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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005

WAC 03 049 53460

IN RE: Petitioner:
Beneficiary: [redacted]

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

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

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 continuing to present.

On appeal, the petitioner submits a statement and additional documentation.

Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 23, 2001. The proffered salary as stated on the labor certification is $10 per hour or $20,800 per year.

With the petition, the petitioner, through counsel, submitted a copy of its 2000 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for fiscal year October 1, 2000 through September 30, 2001. The petitioner has been incorporated since December 5, 1983. The tax return reflected a taxable income before net operating loss deduction and special deductions of $1,390 and net current assets of $25,239. The director determined that the documentation submitted was insufficient to establish the petitioner's ability to pay the proffered wage. On March 11, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date to the present. The director specifically requested complete, signed copies of the petitioner's 2001 and subsequent federal income tax returns, and copies of the petitioner's Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California.

In response, counsel provided copies of the petitioner's 2000 and 2001 Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns for fiscal years October 1 through September 30, copies of Forms DE-6 for the quarters ended June 30, 2002 through March 31, 2003, and a letter from the president of the corporation. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of $1,913 and net current assets of $16,704. There is no evidence that the beneficiary worked for the petitioner from 2001 until the present. The letter from the president of the company states that he is the restaurant's Japanese cook, that his salary is approximately $67,500 per year, that the beneficiary will replace him as the Japanese cook, and that the company will reduce his salary to pay the beneficiary.

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 June 18, 2003, denied the petition.

On appeal, counsel submits a statement, a letter from the president of the petitioner, and a letter from the beneficiary. The president's letter states:

> My name is [redacted] and I am the President of Honda Enterprises, Inc. Our company owns and manages Honda Japanese Restaurant. I am also the Japanese food cook of the restaurant. I am 54 years old, and I have worked at the restaurant for about 20 years.
>
> I wish to have [redacted] replace me as the restaurant's Japanese cook so that I can retire and pursue other interests. For over 20 years, I have worked at the restaurant almost everyday. I do not wish to sell my restaurant since it is doing well and provides sufficient income for my family. Instead, when I retire, I wish to have [redacted] replace me as the restaurant's cook since I know him and trust his ability as a Japanese cook. It is very difficult to find a qualified Japanese cook.
>
> If [redacted] application is approved, and is given a work permit, our company will reduce my current salary (approximately $67,500 per year) since I will be retired, and pay [redacted] the prevailing wage of $20,800 per year. I wanted to retire and hire [redacted] right away in 2001, but I waited since he did not have a work permit then. I could have paid [redacted] his salary back in 2001 since at that time I was paid $67,500. Even after paying [redacted] his wage of $20,800, I would have taken home $46,700, an amount sufficient for our family.

The beneficiary's letter requests a reconsideration of the denial of the petition and states that he wants to provide his children with all the opportunities available to them in the United States.

Counsel states:

> The Immigrant Petition for Alien Worker (Form I-140), under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, as a skilled worker, was recently denied on June 18, 2003 by the Bureau of Citizenship & Immigration Service (Service) due to one reason. The denial notice states that the Employer failed to show the ability to pay the proffered wage to the Alien. The proffered wage is $20,800 per year.
>
> We believe that the documents submitted along with the explanation have shown that the Employer is able to pay the wage offered to the Alien. As explained previously, and through affidavits submitted with this appeal, the President of the Petitioning company is currently employed as the Japanese Food Cook, a position offered to the Alien. The President is currently paid an annual salary of approximately $67,500 and has been employed as the Japanese Food Cook for over 20 years. He plans to retire once the Alien is issued a work permit, and will reduce his current salary to pay the required wage to the Alien.
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> Please review the previously submitted documents as well as additional evidence submitted today. Thank you.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in fiscal years 2000 and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 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, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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 fiscal years in question, 2000 and 2001, were $25,239 and $16,704, respectively. The petitioner could have paid the proffered wage in fiscal year 2000 from its net current assets. The petitioner could not have paid the proffered wage from its net current assets in 2001 alone.

The petitioner's tax return for fiscal year 2000 reflected a taxable income before net operating loss deduction and special deductions of $1,390 and net current assets of $25,239. The petitioner could have paid the proffered wage from its net current assets in fiscal year 2000.

The petitioner's tax return for fiscal year 2001 reflected a taxable income before net operating loss deduction and special deductions of $1,913 and net current assets of $16,704. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in fiscal year 2001. However, as noted by both the president of the petitioner and counsel, the beneficiary will replace the president of the company when he obtains a work permit. In this case, the salary of the president (approximately $67,500 per year) would be reduced to facilitate paying the wage of the beneficiary. In the year in question (fiscal year 2001) the salary of the president would have only needed to be reduced by $4,096 ($20,800 proffered wage - $16,704 net current assets = $4,096 from president's salary). It is noted that the Forms DE-6, Quarterly Wage Reports, provided by the petitioner in response to the director's request for evidence, substantiate the petitioner's claim that the president of the company earns approximately $67,500 per year. For the quarters ended June 30, 2002 through March 31, 2003, the president of the company earned $64,687.50, an amount above that of the proffered wage of $20,800. In light of the petitioner's long and continuing business presence, it is more than believable that the

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[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.

petitioner could pay the proffered wage in fiscal year 2001. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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 met that burden.

ORDER: The appeal is sustained.