

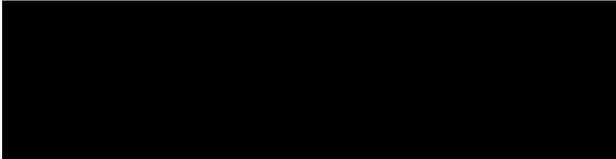
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U.S. Citizenship  
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 14 2005  
WAC 03 145 53146

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a Japanese Teppanyaki restaurant. It seeks to employ the beneficiary permanently in the United States as a Teppanyaki chef. 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 statement.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, 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(l)(3) provides:

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 C.F.R. § 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 \$2,002 per month, which amounts to \$24,024 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001; a letter from the petitioner that stated the beneficiary had worked for the petitioner from December 1999 to January 2001, as a Teppanyaki chef's helper, prior to his promotion to Teppanyaki chef; the beneficiary's W-2 Form for 2002 in the amount of \$4,400; and a Ventura County Fictitious Business Name Statement that stated the petitioner was doing business as Ken of Japan.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 10, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 and 2002 tax return with all forms, schedules and statements. The director also requested copies of the petitioner's Employment Development Department Form DE-6, Quarterly Wage and Withholding Report for all employees for the last four quarters, with names, social security numbers and number of weeks worked by all employees. The director also requested a list of job titles and responsibilities for all employees listed on the DE-6 Forms. The director also requested the beneficiary's W-2 Forms from 1999 to 2002; the petitioner's current business licenses, verification of the beneficiary's address, the petitioner's business name. Finally the director requested verification that the beneficiary, a native of Indonesia, was registered in the NSEERS program.

In response, the petitioner verified the beneficiary's current address, and his compliance with the NSEERS registration. The petitioner also resubmitted evidence with regard to the petitioner's fictitious business name, and submitted for the first time, the petitioner's business license. In addition the petitioner submitted copies of its 2001 and 2002 federal corporate income tax returns along with DE-6 Quarterly Wages and Withholding Reports from four quarters from September 2002 to June 2003. These forms indicated that the beneficiary earned \$4,400 in the last two quarters of 2002, and \$4,800 in the first two quarters of 2003. The petitioner did not submit a list of job titles and duties for each employee, as requested by the director.

With regard to the petitioner's ability to pay the proffered wage, counsel referred to an AAO decision involving the shareholders of a medical corporation. Counsel stated that in this decision, the shareholders of the corporation routinely minimized the taxable income of the corporation by withdrawing the corporation's profit as compensation to avoid double taxation of the corporate entity. Counsel noted that the petitioner had similarly withdrawn enough profit as a compensation to record the taxable income at the break-even point to avoid double taxation. Counsel stated that the petitioner took out the following profits as compensation: \$62,000 in 2001 and \$72,000 for 2002. Counsel also described the sole shareholder's job position in the corporation as manager of food preparation and serving workers, and submitted the Department of Labor *O'Net* code and description for the shareholder/president's position. The DOL description provided a salary range of \$17,410 to \$31,470 for the position. Counsel stated that if the DOL wages of \$31,470 had been the wages for the petitioner's shareholder/president, the petitioner would have recorded a net profit of \$28,176 in 2001, rather than a negative income, and the petitioner would have recorded a net profit of \$50,388 in 2002.<sup>1</sup> Counsel stated that both figures were well above the proffered wage of \$24,024. Counsel also noted that although the director had requested the W-2 Forms for the beneficiary from 1999 to the present, the beneficiary's wages were not recorded in the petitioner's accounting records until late 2002. Thus, according to counsel, no W-2 Forms existed for the period of 1999 to 2001.

