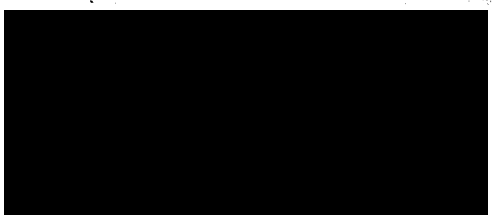
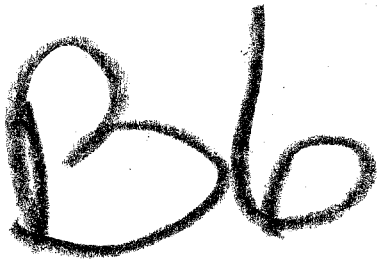
**U.S. Department of Homeland Security**
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services





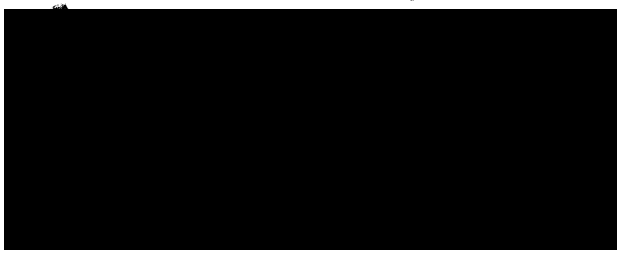
FEB 1 4 2005

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-017-55431

IN RE: Petitioner:
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, California Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The AAO dismissed the appeal. The petitioner then filed a civil complaint seeking review of that decision in federal district court. After the civil complaint was filed, the AAO on its own motion reopened the appeal for the purpose of entering a new decision. A continuance was granted to the government in the civil case for that purpose. After reopening the appeal, the AAO issued the petitioner a notice affording the petitioner 30 days to submit a brief, a period which was later extended for an additional six weeks. The petitioner later submitted a brief and supporting documentation, which have now been considered by the AAO. The appeal will be sustained and the petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef, Mexican cuisine. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the 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 at the priority date and continuing until the beneficiary obtains permanent residence, while at the same time paying the proffered wages to the beneficiaries of other pending petitions submitted by the petitioner. On appeal, counsel states that the evidence establishes the petitioner's ability to pay the proffered wages to each of the beneficiaries of the petitions it has filed, including the instant 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 or seasonal 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. 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 [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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour, which amounts to $20,800.00 annually. On the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary claimed to have worked for the petitioner from February 1996 through the date of the ETA 750B.

On the petition, the petitioner claimed to have a gross annual income of $3,866,719, to have a net annual income of $98,285.00, and to currently have 38 employees. The petitioner left blank the item for the date on which the petitioner was established.

In support of the petition, the petitioner submitted a letter dated March 1, 2001 from the manager of a restaurant in Mexicali, Mexico, stating the beneficiary's experience as a cook from January 1992 to January 1995. The petitioner initially submitted no evidence of the petitioner's ability to pay the proffered wage.

In a request for evidence (RFE) dated December 27, 2002, the director requested evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In response to the RFE, the petitioner submitted the following: copies of the petitioner's Form 941 employer's quarterly federal tax returns for the first three quarters of 2002; copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for the first three quarters of 2002; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; and a copy of the petitioner's Form 100 California Franchise or Income Tax Return for 2001.

In his decision, the director found that the petitioner had submitted six Form I-140 petitions for different beneficiaries and found that the evidence failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary in the instant case while also paying the proffered wages to the beneficiaries of the other petitions. The director therefore determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submitted additional evidence. Some of this evidence consists of additional copies of some of the tax documents and quarterly reports which had been previously submitted for the record. The documents submitted for the first time on appeal are the following: a copy of the petitioner's Form 941 employer's quarterly federal tax return for the fourth quarter of 2002; a copy of the petitioner's Form DE 6 California quarterly wage and withholding report for the fourth quarter of 2002; copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999 and 2000; and a copy of the petitioner's Form 100 California Franchise or Income Tax Return for 2000.

