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U.S. Citizenship
and Immigration
Services

[Handwritten signature]

[Redacted]

[Redacted]

FILE: [Redacted]
SRC 02 179 51708

Office: TEXAS SERVICE CENTER Date:

FEB 03 2005

IN RE: Petitioner:
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:

[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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Chinese food. 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 the petitioner's ability to pay the proffered wage should be measured on a monthly basis, not on a yearly basis, and, therefore, the end of the month balances in the petitioner's bank account demonstrate the petitioner's ability to pay the proffered wage. Counsel submits no new documentation.

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 August 30, 2001. The proffered wage as stated on the Form ETA 750 is a monthly salary of \$2,000, or an annual salary of \$24,000. 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 in March of 1999, and to have three employees. It did not indicate its gross or net annual income. In support of the petition, counsel submitted the petitioner's IRS Form 1120S for the year 2001, with accompanying schedules and statements. Counsel also

submitted documentation on the petitioner's building, articles of incorporation, and a menu from the petitioner's restaurant. Finally, counsel submitted Bank of America monthly bank statements for the petitioner from January 2001 to March 2002. With regard to the beneficiary's qualifications, counsel submitted a letter from the beneficiary's former employer in Zhuhai, China.

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 15, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide W-2 forms for each employee in 2001; copies of Form 941, Quarterly Tax report for each quarter in 2001; a copy of the petitioner's bank statements from April 2002 to the present, and any additional documents to establish the petitioner's ability to pay the proffered wage. IN response, counsel submitted W-2 forms for three employees for the year 2001, copies of Form 941, Employers' Quarterly Federal Tax Return, for March, June, September and December of 2001; and monthly bank statements from April 2002 to November 2002.

On March 5, 2003, the director denied the petition. Based on the petitioner's income tax return, he determined that the petitioner did not have the ability to pay the proffered wage. The director noted the ending balances on the petitioner's bank statements; however, he determined that the bank statements also did not establish that the beneficiary had the ability to pay the proffered wage. The director further examined the salaries paid to the petitioner's three employees in 2001, namely, \$12,190, \$16,500, and \$10,290. The director determined that no employees had been paid a salary comparable the proffered wage.

On appeal, counsel states that the regulations list bank account records as one of the acceptable documents to establish a petitioner's ability to pay a proffered wage. Counsel lists the ending balance of each month of the petitioner's bank account from August 2001 to November 2002. Counsel states that the ending balance of each month represents the petitioner's net monthly income after paying all the overheads and expenditures associated with the restaurant. Counsel also states that the monthly ending balance clearly exceeds the proffered monthly wage of \$2,000. Counsel asserts that this documentation demonstrate the petitioner's ability to pay the beneficiary the proffered wage of \$2,000 a month in any given month after the priority date of August 30, 2001. Counsel notes that in the ETA 750, Part A, and in real life practice, the beneficiary's wage is identified as \$2,000 a month. Counsel asserts that the annual salary of \$ 24,000 should not be used as an indicator to measure the petitioner's ability to pay the beneficiary the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, contrary to counsel's assertion, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. As previously stated, the regulations state that evidence of the petitioner's ability to pay the wage "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Although counsel states that the ending balance of each month represents the petitioner's net monthly income after paying all the overheads and expenditures associated with the restaurant, the AAO does

not agree with this statement. If anything, the balance in the petitioner's bank account at the end of a particular month would indicate some portion of the petitioner's annual net income up to that date. At the end of the year, the aggregate amount, if still in the form of cash, would appear on Schedule L of the petitioner's corporate tax return. Moreover, if each month's ending balance were truly that month's net income, then each new month's balance would have to begin at \$0. Since the beginning balance is the same amount as the previous month's ending balance, it is more likely that the difference between the starting and ending balance of any particular month would represent that month's net income (or loss). Considering that the ending balances for some months are less than the previous months' balances, which would signify a net *loss* in cash for that month, the petitioner's bank statements do not establish its continuing ability to pay the proffered wage from the priority date. Third, as mentioned above, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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 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 proffered wage in 2001 and onward.

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. Only the petitioner's 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: \$291. This figure fails to establish the ability of the petitioner to pay the proffered wage.

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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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's net current assets during the year 2001, however, were \$4,972. If the annual salary of \$24,000 paid to the beneficiary were added to this figure, \$19,028 would still be lacking from the petitioner's net current assets to pay the proffered wage of \$ 24,000.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a minimal net income, and net current assets of only \$4,972, and has not, therefore, 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 funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Although counsel raises an alternative method of analyzing whether the petitioner has the ability to pay the proffered wage, primarily examining whether the beneficiary has sufficient funds to pay the monthly salary of the beneficiary, the AAO does not find this analysis to accurately reflect the sustainable ability of the petitioner to pay the proffered wage. Therefore, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date in August 2001 and onward.

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.

¹ 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.