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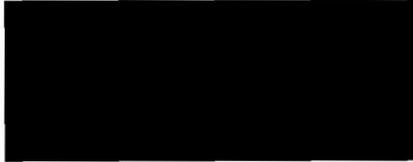
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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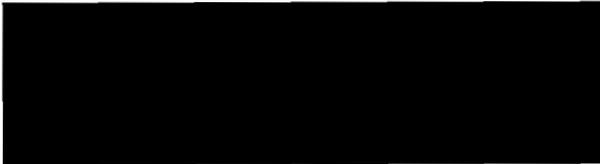
FILE: [REDACTED]  
SRC 06 154 52327

Office: TEXAS SERVICE CENTER Date: NOV 15 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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant 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.

8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13 per hour, which equals \$27,040 per year.

The Form I-140 petition in this matter was submitted on April 6, 2005. On the petition, the petitioner stated that it was established during 1999 and that it employs "300+" workers. The petition states that the

petitioner's gross annual income is \$23,200,000 and that its net annual income is a loss of \$2,800,000. On the Form ETA 750, Part B, signed by the beneficiary on April 29, 2001, the beneficiary claimed to have worked for the petitioner in Quincy, Massachusetts since May of 2000. The Form I-140 petition states that the petitioner would employ the beneficiary in Peabody, Massachusetts and the Form ETA 750 indicates that the petitioner would employ the beneficiary in Quincy, Massachusetts.

**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. In the instant case the record contains (1) the petitioner's<sup>1</sup> 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's financial statements showing its performance during 1999, 2000, 2003, and 2004, and (3) 2002, 2003, 2004, and 2005 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years. 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 returns show that it is a corporation, that it incorporated on February 11, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner had gross receipts of \$29,308,637. It declared a loss of \$580,673 as its Line 23 Income.<sup>2</sup> The corresponding Schedule L shows that at the end of that year petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner had gross receipts of \$25,639,980. It declared a loss of \$1,467,468 as its Line 23 Income. The corresponding Schedule L shows that at the end of that year petitioner's current liabilities exceeded its current assets.

The financial statements covering 1999<sup>3</sup> show a loss of \$1,850,837 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner reported net cash used in operating activities of \$522,143. The petitioner reported net sales of 7,771,095 and loss from operations of \$1,714,008.

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<sup>1</sup> Although the petitioner is described variously on documents in the record as \_\_\_\_\_ and \_\_\_\_\_ Inc. the same Taxpayer ID number, 04-2454751, is shown on all documents, indicating that they are the same entity.

<sup>2</sup> The Line 23, Income of a taxpayer reporting on Form 1120S is the total of its various types of income and loss, including ordinary income, capital gain, interest income, *et cetera*.

<sup>3</sup> More precisely, those financial statements report results and end-of-period assets for the period that began with the petitioner's incorporation on February 12, 1999 and ended January 2, 2000.

The financial statements covering 2000 show a loss of \$3,153,563 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner reported net cash provided by operating activities of \$801,109. The petitioner reported net sales of \$25,289,016 and loss from operations of \$4,328,927.

The financial statements covering 2003<sup>4</sup> show a loss of \$3,153,563 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner reported net sales of \$22,767,588 and loss from operations of \$1,872,828.

The financial statements covering 2004<sup>5</sup> show a loss of \$2,814,744 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner reported net sales of \$23,281,823 and loss from operations of \$1,222,193.

The W-2 forms in the record show that the petitioner paid the beneficiary \$34,031.76, \$33,520.69, \$35,593.31, and \$31,442.41 during 2002, 2003, 2004, and 2005, respectively.<sup>6</sup>

The director found that, although the W-2 forms submitted show that the petitioner was able to pay the proffered wage during 2002, 2003, 2004, and 2005, no evidence in the record demonstrates that the petitioner was able to pay the proffered wage during 2001. The director denied the petition on that basis on August 9, 2006.

