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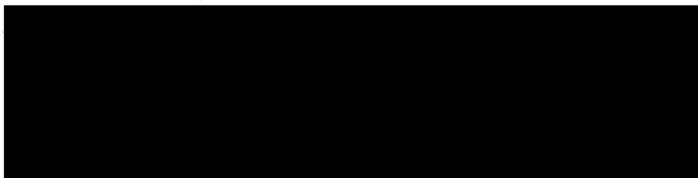
File: [Redacted]
WAC-04-083-52338

Office: CALIFORNIA SERVICE CENTER Date: AUG 14 200

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant and seeks to employ the beneficiary permanently in the United States as a cook ("Chinese Specialty Cook"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 11, 2005, denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 16, 2001. The proffered wage as stated on Form ETA 750 for the position of a cook is \$11.73 per hour, 40 hours per week, which is equivalent to \$24,398.40 per year. The labor certification was approved on October 10, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on February 3, 2004.

Counsel listed the following information related the petitioning entity: established 1981²; gross annual income: \$540,308.00; net annual income: \$364,301.00; and current number of employees: 7; beneficiary's salary: left blank, which we shall take from the certified ETA 750 as \$11.73 per hour.

On November 9, 2004, the Service Center issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay from 2002 to the present, and to submit the beneficiary's W-2 forms and federal tax returns from the time that he was hired to the present. The petitioner responded, but the response was found insufficient, and on February 11, 2005, the director denied the case. The petitioner appealed.

Examining the information on appeal, we shall review the petitioner's ability to pay based on wages paid, net income, and net current assets, and then consider the petitioner's additional arguments raised. Regarding the petitioner's ability to pay, first, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary does not list that he was employed with the petitioner. Based on information in the appeal submitted, the petitioner hired the beneficiary in 2004, and the petitioner submitted the beneficiary's form W-2 for the year 2004 showing earnings in the amount of \$11,900. Wage payment to the beneficiary in the amount of \$11,900 would be insufficient to establish that the petitioner can pay the beneficiary the proffered wage in any year since the priority date.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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 record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the years 2000, 2001, and 2002. The petitioner is structured as a C Corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

² The tax returns show that the petitioner's business incorporated on December 30, 1996. Prior to incorporation, the current owners of the petitioning entity stated that they owned the petitioning business as a sole proprietorship.

The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	-\$47,271 ³
2001	-\$15,205
2000	-\$5,394

As the petitioner's tax returns show negative net incomes for each year, the petitioner's net income would not allow for payment of the beneficiary's proffered wage of \$24,398.40 in any year. The petitioner, therefore based on net income, cannot demonstrate its continuing ability to pay the wage from the priority date of March 16, 2001, until the beneficiary obtains lawful permanent residence.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Following this second analysis, the petitioner's Federal Tax Return similarly shows that the petitioner lacks the ability to pay the required wage.

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$12,697
2001	-\$12,283
2000	-\$42,726

Under this method of evaluation, the petitioner has similarly failed to establish its ability to pay the proffered wage of \$24,398.40 from the priority date until the beneficiary obtains lawful permanent residence, as the petitioner has also exhibited negative net current assets for each year, which would not be sufficient to pay the wage.

The petitioner additionally submitted Forms 941, the Employer's Quarterly Federal Tax Return, for the quarters ending: December 31, 2003, September 30, 2003, June 30, 2003, and March 2003. The petitioner also submitted State Quarterly wage reports sent to the California Employment Development Department (EDD) for the same quarterly time periods. The quarterly reports show only that the petitioner has paid some

³ The petitioner files on a tax year basis, so that the petitioner's 2002 Federal Tax Return is based on a tax year of October 1, 2002 to September 30, 2003. The 2002 return is dated June 10, 2004. The petitioner's 2003 Federal Tax Return would therefore not have been available at the time of filing the I-140 Petition.

⁴ 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.

workers, not that the petitioner has paid the beneficiary the proffered wage.⁵ Specifically, the EDD reports list employees by name and show the amounts paid to each worker quarterly. The beneficiary is not listed on any of these reports.

