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FILE: LIN-03-208-50021 Office: NEBRASKA SERVICE CENTER Date: **AUG 22 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

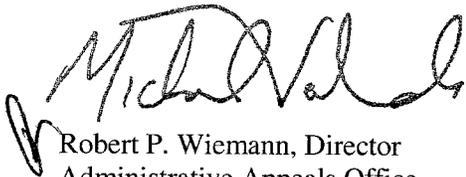
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a pastry cook/baker. 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 statement and additional evidence.

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.

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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on April 25, 1994 and to currently employ nine workers. In support of the petition, the petitioner submitted a copy of the first two pages of its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001 and 2002.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$2,594	\$22,196
Current Assets	\$N/A	\$N/A
Current Liabilities	\$N/A	\$N/A
Net current assets	\$N/A	\$N/A

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 14, 2003, the director requested additional evidence pertinent to that ability. The director requested additional evidence such as audited profit/loss statements, complete bank account records, and/or personnel records, as well as any evidence of wages actually paid to the beneficiary from the petitioner.

In response, the petitioner submitted a letter from Stanley S. Wolenczuk (Mr. Wolenczuk), "Auditor for [the petitioner]." Mr. Wolenczuk states that the petitioner's non-cash depreciation expense should be added back to accurately reflect the petitioner's cash flow from operations. In addition, the petitioner resubmitted the first page to its tax returns.

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 March 23, 2004, denied the petition. The director noted that the petitioner's net income in 2001 and 2002 was less than the proffered wage and nothing in the relevant statute or regulatory provisions requires the director to add the petitioner's depreciation expense back to its net income; that the petitioner had another immigrant petition approved in 2003 with a 2001 priority date; and that the petitioner failed to provide information about its assets.

On appeal, counsel relies upon another letter from Mr. Wolenczuk, which states, in pertinent part, the following:

Funds from operations are obtained by adding back noncash charges to net income. Since this concept is recognized by the Financial Accounting Standards Board as well as financial lending institutions to determine the operating capability of any enterprise, it would be only proper for [Citizenship and Immigration Services (CIS)] to give it the same consideration."

At the outset, the AAO notes that the petitioner was provided notice that it did not provide complete information and evidence pertaining to its current assets from the director's decision. The petitioner provided incomplete tax returns without schedules and attachments and still did not provide complete returns on appeal. Those schedules and attachments would have provided information concerning its net current assets, which will be further discussed below. Additionally, the AAO notes that the failure to provide anything but the first two pages to its S corporation tax return precludes the AAO from a thorough analysis of the petitioner's continuing ability to pay the proffered wage².

² For example, where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Since the petitioner omitted its Schedule K, the AAO cannot evaluate the petitioner's total income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

Contrary to Mr. Wolenczuk's assertions, 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, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In both years, the petitioner's net income is less than the proffered wage. The petitioner failed to provide evidence of its net current assets since it provided incomplete returns. Thus, the petitioner has not demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other

³ 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.

funds were available to pay the proffered wage⁴. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 2002.

Finally, since the petitioner has another immigrant petition already approved, with presumably a similar proffered wage, it must show that it could pay more than one proffered wage from 2001 onwards. Thus, any additional proceedings in this matter must address that issue.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. 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 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.

⁴ The sole shareholder of an S corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, the petitioner provided no evidence concerning its shareholders or that its officer(s) could forego compensation at any level since it provided incomplete tax returns.