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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 09 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 Michael Valdez

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese food specialty 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 states that adding the petitioner's depreciation expenses to its net income results in figures which establish the petitioner's ability to pay the proffered wage during the relevant period.

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.

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 either 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 demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is August 13, 2001. The proffered wage as stated on the Form ETA 750 is $12.00 per hour, which amounts to $24,960.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 2000.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of $4,845,851.00, and to currently have 100 employees.

In support of the petition and in response to two requests for evidence (RFE's) issued by the director, the petitioner submitted the following documents: copies of the petitioner's Form 1065 U.S. returns of partnership income for 2000 and 2001; a copy of the petitioner's Form 568 California Limited Liability Company Return of Income for 2001; a copy of a decision of the AAO dated January 17, 2002 in an unrelated case; a letter dated August 19, 2003 from an owner of the petitioner confirming the beneficiary's employment as a Japanese food cook from January 2000 until the date of the letter; a sworn declaration of the beneficiary

dated October 1, 2003 describing his work experience with the petitioner; copies of statements issued by California Bank & Trust, Los Angeles, California, for three accounts of the beneficiary, with account number ending in the numbers 44-12 for the months of January 2000 through June 2001, with account number ending in the numbers 17-09 for the months of July 2001 through August 2003, and with account number ending in the numbers 49-46 for the months of April 2002 through July 2003; an undated letter from a former employer of the beneficiary in Japan confirming the beneficiary's experience as a Japanese food cook from April 1991 to June 1996; a sworn declaration of the beneficiary dated June 13, 2003 describing his work experience as a Japanese food cook with a restaurant in Thousand Oaks, California, from September 1997 until December 1999; copies of business licenses of the petitioner issued by the Los Angeles County government, the California State Board of Equalization, and the California Department of Alcoholic Beverage Control; a copy of the petitioner's Form 8800 Application for Additional Extension of Time to File U.S. Return for a Partnership, REMIC, or for Certain Trusts for the petitioner's tax year beginning October 1, 2001; copies of the summary page of the petitioner's Form DE6 quarterly wage and withholding reports for the last two quarters of 2001 and the first two quarters of 2002; copies of several pages of the beneficiary's Japanese passport; printouts of several pages from the petitioner's Internet web site; copies of two of the petitioner's menus; copies of statements issued by [redacted] Portland, Oregon, for two accounts of the petitioner, with account number ending in the numbers 884 for January 2001 through April 2003, and with account number ending in the numbers 728 for January 2001 through December 2001, and May 2002 through April 2003; and copies of the petitioner's complete Form DE 6 quarterly wage and withholding reports for the last three quarters of 2002 and the first quarter of 2003.

In a decision dated November 22, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and evidence. All of the evidentiary documents submitted on appeal, however, are duplicate copies of documents submitted prior to the director's decision.

Counsel states on appeal that adding the petitioner's depreciation expenses to its net income produces figures which establish the petitioner's ability to pay the proffered wage during the relevant period. Counsel also asserts that the AAO decision in case number EAC 00-194-52073, a copy of which is in the record, allows depreciation to be added to the petitioner's net income when evaluating the petitioner's ability to pay the proffered wage. Counsel states that that the AAO decision in EAC 00-194-52073 is a published decision which is therefore binding of CIS.

Since no new evidence is submitted on appeal, AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

As noted above, the I-140 petition states in Part 5 that the petitioner was formed in 1998 and has 100 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted above, states that where a petitioner 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. Although the petitioner was permitted by this regulation to submit a statement from one of its financial officers in order to establish the petitioner's ability to pay the proffered wage, the petitioner did not do so. Counsel instead submitted extensive financial documentation on the petitioner.

Absent any statement from a financial officer of the petitioner, 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 instant case, the beneficiary claimed to have begun working for the petitioner as of January 2000.

