U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 01 2006

EAC 04 205 51054

IN RE: Petitioner: [redacted]
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Halal meat and grocery store. It seeks to employ the beneficiary permanently in the United States as a Halal meat cutter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

According to the Form I-140 petition, the petitioner was established on June 11, 1998 with the current number of its employees at the date of signing of the petition not disclosed. The petitioner requested during the review process that the petition be adjudicated as Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) instead of another preference classification selected on the petition.

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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $20.50 per hour ($820.00 per week; $42,640.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence which is a W-2 Wage and Tax Statement and a personal U.S. federal tax return.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a U.S. Internal Revenue Service Form tax return for 2003; a certificate of incorporation; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on March 30, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2001, 2002, 2003 and 2004. An alternative evidence submission was also requested to the above. The director also requested annual reports for the same years with audited financial statements. The director requested Form W-2 Wage and Tax Statement for the beneficiary if he was ever employed by the petitioner.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted an explanatory letter and copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2001, 2002, 2003 and 2004, and a form 1120 tax return for 2001.

The director denied the petition on June 9, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the alien was not employed in 2001; that the proffered wages on the original application" were "$500/-week," then the wages were changed to "$820/week;" and the business has shown a profit in 2001. Counsel further contends "... the profit of the Employer was enough to sustain the employee for more than six months, based on the expected wages of $500/week" as well as other contentions.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. In 2004, the petitioner paid the beneficiary $10,660.00.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $42,640.00 per year from the priority date of April 30, 2001:

- In 2001, the undated Form 1120S stated taxable income of $36,788.00.
- In 2001, the undated Form 1120 (NYC Worksheet) stated taxable income[1] of $14,288.00.
- In 2002, the Form 1120S stated taxable income of $25,199.00.
- In 2003, the Form 1120S stated taxable income of $27,974.00.
- In 2004, the Form 1120S stated taxable income of $11,270.00.

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 2004, the Form 1120S stated taxable income of $11,270.00. In 2004, the petitioner paid the beneficiary $10,660.00. The sum of these two figures is less than the proffered wage of $42,640.00 per year.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2004 for which the petitioner's tax returns are offered for evidence.

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.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

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[1] IRS Form 1120, Line 28. The difference between the two returns is that this return states "wholesale income" in the amount of $22,500.00 as additional income.

[2] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of $12,356.00 and $0.00 in current liabilities. Therefore, the petitioner had $12,356.00 in net current assets. Since the proffered wage is $42,640.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of $18,020.00 and $0.00 in current liabilities. Therefore, the petitioner had $18,020.00 in net current assets. Since the proffered wage is $42,640.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of $17,871.00 and $0.00 in current liabilities. Therefore, the petitioner had $17,871.00 in net current assets. Since the proffered wage is $42,640.00 per year, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120S return stated current assets of $18,460.00 and $0.00 in current liabilities. Therefore, the petitioner had $18,460.00 in net current assets. Since the proffered wage is $42,640.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2004 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[3] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that the beneficiary was not employed in 2001; that the proffered wages on the original application" were "$500/-week," then the wages were changed to "$820/week;" and, that the business has shown a profit in 2001. Counsel further contends "... the profit of the Employer was enough to sustain the employee for more than six months, based on the expected wages of $500/week ..." the beneficiary would earn.

As noted from the certified Alien Employment Application the proffered wage is $20.50 per hour ($820.00 per week; $42,640.00 per year) not $500.00 each week. The ability to pay the proffered wage is calculated on the labor certification terms. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Counsel asserts on the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date by employing the beneficiary because it is "... a fundamental business rule that with the engagement of additional employee, one can generate more profit in the business" and, therefore by a logical extension of counsel's contention evidence the ability to pay the proffered wage. . Counsel cites no legal precedent for the contention, and, according to regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is

[3] 8 C.F.R. § 204.5(g)(2).

determined. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a Halal meat cutter will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.