On October 14, 2003, the director sent a second request for further evidence to the petitioner. The director stated that the W-2 Form submitted by the petitioner indicated that the beneficiary only earned \$4,400 in 2002, although the Form ETA 750 indicated the beneficiary would be earning \$2,002 a month or \$24,024 a year. The director requested a clarification of the beneficiary's wages. In addition, the director stated that the record indicated that

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<sup>1</sup> Counsel used the figures for the shareholder's compensation in 2001 and 2002, in combination with the petitioner's net income for 2001 and 2002 to arrive at these figures.

beneficiary had worked for the petitioner since December 1999. The director requested that the petitioner submit a copy of the beneficiary's W-2 Forms for the years 2000 and 2001.

In response, counsel stated that the petitioner was not required to pay the prevailing wage until the granting of residency and that the beneficiary is not required to work for the employer until his receipt of residence. The petitioner submitted W-2 Forms for 1999, 2000 and 2001. These W-2 Forms established that the petitioner paid the beneficiary \$800 in 1999, \$9,600 in 2000, and \$10,800 in 2001.<sup>2</sup> 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 January 31, 2004, denied the petition. The director stated that neither the petitioner's 2001 or 2002 federal income tax return indicated sufficient ordinary income or net current assets to pay the proffered wage of \$24,024. The director also noted that the petitioner had employed the beneficiary in both 2001 and 2002, and that the beneficiary earned \$10,800 in 2001, and \$4,400 in 2002. The director stated that the petitioner lacked sufficient financial resources to make up the difference between the actual wages earned by the beneficiary in 2001 and 2002 and the proffered wage. Therefore the director determined that the petitioner did not have the ability to pay the proffered wage from the priority date to the present time.

On appeal, counsel asserts that the director failed to take several issues into consideration, namely, that the petitioner's president and shareholder took the corporation's profit as compensation to avoid double taxation; that the petitioner has been in business since 1997 and has paid 12 employees on a regular basis; that the petitioner's 2001 income was more than \$100,000 higher than its income for the tax year 2000; that the position being filled was not a new one, and the beneficiary could be replacing another worker since restaurants have high turnover rates; that the petitioner, as of March 31, 2002, had assets of \$328,639; and that the petitioner had employed and paid the beneficiary since December 1999. Counsel provides no further evidentiary documentation.

On appeal, counsel makes various assertions with regard to the petitioner's ability to pay the proffered wage. However, neither counsel nor the petitioner provides any further documentation to further substantiate these assertions. The assertions of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Furthermore several assertions are irrelevant to the issues to be addressed in the instant petition. Counsel states that the petitioner's income is more than \$100,000 higher than in the year 2000.<sup>3</sup> However, the petitioner's federal income tax return for 2000 is not in the record to substantiate this amount of income. Furthermore, the priority date for the instant petition is April 20, 2001. Therefore the petitioner's income for the tax year 2000 would not be dispositive as to whether the petitioner can pay the proffered wage in 2001 and onward. Counsel also appears to infer that the beneficiary could be replacing another worker whose salary is already reflected in the petitioner's overall paid wages; however, counsel provides no further evidence as to any actual employees to be replaced, or evidence of the petitioner's high turnover rate of employees.

In response to the director's request for further evidence, counsel referred to the prevailing wages for manager of food preparation and serving workers in Los Angeles county, and how the petitioner could have posted a net

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<sup>2</sup> Since the priority date for the instant petition is April 2001, the beneficiary's wages in 1999 and 2000 are not dispositive as to the petitioner's ability to pay the proffered wage.

<sup>3</sup> Counsel does not distinguish whether he refers to the petitioner's gross or taxable income.

profit in 2001 and a greater profit in 2002 based on the use of the prevailing wage for the president/shareholder's salary, instead of the actual wages paid to the president/shareholder. This assertion is not persuasive. First, the petitioner did not establish anywhere in the record the actual duties of the president/shareholder. The petitioner did not submit a list of job titles and job responsibilities for all employees listed on the petitioner's DE-6 Quarterly Reports, as requested by the director. Second, such an assertion is speculative, with regard to what could have been done in prior years.

