the unaudited financial statements submitted. As it is based entirely on unreliable evidence, it is also unreliable.

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, 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, although the beneficiary claimed to have worked for the petitioner since January 2001, the petitioner submitted no evidence of any wages it has paid to 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 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).

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.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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* 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 typically⁵ 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 \$31,886.40 per year. The priority date is November 13, 2001.

During its 2001 fiscal year 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 net current assets of \$27,438. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,658. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$15,349. That amount is also insufficient to pay the annual amount of the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during its

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

2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 fiscal year 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 submitted no reliable evidence of any other funds at its disposal during its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

During its 2004 fiscal year 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 submitted no reliable evidence of any other funds at its disposal during its 2004 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on March 16, 2006. On that date the petitioner's 2005 tax return was unavailable.⁶ On April 14, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on May 11, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2005 tax return may still have been unavailable. For the purpose of today's 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 its 2001, 2002, 2003, and 2004 fiscal years. 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.

⁶ Based on its previous tax returns one would expect that the petitioner declared taxes pursuant to a 2005 fiscal year that ran from April 1 2005 to March 31, 2006 and to report taxes on a Form 1120, U.S. Corporation Income Tax Return. Pursuant to the instructions to the Form 1120, that return would have been due, absent extension, on the fifteenth day of the third month after the close of that fiscal year, or June 15, 2006.