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

PUBLIC COPY

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FILE:

[REDACTED]
LIN 07 161 51193

Office: NEBRASKA SERVICE CENTER

Date: **MAY 12 2008**

IN RE:

Petitioner:
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:

[REDACTED]

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 employment based 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 Mexican 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

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. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on Part A of the ETA 750 is \$11.87 per hour, which amounts to \$24,689.60 per year. On Part B of the ETA 750, signed

by the beneficiary on May 4, 2007, who is a substitution for the originally sponsored beneficiary, the current beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, which was filed on May 7, 2007, the petitioner states that it was established on August 1, 2001, currently employs sixty workers, reports an annual gross income of \$3,316,529, and an annual net income of \$211,117.

In addition to copies of its bank statements from September 2001 to December 2006, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, 2004, and 2005. It provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2006. Except for the 2001 tax return which indicates that it covers the period from August 1, 2001 to December 31, 2001, the tax returns are filed based on a standard calendar year. The tax returns for 2001-2005 indicate that the petitioner was incorporated on August 28, 2000 and elected an S corporation status on August 1, 2001. The employer tax identification numbers are the same on all tax returns. The petitioner did not provide any explanation for the use of the Form 1120 for the 2006 tax year and Schedule L does not reflect any beginning of the year figures. The returns contained the following information:

	2001	2002	2003	2004	2005	2006
Net Income ¹	-\$126,379	-\$ 6,065	\$ 17,631	\$138,719	\$148,848	\$211,117
Current Assets	\$ 36,047	\$ 18,178	\$ 76,772	\$ 76,241	\$ 80,352	\$175,151
Current Liabilities	\$ 462,142	\$ 398,621	\$295,247	\$ 193,570	\$232,227	\$136,839
Net Current Assets	-\$ 426,095	-\$ 380,443	-\$218,475	-\$117,329	-\$151,875	\$ 38,312

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-

¹ For the purpose of this review and for 2006, the petitioner's net income is the figure reflected on line 28 of page one of the Form 1120; taxable income before net operating loss deduction and special deductions. For the remaining years of 2001 through 2005, it is noted that where an S Corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (2001-2003) and line 17e* (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income is found on line 23 of Schedule K of its tax returns for 2001, 2002, and 2003 and on line 17e of Schedule K for 2004 and 2005.

² According 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.

end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Following a review of the evidence submitted, the director denied the petition on August 16, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage, noting that although the petitioner's net income reflected sufficient amounts to cover the proffered wage in 2003-2006, the documentation failed to establish that the petitioner had the ability to pay the proffered wage in 2001 and 2002.

On appeal, the petitioner, through counsel, resubmits copies of bank statements previously submitted and additionally provides copies of bank statements from November 30, 2000 through December 2001 and maintains that these cash assets could have covered the proffered wage in addition to other fixed assets such as the building and restaurant equipment.

We do not find counsel's assertions to be persuasive. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is April 23, 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage because his employment was less than full-time or because his wages were less than the proffered wage is not relevant to this calculation. Actual amounts will be considered if they are supported by the documentation contained in the record. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. The record in this case does not indicate that the petitioner employed the beneficiary.

Counsel's reliance on the petitioner's bank statements does not overcome the evidence reflected on the petitioner's tax returns. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already

balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, with the exception of the period before August 1, 2001, when no tax return or audited financial statement was submitted that covered the priority date of April 23, 2001 or that showed that the petitioner was an operating entity at that date, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the corresponding tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record does not indicate that the petitioner has employed 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, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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.

(Original emphasis.) *Chi-Feng Chang* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. Total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets such as the petitioner's building or equipment, as suggested to be considered on appeal, 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, a 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.

In this matter, if the 2006 change of filing status as a C corporation and the omissions in Schedule L were adequately explained, either its reported net income of \$211,117 or its net current assets of \$38,312 would be sufficient to cover the proffered wage and demonstrate the petitioner's ability to pay the proffered wage. Because the earlier years of 2001-2003 do not demonstrate the ability to pay the certified wage, we will not remand on this issue. It is noted that the petitioner's net income of \$138,719 in 2004 and \$148,848 in 2005 demonstrate its ability to pay the proffered salary in each of those years.

However, the petitioner failed to demonstrate that either its net income of -\$126,379 or its -\$426,095 in net current assets could cover the payment of the proffered salary of \$24,689.60 in 2001, even considering the period covered by the 2001 tax return. The petitioner did not demonstrate its ability to pay the proposed wage offer in 2001. Moreover, it is noted that the petitioner failed to provide any financial information covering the priority date of April 23, 2001 as required by the regulation at 8 C.F.R. § 204.5(g)(2). 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 2002, neither the petitioner's net income of -\$6,065 nor its net current assets of -\$380,443 could cover the proffered salary. The petitioner did not establish its ability to pay the certified wage for this year.

Similarly, in 2003, neither the petitioner's net income of \$17,631 nor its net current assets of -\$218,475 could cover the certified wage of \$24,689.60, or demonstrate the ability to pay for this year.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

It is further noted that the current beneficiary bears the same family name as the two officers of the petitioning corporation. 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 Summart 374*, 00-INA-93 (BALCA May 15, 2000). It is that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.³

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.

³ It is additionally noted that CIS electronic records reflect that “Guapos Restaurant” has filed at least 32 I-140s in the last few years, including at least six in 2007. A couple of the beneficiaries sponsored by this entity also bear the same family name as the corporate officers in this case. If this entity is also the petitioner in this matter, then it is obliged to establish that it has the continuing ability to pay all the beneficiaries’ proffered wages as of their respective priority dates.