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FILE: [REDACTED]  
EAC 03 093 50759

Office: VERMONT SERVICE CENTER

Date: AUG 19 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

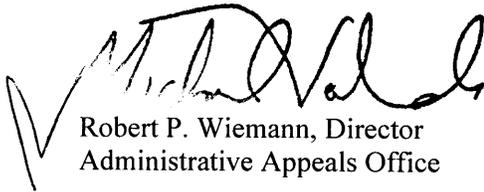
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director  
Administrative Appeals Office

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

The petitioner is a restaurant specializing in Mexican cuisine. 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, 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291 annually. On the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on December 26, 2002. On the petition, the petitioner claimed to have been established on May 3, 1994, to currently have 11 employees, to have a gross annual income of \$563,247, and to have a net annual income of \$61,260.

In support of the petition, the petitioner submitted:

- A Form G-28 for counsel;
- An original Form ETA 750; and,
- The petitioner's Form 1120S tax return for 2001.

In a request for evidence (RFE) dated November 10, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director

also specifically requested Form W-2s issued to the beneficiary for 2001, “accredited profit/loss statements, bank account records, or personnel records.”

In response to the RFE, the petitioner submitted:

- The petitioner’s Form 1120S return for 2002;
- A letter from the petitioner’s CPA vouching for the petitioner’s ability to pay;
- Form W-2 Wage and Tax Statement for 2001 reporting (partial year) wages of \$7,800 paid to the beneficiary, and for 2002, wages of \$19,000.02.

In a decision dated April 16, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, and accordingly denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner’s gross receipts, and total assets establish its ability to pay the proffered wage. The additional evidence submitted on appeal consists of the petitioner’s Form 1120S for 2003. He cites the company CPA’s January 28, 2004 letter that asserts the petitioner “has the ability to pay its wages and expenses,” citing business profits of \$2,563 for 2002, depreciation of \$4,001, \$102,200 in wages and \$37,800 in officers compensation. Counsel further asserts that the petitioner’s income growth and accumulated assets of \$227,218 “establish the fact that the Petitioner’s business was poised to expand as of the filing date and did so.”

Counsel’s assertions appear to rest on the same rationale as expressed in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business. Counsel correctly implies that losses and very low profits, if occurring uncharacteristically within a framework of profitable or successful years and are unlikely to recur, can be overlooked in determining ability to pay the proffered wage. Here, however, the petitioner is a newer business, established barely more than 10 years ago, with nothing in the record suggesting it has ever posted a large profit. Making an assumption that the petitioner’s business will flourish at some unspecified future date is speculative.

Further, while the CPA’s letter speaks generally of the petitioner’s financial strength, it specifically cites the amount of the petitioner’s ordinary income reported on its Form 1120A for 2002, its wages paid, its depreciation, and its officer compensation. In general, wages already paid cannot now be shown to have been available to pay an additional wage. Likewise, there is no precedent to add depreciation, as discussed below, back to the petitioner’s income. Finally, the petitioner’s total officer compensation is less than the proffered wage and, in any event, there is nothing in the record that would suggest that the petitioner’s officer(s) would be willing to forego the entire amount of officer compensation.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As a means of determining the petitioner's ability to pay the proffered wage, CIS follows the foregoing policy and will proceed to examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In determining the petitioner's ability to pay the proffered wage will also 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 instant case, on the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary did not claim to have worked for the petitioner but counsel has since submitted Form W-2s that indicated otherwise.

CIS has prorated the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary as follows:

<u>Tax Year</u>	<u>Beneficiary's Actual Compensation</u>	<u>Wage Proffered</u>	<u>Resulting Surplus (Deficit)</u>
2001	\$7,800	\$39,291	\$31,491
2002	\$19,000	\$39,291	\$20,291

The petitioner has asserted that it paid the beneficiary \$7,800 in 2001 and \$19,000 in 2002. Since the proffered wage is \$39,291 a year, the petitioner must show that it can pay the remainder of the proffered wage for each year, which would be \$31,491 in 2001 and \$20,291 in 2002.

Tax Year	Ordinary Income	Proffered Wage <sup>1</sup>	Surplus (Deficit)
2001	-\$1,081	\$31,491	(\$32,572)
2002	\$2,563	\$20,291	(17,728)

Since each of the end figures is negative, they fail to establish the ability of the petitioner to pay the proffered wage.

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 a corporate taxpayer's current assets less its current liabilities. 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. The net current assets are those the petitioner expects to convert to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule Ls attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

<u>Tax Year</u>	<u>Net Current Assets</u>	<u>Shortage Below Amount Of Proffered Wage<sup>2</sup></u>
2001	\$9,938	-\$21,553
2002	\$8,045	-\$12,246

Since each of the end figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

<sup>1</sup> Crediting the petitioner with the amounts actually paid to the beneficiary in each year.

<sup>2</sup> Crediting the petitioner with the amounts actually paid to the beneficiary in each year.