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

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: WAC 02 190 50381 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

**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 dismissed.

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

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 from 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 March 16, 2001. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In requests for evidence (RFE) dated August 13 and November 21, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFEs exacted, for 2000, for 2001, and to the present, the petitioner's federal income tax return, annual report, or audited financial statement. Upon a review of the entire record, AAO cannot ascertain the relevance of documentation for 2000 and will not consider it.

In response, the petitioner submitted the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. It reported an ordinary loss from trade or business activities of ($71,850), less than the proffered wage. Schedule L stated current assets of $76,925, minus current liabilities of $1,578,870, or a deficit of net current assets of ($1,501,945), less than the proffered wage. *See* further discussion, *infra*.

The petitioner, moreover, provided its quarterly wage and withholding reports (Form DE-6) for the fourth quarter of 2000 and all quarters of 2001. Counsel did not analyze them, but a thorough review reveals that the 2001 Forms DE-6 reported that the petitioner paid the beneficiary $10,378.50, less than the proffered wage.

The director stated, but did not define, "negative cash assets" as ($78,249) and considered the ordinary loss of ($71,850). The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

In response to the denial, counsel submits Forms DE-6 for 2002. Counsel does not analyze them, but a thorough review reveals that the 2002 Forms DE-6 report that the petitioner paid the beneficiary $13,892.26, less than the proffered wage. Counsel offers the 2001 Form 1065 again on appeal, but no other new documentation.

Counsel, nonetheless, states on appeal:

> The petitioner is enclosing proof to show that they make enough income.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will first examine whether the petitioner employed the beneficiary at or after the priority date. If documentary evidence supports the employment of the beneficiary at a salary equal to, or greater than, the proffered wage, such evidence is *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner established payment of salary or wages to the beneficiary of $10,378.50 in 2001 and $13,892.26, each less than the proffered wage.

In the alternative, AAO will consider wages that the petitioner paid to the beneficiary plus the petitioner's net income, 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). [redacted] 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.

The wages paid to the beneficiary, minus the petitioner's ordinary losses, in 2001 and 2002, are negative amounts and, necessarily, less the proffered wage. Consequently, AAO will review the petitioner's net current assets, viz., the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the Form 1065, or on balance sheets. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period. In this instance, net current assets in 2001 were a deficit of ($1,501,945), less than the proffered wage. Net current assets could not, therefore, demonstrate the ability to pay the proffered wage at the critical priority date.

Counsel, consequently, has not adduced the claimed proof that the petitioner makes enough income. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm.

1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

After a review of the federal tax returns and Forms DE-6 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.