U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 23 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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, accompanies 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.

On appeal, the petitioner submits additional evidence.

Section 203(b)(3)(A)(i) of 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 27, 2001. The proffered salary as stated on the labor certification is $10 per hour or $20,800 per year.

With the petition, counsel failed to submit any evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. On January 16, 2003, the director issued an Intent to Deny and requested additional evidence. The director explained that since the petitioner has filed a total of six petitions, it must be able to establish that it can pay all of the salaries from their priority dates and continuing until each beneficiary obtains lawful permanent residence. The director specifically requested copies of the petitioner's 2001 tax documents, copies of Form W-2, Wage and Tax Statement, for 2001, and copies of the 2001 Form DE-6, Quarterly Wage and Withholding Report.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year July 1, 2001 through June 30, 2002, a copy of the petitioner's 2001 Form DE-6, Quarterly Wage and Withholding Report, and a copy of the beneficiary's 2002 Form 1099-MISC, Miscellaneous Income. The tax return reflected a taxable income before net operating loss deduction and

special deductions of $98,285 and net current assets of $233,437. The Form DE-6 does not show the beneficiary as having worked for the petitioner in 2001, and the beneficiary's 2002 Form 1099-MISC reflects wages earned as $20,800.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 13, 2003, denied the petition.

On appeal, counsel submits a copy of the petitioner's profit and loss statement for the period July through December 2002, Forms 941, Employer's Quarterly Federal Tax Returns, for the quarters ended June 30, 2002, September 30, 2002, and December 31, 2002, another copy of the petitioner's 2001 federal tax return, and copies of the petitioner's 1999 and 2000 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years July 1, 1999 through June 30, 2000 and July 1, 2000 through June 30, 2001. The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of $3,589 and net current assets of $120,220. The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of $65,725 and net current assets of $185,945. Counsel makes no statement is support of the evidence.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

A further means of determining the petitioner's ability to pay the proffered wage includes reviewing the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and

current liabilities.[1] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 1999 tax return reflects a taxable income before net operating loss deduction and special deductions of $3,589. Because the priority date of the petition is March 27, 2001, the petitioner's 1999 tax return for fiscal year July 1, 1999 through June 30, 2000 has no direct relevance to the petitioner's ability to pay the proffered wage and will not be considered as evidence of the petitioner's ability to pay the wage beginning on the priority date and continuing.

The 2000 tax return reflects a taxable income before net operating loss deduction and special deductions of $65,725 and net current assets of $185,945. The petitioner could pay the proffered wage from either its taxable income or its net current assets, and it could also pay the salaries of the other five beneficiaries petitioned for from its net current assets.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of $98,285 and net current assets of $233,437. The petitioner could pay the proffered wage from either its taxable income or its net current assets, and it could also pay the salaries of the other five beneficiaries petitioned for from its net current assets.

While the Forms 941, Employer's Quarterly Federal Tax Returns, do not show the beneficiary as having worked for the petitioner in 2002, the petitioner has provided a copy of the beneficiary's 2002 Form 1099-MISC, Miscellaneous Income, showing the beneficiary earned $20,800 during that year. The director could have requested additional documentation explaining this discrepancy, but chose not to in the instant case. Therefore, it must not be assumed that the beneficiary did not work for the petitioner based solely on the Forms 941.

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.

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[1] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.