U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-058-53872 Office: CALIFORNIA SERVICE CENTER Date:

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, 8 Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is A French bakery. It seeks to employ the beneficiary permanently in the United States as a bakery manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date 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). The petition's priority date in this instance is October 22, 1996. The beneficiary's salary as stated on the labor certification is $13.25 per hour or $27,560 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated March 5, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner's federal income tax returns for the period October 1996 to the present and evidence of wage payments to the beneficiary, if any.

In response to the RFE, counsel submitted 1996 through 2000 Form 1120-A, U.S. Corporation Short-Form Income Tax Return for FGA Corporation, Saint Honore Bakery (the petitioner's name) for address locations in Redondo Beach and Palos Verdes, California. The street address of the return for the Palos Verdes, California address varies slightly from the petitioner's address as indicated on the visa petition and underlying labor certification application.

The tax return for 1996 reflected a taxable income before net operating loss deduction and special deductions of $31,115. Schedule L of the return reflected net current assets of -$98,494. The tax return for 1997 reflected a taxable income before net operating loss deduction and special deductions of -$18,354. Schedule L of the return reflected net current assets of -$59,687. The tax return for 1998 reflected a taxable income before net operating loss deduction and special deductions of -$30,342. Schedule L of the return reflected net current assets of -$63,338.

The tax return for 1999 reflected a taxable income before net operating loss deduction and special deductions of $25,003. Schedule L of the return reflected net current assets of -$27,812. The tax return for 2000 reflected a taxable income before net operating loss deduction and special deductions of $10,764. Schedule L of the return reflected net current assets of $18,275.

The petitioner also submitted W-2 forms and quarterly states compensation reports illustrating the petitioner has not employed and paid the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that he is submitting the petitioner's 2000 and 2001 federal tax forms to demonstrate that it has the ability to pay the proffered wage. Counsel further states that by hiring the beneficiary the petitioner's business will increase making it easier to pay the proffered wage. Counsel submits 2000 and 2001 Form 1120S U.S. Income Tax Return for an S Corporation for [redacted]n Redondo Beach, California. La Caffita's employer identification number (EIN) differs from the EIN on the returns previously submitted on the petitioner's behalf. No explanation or supporting documentation has been provided to explain the relationship of La Caffita, Inc. and the petitioner, or the rationale behind the evidentiary submission. La Caffita's tax return for 2000 reflected ordinary income of -$3,277. Schedule L of the return reflected net current assets of $6,725.

La Caffita's tax return for 2001 reflected ordinary income of $32,004. Schedule L of the return reflected net current assets of $6,325.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance, no details or documentation has been provided to explain how the beneficiary's employment as a manager will significantly increase profits for the bakery. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings.

In determining the petitioner's ability to pay the proffered wage, 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 previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO 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.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 tax records reflect that the petitioner had taxable income of $31,115 and net current assets of -$98,494 during 1996; taxable income of -$18,254 and net current assets of -$59,687 during 1997; taxable income of -$30,342 and net current assets of -$63,338 during 1998; taxable income of $25,003 and net current assets of -$27,812 during 1999; and a taxable income of $10,764 and net current assets of $18,275 using Form 1120-A in 2000. While the evidence is not dispositive tha[redacted]s tax return may be used as evidence of the petitioner's ability to pay the proffered wage in this case, even assessing them as part of the analysis does not provide a favorable result for the petitioner. La Caffita, Inc. had ordinary income of -$3,227 using Form 1120S in 2000 and $32,004 during 2001. Thus, the petitioner could not pay the proffered wage during 1997, 1999, and 2000 since its taxable income and net current assets were lower than the proffered wage for those years.

After a review of the evidence it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

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[1] 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.