On the Form I-290B notice of appeal counsel left blank the box for item number 3, where the reasons for the appeal should be stated. Since counsel did not specifically address in the notice of appeal the reasons stated in the director's decision for the denial of the petition, a summary dismissal of the appeal might have been appropriate under the regulation at 8 C.F.R. § 103.3(a)(1)(v). Nonetheless, in a decision dated May 17, 2004, the AAO noted that the petitioner had attached copies of tax documents to its notice of appeal. The AAO deemed the submission of that evidence to be an assertion by the petitioner that the petitioner has the ability to pay the proffered wage. The AAO then determined that the evidence did not establish the petitioner's ability to pay the proffered wage while also paying the proffered wage to beneficiaries of other pending and approved petitions submitted by the petitioner. The AAO therefore dismissed the appeal.

Following the dismissal of the appeal, the petitioner filed a civil complaint in the United States District Court for the Central District of California. After that civil complaint was filed, the AAO issued a decision dated November 9, 2004 reopening the instant appeal and granting the petitioner a period of 30 days in which to submit a brief. In response, counsel submitted a letter dated December 7, 2004 requesting an additional six weeks, until January 10, 2005, to submit a brief and additional information. The AAO then sent the petitioner a notice dated

December 9, 2004 granting the petitioner additional time until January 10, 2005 to submit "a brief and/or evidence" into the record. The deadline of January 10, 2005 fell on a Saturday. Therefore, by operation of the regulation at 8 C.F.R. § 1.1(h), the deadline for further submissions by the petitioner was extended to Monday, January 12, 2005.

In response to the December 9, 2004 notice, counsel submitted a letter dated January 7, 2005, which was received by the AAO on January 12, 2005. With that letter, counsel submitted duplicate copies of the petitioner's federal tax returns for 1999, 2000 and 2001 and duplicate copies of the petitioner's California tax returns for 2000 and 2001. With the letter, counsel also submitted new evidence, consisting of copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998 and 2002.

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, including the evidence submitted with counsel's letter of January 7, 2005 following the reopening of this appeal by the AAO.

In determining the petitioner's ability to pay the proffered wage, CIS first examines 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 petition, on the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary claimed to have worked for the petitioner from February 1996 through the date of the ETA 750B. However the record contains no Form W-2 Wage and Tax Statements for the beneficiary and the beneficiary's name does not appear on any of the four Form DE 6 California quarterly wage reports for 2002 in the record. Therefore the petitioner's evidence fails to establish that the petitioner had previously employed the beneficiary

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp., at 1084. The court specifically rejected the argument that CIS 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., supra,* at 1054.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 expected to be converted to cash as the proffered wage becomes due. Thus,

the difference between the 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.

In the record in the instant petition, the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 shows taxable income before the net operating loss deduction and special deductions, on line 28, as $98,285.00 That amount is greater than the proffered wage of $20,800.00 In addition, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2001 yield figures for net current assets of $185,945.00 for the beginning of 2001 and $233,437.00 for the end of 2001. Those amounts are also greater than the proffered wage of $20,800.00. Therefore, if the instant petition were the only I-140 submitted by the petitioner the evidence would establish the petitioner's ability to pay the proffered wage, based both on the petitioner's net income for 2001 as well as on the petitioner's net current assets at the beginning and at the end of 2001.

In his decision, the director referred to only six other petitions. The director apparently did not search the CIS computer database for possible alternate forms of the petitioner's name. As discussed below, searches under different forms of the petitioners name reveal five additional petitions submitted by this same petitioner.

In his decision, the director cited figures on the proffered wages for the beneficiaries of other petitions submitted by the petitioner, information apparently obtained from the files in those petitions. In considering those petitions, the director failed to specify the years in which those petitions had been filed or approved. Although it is reasonable for the director to consider all petitions filed by a single petitioner when evaluating the petitioner's ability to pay the proffered wage to any particular beneficiary, any such consideration must also take into account the dates such petitions were filed and, for those which were approved, the dates of such approvals. A simple adding of the proffered wages in all pending and approved petitions is an incomplete analysis, since the cost to the petitioner of paying multiple beneficiaries will vary, depending on the number of petitions which are pending each year.

The responsibility for compiling and presenting sufficient evidence, however, lies not with the director but with the petitioner. *See* Immigration and Nationality Act § 291, 8 U.S.C. § 1361. In the instant petition, the petitioner submitted no evidence to the director which addresses the issue of the petitioner's ability to pay the proffered wages to multiple beneficiaries.

