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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC 03 080 51994 Office: VERMONT SERVICE CENTE Date: AUG 30 2005

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

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 Korean/Japanese restaurant. It seeks to employ the beneficiary[1] permanently in the United States as a specialty cook (Korean cuisine). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is $18.89 per hour ($39,291.20 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 2001, and, copies of documentation concerning the beneficiary's qualifications.

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[1] The beneficiary is a substituted beneficiary on the Alien Employment Certification.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of from the priority date.

- In 2001, the Form 1120S stated taxable income[2] of $37,515.00. The proffered wage as stated on the Form ETA 750 is $18.89 per hour ($39,291.20 per year).

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on October 22, 2003 requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

> The 2001 federal tax return you have submitted to establish your company's ability to pay the beneficiary the proffered wage indicates a taxable income of $37, 515. Schedule L does not reflect that current assets exceed current liabilities in an amount sufficient to pay the wage ....
>
> Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of $39,291 as of April 17, 2001, the date of filing and continuing to the present.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the petitioner's W-3 Transmittal of Wage and Tax Statements as well as its employees 2001 W-2 Wage and Tax Statements.

The director denied the petition on April 20, 2004 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date

On appeal, counsel asserts in pertinent part: that "non-cash expenses," "depreciation" and "amortization" are monies available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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.*

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[2] IRS Form 1120S, Line 28.

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. v. Sava*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage in 2001 for which petitioner's tax return is offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Return submitted by petitioner, Schedule L found in each of that return indicates the following.

- In 2001, petitioner's Form 1120S return stated current assets of $104,610.00 and $461,100.00 in current liabilities. Therefore, the petitioner had a <$356,490.00>[4] in net current assets for 2001. Since the proffered wage was $39,291.20 per year, this sum is less than the proffered wage.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through by considering "Depreciation," "Amortization"[5] as assets available to pay the proffered wage, petitioner's gross income and the amount of wages paid. Counsel cites no legal precedent for the additive calculation, and, according to regulation,[6] copies

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[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.

[4] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

[5] Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

[6] 8 C.F.R. § 204.5(g)(2).

of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg,* 719 F. Supp. 532 (N.D. Tex. 1989) noted:

> "Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537."

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation or amortization deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Also, counsel suggests that the amount of the gross earnings of the petitioner lends credence to the petitioner's ability to pay the proffered wage. As already stated above, in *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

Likewise, counsel points to the petitioner's payroll expense as indication of the ability to pay the proffered wage. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability the ability to pay the proffered wage.

Counsel's analysis cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.