

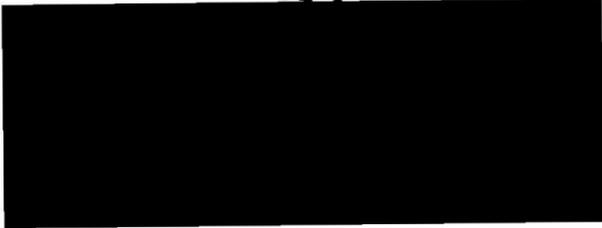


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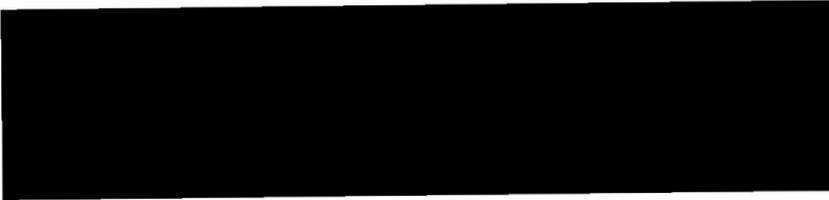
Date: AUG 29 2006

IN RE: Petitioner:  
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:



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 preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. 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 brief and additional evidence.<sup>1</sup>

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 at 8 C.F.R. § 204.5(g)(2) states:

*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 either 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. See 8 C.F.R. § 204.5(d). 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 March 29, 2004. The proffered wage as stated on the Form ETA 750 is \$2,200 per month (\$26,400 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. The beneficiary was not in the United States and did not claim to have worked for the petitioner on the Form ETA 750B. On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$646,658, to have a net annual income of \$230,589, and to currently employ twelve (12) workers.

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<sup>1</sup> 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

With the petition, the petitioner submitted a notarial certificate issued by the People's Republic of China the Ministry of Labor and Social Security to the beneficiary to recognize him as a fourth level/medium skill level cook, a notarial certificate of work experience as a cook, the petitioner's Form 1065 U.S. Return of Partnership Income for 2001 and 2003 and a letter from Key Bank pertinent to the petitioner's checking account and [REDACTED] checking account.

The director denied the petition on March 12, 2005, finding that the petitioner did not establish that it has the ability to pay the proffered wage at the time the priority date was established and continuing to the present with an ordinary income of \$8,237 in 2003.

On appeal, counsel asserts that the petitioner's gross receipts of \$646,658, total income of \$230,589, paid salaries of \$91,433 and officer's compensation of \$20,000 as well as substantial monthly balance in its business checking account establish its ability to pay the proffered wage in 2003. Counsel also argues that the owner's real estate holdings and assets in other businesses can be utilized to pay the beneficiary the proffered wage in 2003. Counsel submits the petitioner's 2004 tax return, and letters and documents concerning the petitioner's balance in its checking account, and the owner's real estate holdings and other assets in other business entities.

Counsel submitted letters from a bank concerning the balance in the petitioner's business checking account and asserted that the balances in the account could establish the petitioner's ability to pay the beneficiary the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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. 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. Third, 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Finally, counsel claimed that the petitioner owners' personal assets including real estate and other assets invested into other businesses can be used to establish the petitioner's ability to pay the proffered wage. The petitioner files its tax return in the name of [REDACTED] and checks the box in Schedule B Item 1 c as a type of entity: Domestic limited liability company. The petitioner is a LLC. Unlike a sole proprietorship, a LLC is a legal entity separate and distinct from its owners and other companies. The debts and obligations of the company generally are not the debts and obligations of the owners or other business entities.<sup>2</sup> The petitioner must show the ability to pay the proffered wage out of its own funds. Counsel's reliance on the owners' assets and assets of the other business entities the owners owed in determining the petitioner's ability to pay is misplaced.

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 claim that the

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<sup>2</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

beneficiary worked for the petitioner and did not submit any documentary evidence of the beneficiary's compensation from the petitioner during these years. Therefore, the petitioner did not establish that it employed and paid the full proffered wage from the priority date.

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). Counsel's reliance on the petitioner's gross receipts, total income and wage expenses is misplaced. 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. The court in *Chi-Feng Chang* further 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.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 2003 and 2004. The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC). According to the tax returns in the record, the petitioner's fiscal year is based a calendar year. The tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage for the year of the priority date.

Tax year	Net income	Proffered wage	Surplus or deficit
2004	\$(307) <sup>3</sup>	\$26,400	\$(26,707)

Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage.

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<sup>3</sup> Ordinary business income (loss) as reported on Line 22 of Form 1065.

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.<sup>4</sup> A LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17 of Schedule L, Form 1065. If a LLC'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 tax return for 2004 submitted on appeal shows that the petitioner had current assets of \$62,382, and current liabilities of \$29,245, thus its net current assets at the end of year 2004 were \$33,137, which were sufficient to cover the beneficiary's proffered wage in 2004.

The regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its ability to pay the proffered wage from the time the priority date is established. In the instant case the priority date is March 29, 2004. The petitioner is not obligated to demonstrate its ability to pay for the years prior to the year of the priority date, i.e. 2004 in this case and the 2003 tax return is not necessarily dispositive.

Counsel's assertions on appeal have not overcome the director's finding in his decision to deny the petition, however, the evidence submitted on appeal, that is the petitioner's 2004 tax return demonstrates that the petitioner had sufficient net current assets to pay the proffered wage in 2004. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner established that it had the ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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. The petition is approved.

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<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.