In an RFE dated July 30, 2003 the director specifically requested copies of the beneficiary's W-2 wage and tax statements for 2001, which is the year of the priority date, and for 2002. Nonetheless, the petitioner submitted no W-2 forms for the beneficiary. In a letter dated October 2, 2003 in response to that RFE, counsel states that the beneficiary was paid in cash and for that reason was issued no W-2 forms. The petitioner submitted copies of bank statements for three accounts of the beneficiary, with at least one statement for each of the months from January 2000 through July 2003. Nonetheless, the bank statements do not indicate the source of the funds shown as deposits to those accounts. Therefore the bank statements fail to establish that the beneficiary was employed by the petitioner during the relevant period. The petitioner also submitted copies of its quarterly wage and withholding reports for the last three quarters of 2002 and the first quarter of 2003. But the beneficiary's name does not appear on any of those reports as an employee of the petitioner.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as a partnership. For a partnership, CIS considers net income to be the figure shown on line 22, ordinary income, of the Form 1065 U.S. Return of Partnership Income. The petitioner's tax returns state that its tax year runs from October 1 until September 30 of the following calendar year. The petitioner's tax returns show the following amounts for ordinary income: -$9,595.00 for 2000 (10/1/00 to 9/30/01); and -$56,857.00 for 2001 (10/1/01 to 9/30/02). Since each of those figures is negative, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As noted above, counsel asserts that the AAO decision in case number EAC 00-194-52073 allows depreciation to be added to the petitioner's net income when evaluating the petitioner's ability to pay the proffered wage. Counsel states that that the AAO decision in EAC 00-194-52073 is a published decision which is therefore binding on CIS. Counsel does not provide a published citation for that case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nothing in the decision in EAC 00-194-52073 indicates that it has been designated as a precedent case. The analysis in that case appears to be inconsistent with current CIS policy, though the record in that case may have contained evidentiary documents which justified considering depreciation expenses in that case. Moreover, even if the analysis was incorrect, the evidence in that case may nonetheless have supported the same result of approving the petition. In any event, under current CIS policy,

depreciation expenses are not added to a petitioner's net income when considering the petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

As an alternative to an analysis of the petitioner's net income in determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate or partnership taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a partnership's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$154,354.00 for the beginning of its 2000 tax year (10/1/00); -$80,992.00 for the end of its 2000 tax year (9/30/01); and -$20,739.00 for the end of its 2001 tax year (9/30/02). Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements for accounts of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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 paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	Acct. #. . . 728	Acct. #. . . 884	Total
2001:			
January	$37,032.72	$55,565.83	$92,598.55
February	$24,048.27	$45,630.07	$69,678.54
March	$20,513.21	$38,372.59	$58,885.80
April	$40,619.10	$40,522.05	$81,141.15
May	$43,003.76	$47,861.88	$90,865.64
June	$32,442.08	$10,536.93	$42,979.01
July	$62,709.50	$19,355.19	$82,064.69
August	$23,626.82	$60,235.15	$83,861.97
September	$14,308.09	$13,699.66	$28,007.74
October	$9,794.31	$26,680.39	$36,474.70
November	-$171.92	$10,328.84	$10,156.92
December	$19,867.32	$22,776.76	$42,644.08

	Acct. # . . . 728	Acct. # . . . 884	Total
2002			
January	no statement	-$964.36	-$964.36
February	no statement	$33,384.00	$33,384.00
March	no statement	$15,449.13	$15,449.13
April	no statement	$0.01	$0.01
May	no statement	$19,446.01	$19,446.01
June	$37,383.89	$19,702.49	$57,086.58
July	$71,129.68	$4,677.43	$75,807.11
August	$15,631.49	$1,079.97	$16,711.46
September	$16,133.82	-$8,736.34	$7,397.48
October	$26,415.17	$285.24	$26,700.41
November	$39,476.82	$9,896.68	$49,373.50
December	$34,625.42	$25,248.53	$59,873.95
2003			
January	$25,852.92	-$23,471.05	$2,381.87
February	-$2,275.88	$73.85	-$2,202.03
March	$16,117.48	$354.04	$16,471.52
April	$22,781.27	$276.47	$23,057.74

The monthly total ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Although in about half of the months listed above the total ending balances were greater than one year's proffered wage, for the other months the total ending balances were less than the annual proffered wage or were even negative. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a petitioner's net current assets. For the foregoing reasons, the petitioner's bank statements fail 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.

In his decision, the director correctly analyzed the petitioner's net income as shown on its tax returns, and found that it failed 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 director failed to consider the petitioner's net current assets, but that error did not affect the outcome of the director's decision, since, as shown above, the figures for the petitioner's net current assets also fail to establish the petitioner's ability to pay the proffered wage during the relevant period. The director also considered the petitioner's bank statements, but the director failed to note that statements from two separate accounts were submitted in evidence. The director's analysis of the bank statement evidence was therefore incomplete. Nonetheless, this error also did not affect the outcome of the director's decision, since the petitioner's bank statements in the records, analyzed in full above, also fail to establish the petitioner's ability to pay the proffered wage during the relevant period. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits no new evidence. The assertions of counsel in his brief, principally arguing that depreciation expenses should be added to the petitioner's net income for purposes of analysis of the petitioner's ability to pay the proffered wage, have been discussed above. Those assertions fail to overcome the decision of the director.

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.