In his decision, the director relied only on the taxable income information shown on the petitioner's Form 1120 U.S. Corporation Income Tax Returns. The director failed to analyze the net current assets of the petitioner in each of the relevant years. Nonetheless, although the above analysis shows that the net current assets of the petitioner at the beginning and at the end of the year 2001 would have been sufficient to pay the proffered wage to the single beneficiary in the instant petition, the failure of the petitioner to submit evidence in the instant petition pertaining to its ability to concurrently pay the proffered wages to multiple beneficiaries prevented any analysis of this issue based on either the petitioner's net income or its net current assets.

The petitioner must show that it had sufficient net income or net current assets to pay all the wages as of the priority date of each petition and continuing until each beneficiary obtains permanent residence. The evidence submitted prior to the decision of the director failed to establish those facts.

For the above reasons, therefore, although the analysis of the director was incomplete, the director was correct in concluding that the evidence then in the record failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary while also paying the proffered wages to the beneficiaries of other petitions submitted by the petitioner.

On appeal the petitioner submits additional evidence. The documents submitted for the first time on appeal were the following: a copy of the petitioner's Form 941 employer's quarterly federal tax return for the fourth quarter of 2002; a copy of the petitioner's Form DE 6 California quarterly wage and withholding reports for the fourth quarter of 2002; copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999 and 2000; and a copy of the petitioner's Form 100 California Franchise or Income Tax Return for 2000. In addition, following the AAO's decision to reopen the instant appeal, counsel submitted a letter dated January 7, 2005 and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998 and 2002.

The evidence newly submitted on appeal does not directly address the issue of the petitioner's ability to pay the proffered wages to multiple beneficiaries. The only information in the record on the proffered wages of the beneficiaries of the other petitions filed by the petitioner is found in the letter dated January 7, 2005 from counsel, submitted in response to the AAO's decision to reopen the instant appeal. The assertions of counsel do not constitute evidence and they may not serve as the basis for a decision unless supported by competent evidence in the record. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In the instant petition, however, the assertions of counsel are indirectly supported by copies of the petitioner's Form DE 6 California wage and withholding statements for 2002 in the record, which show that four of the beneficiaries listed in counsel's letter each received $24,024.00 in compensation from the petitioner that year. In addition, the assertions of counsel concerning the proffered wage for the beneficiary of the instant petition are supported by the Form ETA 750 in the record of this petition. The foregoing evidence is found sufficient to support the assertions made by counsel in his letter of January 7, 2005 concerning the proffered wages for the beneficiaries of other petitions submitted by the petitioner.

Counsel asserts that the petitioner's ability to pay the proffered wages is established by the amount of assets shown on the petitioner's Schedule Ls attached to its income tax returns. Although counsel's letter discusses the petitioner's tax returns for each year from 1998 through 2002, the years prior to 2001 are not directly relevant to the instant petition, since the priority date is March 26, 2001. Therefore the AAO will summarize counsel's comments about only the years 2001 and 2002.

For the year 2001, counsel states that the petitioner's tax return shows "in excess of $578,000.00 in hard assets (building and other depreciable asserts [sic]), [and] $122,000.00 in inventory on hand." Counsel states, "This totals over $800,000.00 in assets." (Letter of January 7, 2005, page 2).

For the year 2002, counsel states that the petitioner's tax return shows "in excess of $612,000.00 in hard assets (building and other depreciable asserts [sic]), [and] $109,000.00 in inventory on hand." Counsel states, "This totals over $721,000.00 in assets." (Letter of January 7, 2005, page 2).

Counsel's analysis fails to distinguish between current assets and long-term assets. Counsel's analysis also fails to consider the petitioner's liabilities. As discussed above, CIS relies not on a petitioner's total assets in evaluating a petitioner's ability to pay the proffered wage, but on a petitioner's net current assets, that is, its current assets minus its current liabilities.

As noted above, the director found that the petitioner had submitted six other petitions in addition to the instant petition, that is, a total of seven petitions, each with one beneficiary. The director apparently relied on an electronic records search using the petitioner's name as it appears on the instant I-140 petition.

