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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 139 53864 Office: VERMONT SERVICE CENTER Date: OCT 07 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

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DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 an American food 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 additional evidence and asserts that the petitioner has established its continuing financial ability to pay the proffered wage.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 April 18, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which amounts to $24,689 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since January 2000.

On Part 5 of the petition, filed March 14, 2002, the petitioner claims to have been established in 1992, to have a gross annual income of 1.3 million dollars, and to currently employ twenty-three workers. In support of its ability to pay the proffered salary, the petitioner initially submitted a partial copy of a Form 1065, U.S. Return of Partnership Income for the year 2000.[1] The entity named as the filer is not the petitioner, but rather "Muggs

[1] The tax return lacks most of the referenced attachments.

LLC." The address is the same as that given for the petitioner on the Immigrant Petition for Alien Worker (I-140). The employer identification number is the same as the hand-lettered employer identification number appearing on the I-40. The date identified as the date that the business started is "1997," rather than 1992 as stated on the visa petition. The tax return shows that [redacted] reported no gross receipts or sales in 2000, but declared -$1,420 as ordinary income (loss) from other partnerships, estates, and trusts, $272,732 in salaries and wages, and -$1,420 in ordinary income (loss) from trade or business activities. Schedule L of this tax return shows that Muggs LLC had $1,457 in current assets and no liabilities, resulting in $1,457 in net current assets. Besides net income, CIS will consider a petitioner's net current assets as an alternative method of demonstrating a petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] If a petitioner's end-of-year net current assets are equal to or greater than the proffered wage, a petitioner is expected to be able to pay the proffered wage out of those net current assets.

It is noted that Schedule K, Partner's Share of Income, Credits, Deductions, etc., of the Muggs LLC 2000 tax returns appears to come from a completely separate partnership tax return of another entity called [redacted] It names [redacted] a 50% partner and contains financial information that appears to have no relationship to page 1 of the [redacted] partnership tax return. The tax identification number of this partnership is different than that given for [redacted] or the I-140 petitioner. The petitioner also submitted a copy of the beneficiary's 2001 individual tax return, along with a general ledger document showing that the beneficiary was paid $22,400 by an entity with the same tax identification number as Muggs LLC or the I-140 petitioner, and $9000 by the Tap-K's LLC.

On May 16, 2002, the director requested additional evidence pertinent to the petitioner's continuing financial ability to pay the beneficiary's proposed wage offer. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director specifically requested the petitioner to provide an explanation of the relationship between the petitioner and [redacted] The director also requested the petitioner to provide a copy of its 2001 federal income tax return with all schedules and attachments or in the alternative, a copy of the petitioner's 2001 annual report accompanied by audited or reviewed financial statements. The director also specifically requested a copy of the beneficiary's 2001 Wage and Tax Statement (W-2) if the petitioner employed the beneficiary during that period.

In response, the petitioner, through counsel, advised the director by letter dated July 12, 2002, that the petitioner's taxes/reports for 2001 would not be completed until September 2002. Counsel advised that an Internal Revenue Service (IRS) extension to file the 2001 return had been filed, and that when the return was completed, a copy would be forwarded to the director.

The director denied the petition on June 12, 2003. He 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. The

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[2] 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.

director noted that the petitioner had failed to provide any of the documents that had been requested in May 2002, as well as an explanation of the relationship between the I-140 petitioner and Muggs LLC.

On appeal, counsel submits another copy of the beneficiary's 2001 individual tax return with the accompanying general ledger sheet showing compensation received as noted above. Counsel does not submit a copy of the beneficiary's W-2 for 2001, but provides a copy of a 2000 W-2 issued by [redacted] showing that it paid the beneficiary $18,348.75 in 2000. Counsel provides no further federal income tax returns from either the petitioner or [redacted] but submits a document signed by [redacted] President. It simply states that [redacted] is the corporation which owns and operates [redacted]

At the outset, counsel's assertion that the relationship of [redacted] has been established by Mr. Kennedy's bare assertion, submitted on appeal, is not persuasive, especially given the incomplete financial information previously submitted to the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, with regard to the evidence relating to the relationship of the petitioner and Muggs LLC, as well as the failure of the petitioner to provide its 2001 federal income tax return or other comparable evidence, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 may have 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. To the extent that a petitioner may have employed a beneficiary at a salary less than the proffered wage, such payment will be considered as part of the evaluation of a petitioner's ability to pay the full wage offer.

If the petitioner does not establish that it may have 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 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 evidence fails to sufficiently establish that the petitioner and Muggs LLC should be considered as the same entity. Even if this had been shown, the only financial evidence submitted relating to an employer's status has been a copy of Muggs LLC's 2000 tax return. In a comparison with the beneficiary's 2000 W-2 provided on appeal, it reveals that Muggs LLC paid the beneficiary $6,340.25 less than the proffered wage. This shortfall could not be paid out of either the 2000 net current assets of $1,457, or Muggs LLC's net income of -$1,420.

With reference to 2001, which is the period most relevant to the priority date, the only evidence of salary paid to the beneficiary is a general ledger sheet reflecting some type of compensation in the sum of $22,400, paid in 2001, by the entity that is claimed to own the petitioner. This is $2,289.60 less than the proffered wage of $24,689.60. The petitioner has provided no other financial information to show that this difference could be covered by its net income or its net current assets pertinent to that period. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish a *continuing* ability to pay the proffered wage beginning at the priority date. In this case, the petitioner failed to submit persuasive evidence showing that it had continuing ability to pay the full proffered wage beginning at the priority date of April 18, 2001.

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.