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. As previously stated, the beneficiary's wages in 1999 and 2000 are not dispositive in these proceedings. With regard to earnings following the priority date of April 2001, the petitioner established that the beneficiary earned \$10,800 in 2001, \$4,400 in 2002, and \$4,800 in 2003. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full 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 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, now CIS, should have considered income before expenses were paid rather than net income. In 2001, the petitioner's income tax return indicates the following net income: -\$2,364. In 2002, the petitioner's net income was \$9,858. With regard to 2001, the petitioner's negative income is insufficient to pay the difference between the \$10,800 paid to the beneficiary and the proffered wage of \$24,024, namely \$13,224. With regard to the petitioner's net income for 2002, the combined net income of the petitioner and the actual wages paid to the beneficiary in 2002 would only amount to \$14,258. The petitioner would still lack \$9,766 to pay the proffered wage based on its net income. Thus the petitioner's net income for both 2001 and 2002 is insufficient 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. In addition, 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.<sup>4</sup> 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 tax returns reflect the following information for the following years:

	2001	2002
Taxable income <sup>5</sup>	\$ -2,364	\$ 9,858
Current Assets	\$ 0	\$ 6,032
Current Liabilities	\$ 11,916	\$ 6,332
Net current assets	\$ -11,916	\$ -300

The petitioner has demonstrated that it paid \$10,800 to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of -\$2,364, and negative net current assets of \$11,916 and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage through either the petitioner's net income or net current assets.

However, in its response to the director's request for further evidence, counsel addressed the issue of the compensation of the petitioner's only officer and shareholder. Citizenship and Immigration Services (CIS) can examine the totality of circumstances in its determination of whether the petitioner has the ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Counsel noted that the petitioner withdrew enough profit as compensation of the sole officer/stockholder in both years in question to avoid the effects of double taxation. Counsel also noted that the officer's compensation was \$62,000 in 2001 and \$72,000 in 2002. On appeal, counsel makes reference to a prior AAO decision involving a medical corporation, and again states that the officer took the petitioner's profit as compensation to avoid double taxation. In addition, the DE-6 Quarterly Reports submitted by the petitioner indicates that the president/shareholder of the petitioner draws a regular salary from the petitioner which would also support the officer's additional compensation as being discretionary. To the extent that the record indicates that the compensated officer is the petitioner's only officer and shareholder, that the officer receives a regular salary apart from the documented compensation, and that the officer's compensation is significantly greater than the proffered wage and actual compensation varies between the two years thus adding to the discretionary nature of the compensation, the officer's compensation appears to be a source of additional funds to pay the proffered wage. In addition, the totality of the circumstances of the petitioner's business, namely, its existence since 1997 and the regular payment of twelve employees, does add weight to the finding that the officer's compensation could be considered additional funds from which the

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>5</sup> Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

beneficiary's wages could be drawn. With regard to tax year 2001, while the petitioner showed negative taxable income of -\$2,364, it did pay \$10,800 to the beneficiary. Therefore, it is reasonable to conclude that the sole shareholder would have been able to pay the remaining \$13,224 out of his compensation as the petitioner's sole officer. The petitioner has therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

The petitioner has demonstrated that it paid \$4,400 to the beneficiary during 2002. In addition, for 2002, the petitioner shows a taxable income of \$9,858 and net current assets of -\$300. Although the petitioner's net income and the beneficiary's actual wages in 2002 would have covered \$14,258 of the proffered wage, as stated previously, the petitioner still lacks \$9,766 to pay the proffered wage of \$24,024. In 2002, the petitioner's sole officer received \$72,000 in compensation, a sum more than sufficient to pay the remainder of the beneficiary's wages, namely \$9,766. Thus, the petitioner has established that it had sufficient financial resources to pay the proffered wage in both 2001 and 2002. Therefore, the petitioner has established that it had the ability to pay the proffered wage from the priority date to the present.

Therefore, the director's decision shall be withdrawn, and the petition shall be approved.

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 sustained. The petition is approved.