Counsel asserts on the first page of his letter that the petitioner has a total of ten petitions pending. But counsel uses the term "petition" and "application" interchangeably, and on page three of his letter counsel states that three of the pending applications remain with either the Department of Labor or with the Employment Development Department. These statements imply that counsel is asserting that only seven immigrant petitions are pending with CIS.

CIS electronic records show that a total of eleven petitions have been filed by the petitioner under various forms of its name.

Of the total of eleven petitions filed by the petitioner, two are not relevant to the instant petition because they were approved prior to the instant petition's priority date of March 26, 2001. Two other petitions are no longer relevant because they were denied without being appealed, on March 13, 2003 and July 4, 2004. This leaves a total of seven petitions, including the instant petition, which were pending on or after the priority date. Three of those petitions were approved after the priority date, so they are no longer pending, but those petitions remain relevant to the instant petition, since the petitioner presumably intends to employ the beneficiaries at their proffered wages. The other four petitions are either still pending before the director or are pending on appeal, including the petition in the instant appeal.

Counsel's list of beneficiaries of pending petitions in his January 7, 2005 letter contains some discrepancies with CIS records. Counsel's list of pending petitions included two of the petitions that were approved after the priority date, but counsel's list omitted the name of the beneficiary of the other petition that was approved after the priority date. On the other hand, counsel's list of beneficiaries in his January 7, 2005 letter included the petition that had been denied on July 4, 2004 without being appealed, a petition that was no longer pending as of January 7, 2005. Therefore, as noted above, that petition is no longer relevant to the instant petition.

In summary, CIS records show a total of seven petitions which have either been approved after the priority date of March 26, 2001 or which remain pending, including the instant petition. Therefore, in order for the instant petition to be approved, the petitioner must establish its ability to pay a total of seven beneficiaries, including the beneficiary in the instant petition.

Since the list of beneficiaries in counsel's letter of January 7, 2005 omitted the beneficiary of one of the approved petitions, the record lacks direct evidence on the proffered wage for that beneficiary. However, the petitioner's Form DE 6 quarterly wage and withholding reports show that in the year 2002 that beneficiary received $24,024.00 in compensation from the petitioner. Therefore that amount may be assumed to be the proffered wage for that beneficiary.

Of the seven relevant petitions, the proffered wage in four petitions is $24,024.00, for a total of $96,096.00 and the proffered wage in the other three petitions, including the instant petition, is $20,800.00, for a total of $62,400.00. The total for all seven relevant petitions is $158,496.00

As shown in the analysis above, the petitioner's 2001 tax return shows taxable income before the net operating loss deduction and special deductions, on line 28, as $98,285.00. That figure is insufficient to establish the petitioner's ability to pay the total proffered wages of $158,496.00.

Calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2001 yield figures for net current assets of $185,945.00 for the beginning of 2001 and $233,437.00 for the end of 2001. Each of those figures is sufficient to establish the petitioner's ability to pay total proffered wages of at least $158,496.00 in 2001, the year of the priority date.

The petitioner's response to the AAO's decision to reopen the instant appeal included a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002. That return shows taxable income before the net operating loss deduction and special deductions, on line 28, as $107,819.00. The record also contains copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for the four quarters of 2002. Those reports show that the petitioner paid compensation in the amount of $24,024.00 that year ($6,006.00 per quarter) to each of three beneficiaries of the relevant petitions, for total compensation of $72,072.00 paid to those three beneficiaries in 2002. That amount must be credited against the total proffered wage obligation of $158,496.00 for that year, leaving the amount of $86,424.00 as the amount of the additional proffered wages for 2002. The petitioner's taxable income for 2002 of $107,819.00 is sufficient to establish the petitioner's ability to pay the additional proffered wages of $86,424.00 that year.

In addition, calculations based on the current assets and the current liabilities shown on the petitioner's Schedule L for 2002 yield figures for net current assets of $233,437.00 for the beginning of 2002 (the same as at the end of 2001) and $179,789.00 for the end of 2002. Each of those figures is also sufficient to establish the petitioner's ability to pay the additional proffered wages of $86,424.00 in 2002.

For the foregoing reasons, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition and also to pay the proffered wages to the beneficiaries of the other approved and pending petitions submitted by the petitioner. The appeal therefore will be sustained.

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.