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U.S. Citizenship
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Services

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[Redacted]

FILE:

[Redacted]
EAC 02 219 52885

Office: VERMONT SERVICE CENTER

Date: NOV 03 2005

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:

[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, 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 sustained. The petition will be approved.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$24,690 annually. On the Form ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary claimed to have worked for the petitioner beginning in March of 2001 and continuing through the date of the ETA 750B.

The Form I-140 petition was submitted on June 15, 2002. The petition claims the business was established on August 4, 1997, and to have a gross annual income of more than \$250,000, to have a net annual income of more than \$100,000, but the petition item asking how many employees the petitioner currently has is blank.

In support of the petition, the petitioner submitted:

- An original certified Form ETA 750; and,
- The petitioner's 2000 Form 1120A tax return showing a \$1,719 taxable income.

In a request for evidence (RFE) dated March 14, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance

with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested the petitioner's 2001 federal income tax return, or its 2001 annual reports with audited or reviewed financial statements, and a 2001 Form W-2 Wage and Tax Statement the petitioner may have issued to the beneficiary.

In response to the RFE, the petitioner on May 28, 2003, submitted:

- The petitioner's 2001 Form 1120 tax return showing a negative \$61,121 taxable income.

On November 4, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that, as evidenced by the petitioner's income tax return for 2001, it paid \$26,581 in contractors fees for work that would otherwise constitute duties of the proffered position. Further it paid [REDACTED] the sole shareholder of the petitioner, \$25,510 in wages that counsel claims would cover the proffered wage if CIS approves the petition.

On appeal, counsel also submits:

- The November 20, 2003 affidavit of [REDACTED] stating that the petitioner intends to pay the proffered wage out of his own salary, which totaled \$26,581 in 2001, along with money the petitioner spent on the "full time employment," wages of temporary contractors if CIS approves the petition, further asserting the petitioner's plan to expand into Northern Virginia area will absorb more of [REDACTED] time, increasing the need to hire the beneficiary, because [REDACTED] would no longer be baking,
- [REDACTED] unaudited personal finances statement of his total assets, bakery salary and his monthly expenditures; and,
- The petitioner's 2002 Form 1120 tax return showing a \$45,116 loss under "taxable income".

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). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director did not specifically request any of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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).

In determining the petitioner's ability to pay the proffered wage CIS will first 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.

Despite the petitioner's claim that the beneficiary has worked for it since March 2001, the record contains no Form W-2 Wage and Tax statements showing the petitioner paid wages to the beneficiary. Thus, the petitioner has not established that the beneficiary has been working in the proffered position since 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 the relevant period, the petitioner must establish its ability to pay through some other means, such as through proof of its net income or net current assets since the priority date.

CIS will next 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 (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 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.

The evidence indicates that the petitioner is a corporation.¹ For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the 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. The tax returns show the following:

Tax Year	Taxable Income	Wage Increase Still Needed To Pay The Proffered Wage
2001	-\$61,121*	\$24,690
2002	-\$45,116*	\$24,690

*The full proffered wage, since there is no evidence of wage payments in any year.

¹ While Schedule E of the petitioner's 2001 tax return lists no one as owner of its shares, Schedule E of its 2002 return lists [redacted] as 100-percent shareholder. It is noted the 2001 return lists the \$25,510 paid [redacted] were wages while the 2002 return lists the \$25,200 paid to him as officer compensation.

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. A business owner would typically expect to convert its net current assets 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, can evidence the petitioner's ability to pay.

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

Tax Year	Net Current Assets	Wage increase needed To Pay The Proffered Wage*
2001	-\$5,460	\$24,690
2002	\$28,848	\$0

* The full proffered wage, since no wage payments were made to the beneficiary in any year.

The petitioner's net current asset amounts fail to establish its ability to pay the proffered wage in 2001.

The record also contains copies of unaudited financial statements in the form of [redacted] personal financial statement. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Further, the petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. In his November 20, 2003 affidavit, [redacted] states:

Once the beneficiary is available to be employed and assumes the duties of this position, the salaries and wages paid to the officers and outside contractors (in year 2001 this sum was in excess of \$26,000) [will cease]. Therefore with the full time employment of the beneficiary the officers and the outside contractors will be relieved of the duties that they have carried out for this business to date.

The affidavit further states that hiring the beneficiary would enable [redacted] to expand his business elsewhere. But while it is possible that the beneficiary would replace all of the outside contractors, counsel has not provided any evidence supporting a standard or criterion for the evaluating the beneficiary's ability to

replace [REDACTED] work output. Nor does the petitioner demonstrate that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Counsel's assertion that the petitioner can readily shift the officer compensation it pays its sole shareholder is unpersuasive. [REDACTED] compensation as an officer only appears in Schedule E of the petitioner's 2002 return and the earlier returns make no similar listing of his compensation, and thus fail to provide corroboration for his 2001 earnings. The owner-president's compensation is \$25,510, little more than the proffered wage of \$24,690. It is thus unrealistic to expect that the petitioner's owner will forgo receipt of his own compensation in order to hire an employee.

Based upon the totality of circumstances, this office does not find the cited evidence weighs in favor of the petitioner. Here, the petitioner, established in August 1997, demonstrates a less-than-robust financial picture, reporting a \$61,121 loss in taxable income for 2001, a \$45,116 loss in 2001, and a \$710 gain in 2000. Further, [REDACTED] salary is hardly large enough to suggest he would not notice if it were reduced by the amount of the proffered wage. Nor would diverting the compensation it pays its officers enable the petitioner to pay the proffered wage.

Nevertheless, the owner's 2001 salary would be available to pay the beneficiary's wage on and after the April 27, 2001 priority date due to the fact that [REDACTED] November 20, 2003 affidavit states the corporation paid [REDACTED] a \$25,510 salary in 2001 "to complete the duties and tasks for running the business activities which we seek to fulfill by employing the beneficiary." We are persuaded from [REDACTED] affidavit that the beneficiary would replace the work he performed in 2001, and accordingly will credit his \$25,510 in wages toward the petitioner's ability to pay the proffered wage in 2001. Given the aforementioned petitioner's \$28,848 in net current assets for 2002, the petitioner has therefore established its ability to pay the proffered wage for both years.

Accordingly, after a review of the federal tax returns, the record and the affidavit, it is concluded that the petitioner has established its continuing ability to pay the proffered wage from the priority date 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.