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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 24 2004

IN RE: Petitioner: [redacted]
Beneficiary

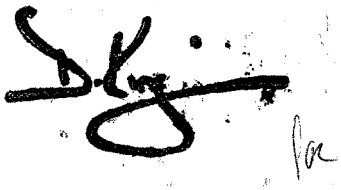
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 floor manager. 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 granting 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 September 27, 2000. The proffered wage as stated on the Form ETA 750 is $9.04 per hour, which equals $18,803.20 per year.

On the petition, the petitioner stated that it was established on February 1, 1998 and that it employs 14 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner in the proffered position since March 1998.

Subsequently, in a letter dated November 22, 2000, sent to the Employment Development Department of the California Alien Labor Certification Office in Sacramento, and signed by the beneficiary, the beneficiary's employment history was amended to include two prior employers.

In support of the petition, counsel submitted the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of $1,421 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 27, 2001, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested a copy of the petitioner's 2000 tax return. The Service Center also requested copies of the beneficiary's 2000 and 2001 tax returns, including Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary during those years, and the petitioner's three most recent pay stubs.

In response, counsel submitted IRS printouts of information from the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return, copies of the beneficiary's 2000 and 2001 Form 1040 individual tax returns including copies W-2 forms. The 2000 W-2 form shows that the petitioner paid the beneficiary $6,141.09 during that year. The 2001 W-2 form shows that the petitioner paid the beneficiary $6,796.28 during that year. The petitioner's end-of-year net current assets cannot be determined from the information on that printout. The petitioner did not provide a copy of its actual return, from which that information might have been extracted. The petitioner did not provide the requested pay stubs.

The IRS printout of the petitioner's 2000 tax return shows that it declared a taxable income before net operating loss deduction and special deductions of $0 during that year.

On October 22, 2002, the California Service Center requested copies of the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the previous four quarters. The petitioner submitted those reports for all four quarters of 2001 and the first, second, and third quarters of 2002. The reports show that the petitioner paid the beneficiary $2,674.93, $2,168.13, $2,534.38, $2,093.77, $2,223.83, $2,347.32, and $2,683.73 during those quarters, respectively. Those reports also show that the petitioner employed between three and six employees during those quarters.

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 July 18, 2003, denied the petition.

On appeal, counsel submits a brief in which he argues that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also provides additional copies of the tax documents previously submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed and paid the beneficiary $6,141.09 during 2000 and $6,796.28 during 2001.

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, the AAO will, in addition, examine the net income figure reflected on the

petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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*, the court held that CIS, then the Immigration and Naturalization Service, 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, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537. See also *Elatos*, 632 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. Citizenship and Immigration Services will consider the petitioner's net current assets (current assets less current liabilities) in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $18,803.20 per year. The priority date is September 27, 2000.

During 2000, the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net income. The petitioner ended that year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared no taxable income before net operating loss deduction and special deductions. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. The petitioner provided no evidence from which its net current assets could be computed. The petitioner has not, therefore, demonstrated that its net current assets were sufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.