On appeal, counsel asserted that the decision of denial clearly conflicts with CIS policy expressed in a May 4, 2004 memorandum issued by the William R. Yates, Associate Director for Operations of Citizenship and Immigration Services (CIS), in that the memorandum mandates approval of the petition because the petitioner is currently paying the beneficiary the proffered wage. Counsel also noted that, pursuant to 8 C.F.R. § 204.5(g)(2), the director might have approved the petition on the strength of the petitioner's employment of 100 or more employees.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

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<sup>4</sup> More precisely, those financial statements report results and end-of-year assets for the year ended December 28, 2003.

<sup>5</sup> More precisely, those financial statements report results and end-of-year assets for the year ended January 2, 2005. The reason for the irregular reporting periods during 2003 and 2004 is unknown to this office.

<sup>6</sup> The record contains another 2005 W-2 form showing wages paid to the beneficiary by another entity, apparently unrelated to the petitioner. That second W-2 form is therefore believed to be irrelevant to the determination of the instant petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage *beginning on the priority date*. If CIS and the AAO were to interpret and apply the memorandum as counsel urges, then in this particular factual context, an interoffice guidance memorandum would usurp the clear language in the regulation without binding legal effect. The memorandum, by its own terms, was not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance.

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 established that it paid the beneficiary \$34,031.76, \$35,593.31, and \$31,442.41 during 2002, 2003, 2004, and 2005, respectively. Having actually paid the beneficiary an amount greater than the annual amount of each of those years, the petitioner has demonstrated that it was able to pay the proffered wage during those years. The remaining issue is whether the petitioner was able to pay the proffered wage during 2001.<sup>7</sup>

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).

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<sup>7</sup> The petition in this matter was submitted on April 6, 2006. On that date the petitioner's 2006 tax return and other perfected evidence pertinent to its performance during that year were unavailable. On May 12, 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 July 31, 2006, and the record is deemed to have closed on that date. On that date perfected evidence pertinent to 2006 remained 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 2006 and later years.

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 typically<sup>8</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 \$27,040 per year. The priority date is April 30, 2001. Having demonstrated its ability to pay the proffered wage during the other salient years, the remaining issue is the petitioner's ability to pay the proffered wage during 2001.

The 2001 tax return submitted shows that during that 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's tax returns are insufficient to show the petitioner's ability to pay the proffered wage pursuant to the typical analysis.

Counsel is correct that, pursuant to 8 C.F.R. § 204.5(g)(2), the director was able to find that the petitioner was able to pay the proffered wage based on its employment of 100 or more workers. When the director exercised

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<sup>8</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

discretion not to find ability to pay the proffered wage, notwithstanding that the petitioner claimed, on the Form I-140, to employ "300+" workers, the director should have stated the reason for this exercise of discretion contrary to the petitioner's interest. This office need not pursue that matter.

This office recognizes that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967) states that CIS should find ability to pay the proffered wage, notwithstanding losses or low profits during a given year, if the totality of circumstances indicates that the petitioner was able to pay the proffered wage.

In the instant case, the petitioner had gross receipts of almost \$30 million. Although it suffered a loss of \$580,673 during the same year, the volume of the petitioner's operations renders unlikely that the payment of the \$27,040 proffered wage during that year would have posed an insurmountable burden. This office finds, based on the totality of the factors in this case, that the petitioner was able to pay the proffered wage during 2001.

The record suggests an additional issue. In the May 12, 2006 request for evidence the director requested a copy of the 2001 W-2 form showing wages the petitioner paid to the beneficiary during that year. Counsel did not provide that W-2 form with his response and did not explain that omission. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition might conceivably have been denied on this additional basis.

The only material issue that this office perceives the 2001 W-2 forms might have been relevant to, however, is the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because the petitioner has demonstrated that ability otherwise, this office will not deny the petition based on the petitioner's failure to provide that requested evidence.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years and has overcome the sole basis for the decision of denial. Further, the record suggests no other issues that would preclude approval of the instant petition. The appeal will be sustained. The petition will be approved.

**ORDER:** The appeal is sustained. The petition is approved.