On appeal, counsel argues that the petitioner has paid the beneficiary at the proffered wage from August 2004 to December 2004, and that they have paid the beneficiary at a rate of \$13.85, which exceeds the proffered wage, from January 2005 to the present. Further, counsel asserts on the petitioner's behalf that based on payment of the proffered wage, that wage payment would be "prima facie proof" of the petitioner's ability to pay the proffered wage. Counsel's statement would be correct *only* if the petitioner could show that they have paid the proffered wage to the beneficiary from the priority date onward (or through a combination of wage payment and positive net income or positive net current assets). See 8 C.F.R. § 204.5(g)(2) cited in full above, and in pertinent part: "*Ability of prospective employer to pay wage . . . The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.*" (Emphasis added). Here, the priority date was established on March 16, 2001, and the petitioner can only demonstrate partial payment of the proffered wage in 2004, and has only supplied a hand written ledger to show wage payment to the beneficiary in 2005. This leaves a gap in proffered wage documentation between March 16, 2001 and August 2004 with no documentation provided to show the petitioner's ability to pay the proffered wage for this time period through either wages paid to the beneficiary, positive net income, or positive net current assets in an amount sufficient to pay the proffered wage.

Counsel additionally contends that the petitioner seeks to move [REDACTED] one of the owners, from his position in the kitchen to a greater management role, and that the beneficiary would replace [REDACTED] as the main cook in the kitchen. Counsel further contends that the beneficiary's employment in the kitchen would help retain existing customers and generate new business as the beneficiary is a "talented specialty chef." We find this argument speculative. While the beneficiary might be a talented chef, the petitioner has not provided any documentation to show that the beneficiary's reputation would provide "an immediate draw" to the restaurant.

Finally, counsel has submitted an accountant's report. The accountant's report reviewed gross wages for fiscal years ended September 30, 2001, 2002, 2003, and 2004, as well as for the six months ended March 31, 2005. The report states that the accountant has conducted a "review" of the schedule of gross wages prepared by the petitioner's management. The accountant notes that a "review is substantially less in scope than an examination, the objective of which is the expression of an opinion on the schedule of gross wages – income tax basis. Accordingly, I do not express such an opinion." Further, the accountant's report notes that: "based on my review, nothing came to my attention that caused me to believe that the accompanying schedule of gross wages – income tax basis is not presented, in all material respects, in conformity with the income tax basis of accounting." This essentially means that the accountant has reviewed what management has presented, but that he does not render an opinion on the petitioner's ability to pay. The review only confirms that what he was presented with was accurate.

⁵ We note that the quarterly EDD reports show that the owners, [REDACTED] and [REDACTED] were paid the most significant compensation, including \$15,600 in quarterly wages for [REDACTED], and \$12,000 in quarterly wages for [REDACTED] for the quarter ending March 31, 2003.

The gross wage chart which management provided to the accountant breaks down wages paid as following:

	Fiscal years ended				Six months ended
	2001	2002	2003	2004	March 31, 2005
Chefs	\$53,032	\$44,804	\$46,210	\$45,540	\$24,048
Other personnel – Kitchen, dining room, and Administration	\$98,732	\$110,589	\$92,735	\$65,231	\$24,598

In fact in examining the petitioner's U.S. Federal Tax Returns, the wages would break down as follows:

	Tax returns for the year		
	2000	2001	2002
Officer Compensation (payment to [redacted] and [redacted])	\$95,387	\$89,900	\$73,600
Other personnel – Employee wages	\$56,377	\$65,493	\$65,345

Based on the tax return information, the bulk of the wages that the petitioner has paid has been in Officer Compensation.

The petitioner's theory, based on the wage chart that management submitted, would be that the beneficiary would replace the current chef, a "retiring chef," [redacted] and that therefore, the business would not incur the payment of an additional wage, but that the beneficiary would replace [redacted]. However, the petitioner's logic is not persuasive. While [redacted] would move from the kitchen to management, he would still be paid a salary. As the Federal Tax Returns, and Forms 941 submitted evidence, the co-owners, [redacted] and [redacted] are both paid employees. Further, the Forms 941 reflect that [redacted] earns the highest salary. The petitioner has provided no break down regarding what percentage of [redacted]'s wages reflect his role as a chef, and what percentage of wages would reflect his management role. While, therefore, it may be accurate to say that the beneficiary will replace [redacted] as a chef, it does not follow that \$53,032 in funds would now be solely available to pay the beneficiary. [redacted] will remain employed, and in fact, based on the petitioner's assertion, in a more advanced management role, where he might be expected to earn more. The accountant's report of the paid wages, and the replacement worker theory is therefore not compelling.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, March 16, 2001, to the present, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage. The petitioner fails this test under an examination of wages paid to the beneficiary (only evidenced for part of 2004), net income (insufficient for 2000, 2001, and 2002), or net current assets (insufficient for 2000, 2001, and 2002).

⁶ In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The Petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner 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.