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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN-02-256-51294 Office: NEBRASKA SERVICE CENTER Date: DEC 29 2004

IN RE: Petitioner: [redacted]
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:

[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

DISCUSSION: The preference 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 a brief.

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 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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 11, 2000. The proffered wage as stated on the Form ETA 750 is $14.89 per hour, which amounts to $30,971.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on November 1, 1998, to have a gross annual income of $400,000, and to currently employ three workers. In support of the petition, the petitioner submitted the first page of its Forms 1120S, U.S. Income Tax Returns for an S Corporation for "Koong's Enterprises, Inc.," an entity with the same address and employer identification number as the petitioner, for 2000 and 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 4, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also sought evidence concerning the petitioner's payment of wages to its employees.

In response, the petitioner submitted the first pages of its Forms 1120S, U.S. Income Tax Returns for an S Corporation for the years 1998 through 2001[1]. The petitioner's tax returns submitted initially reflect the following information for the following relevant years:

	2000	2001
Net income[2]	$19,120	$25,932
Current Assets[3]	$n/a	$n/a
Current Liabilities	$n/a	$n/a
Net current liabilities	$n/a	$n/a

In addition, the petitioner submitted copies of its internally generated payroll records that do not reflect any wages paid to the beneficiary.

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 April 29, 2003, denied the petition.

On appeal, counsel asserts that the director failed to consider the petitioner's cash assets, and for 2000, could add the petitioner's end of year current assets to its net income as an amount that would cover the proffered wage. The petitioner submits complete copies of the petitioner's corporate tax returns for 2000, 2001, and 2002. The petitioner's complete tax returns submitted on appeal reflect the following information:

	2000	2001	2002
Net income[4]	$19,120	$25,932	$11,031
Current Assets	$27,962	$46,923	$51,005
Current Liabilities	$14,391	$7,695	$6,908
Net current assets	$13,571	$39,228	$44,097

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000, 2001, or 2002.

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 reflected on the petitioner's

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[1] The petitioner's financial situation in 1998, and 1999, which precedes the priority date in 2000, is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

[3] Schedule L of the petitioner's tax returns was not submitted either initially or in response to the director's request for evidence. Thus, no information was provided concerning the petitioner's current assets, current liabilities, or net current assets/liabilities.

[4] Ordinary income (loss) from trade or business activities as reported on Line 21.

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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income of $19,120, $25,932, and $11,031 in 2000, 2001, and 2002, respectively, are all amounts less than the proffered wage of $30,971.20 and thus do not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date out of its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets 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, the 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. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets during 2000, however, were only $13,571, which is less than the proffered wage of $30,971.20. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage beginning on the priority date for the year 2000 out of its net current assets. The petitioner's net current assets during 2001 and 2002, however, were $39,228 and $44,097, respectively, which are both greater than the proffered wage of $30,971.20. Thus, the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date for the years 2001 and 2002 out of its net current assets.

The AAO rejects counsel's argument that the director failed to consider the petitioner's cash assets since the petition failed to submit its complete tax returns containing such information until these appellate proceedings.

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[5] 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.

The AAO also rejects counsel's argument that the petitioner's net current assets can be added to its net income in 2000 or any other year in order to have sufficient funds to pay the proffered wage as it double-counts the petitioner's income contrary to the utilization of either a cash-basis or accrual-basis of general accounting principles. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time used to compose the final summary presented on the income statement's net income figure. Thus, to add the figures together essentially double counts money and distorts the true picture of the petitioner's financial standing.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of only $19,120 and net current assets of only $13,571 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001 and 2002, the petitioner shows net incomes of only $25,932 and $11,031, respectively, but net current assets of $39,228 and $44,097, respectively, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and 2002.

Despite the petitioner's demonstration of its ability to pay the proffered wage in 2001 and 2002 out of its net current assets, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2000. 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 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.