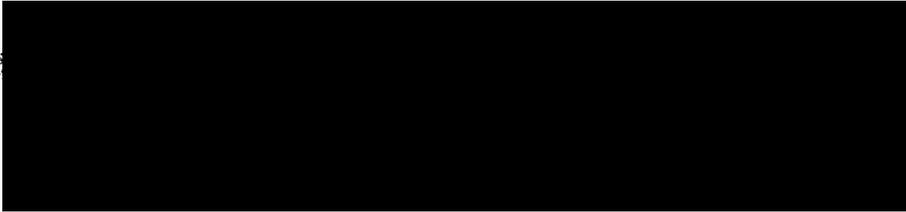


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U.S. Citizenship  
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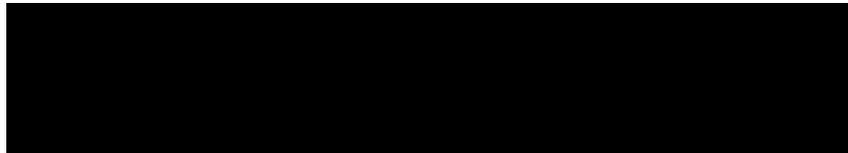
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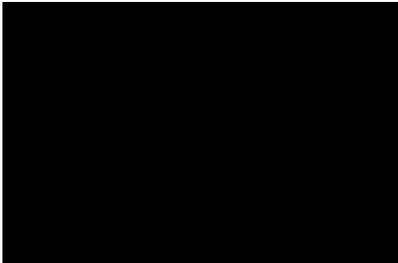
FILE: LIN 04 147 50674 Office: NEBRASKA SERVICE CENTER Date: **OCT 26 2005**

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. 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.

On appeal, counsel submits a brief and additional evidence.

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 granting 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 6, 2003. The proffered wage as stated on the Form ETA 750 is \$2,005 per month, which equals \$24,060 per year.

On the petition, the petitioner stated that it was established on November 20, 2000 and that it employs five workers. The petition states that the petitioner's gross annual income is \$217,643 and that its net annual income is "\$21,773 + 6,698." On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Westminster, Colorado.

In support of the petition, counsel submitted a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a subchapter S corporation, that it incorporated on November 20, 2000, that it reports taxes pursuant to the calendar year, and that during 2000 it reported ordinary income of \$21,773. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,954 and current liabilities of \$3,558, which yields net current assets of \$9,396.

On May 14, 2004 the Director, Nebraska Service Center denied the petition, finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits copies of monthly statements pertinent to the petitioner's bank account. In a brief, counsel asserts that the sum of the petitioner's 2003 ordinary income and its depreciation deduction shows the petitioner's ability to pay the proffered wage. In support of that position counsel cites two non-precedent decisions of this office.

Counsel also submits a letter, dated June 10, 2004, from the petitioner's accountant. The accountant states that the petitioner's "actual book income"<sup>1</sup> for 2003 was \$28,471, the sum of its taxable income<sup>2</sup> and its depreciation. The accountant further states that depreciation "is strictly a paper entry used for tax calculations and should be added back into taxable income in determining the total net income of the business."

The accountant's assertion that the amount of the petitioner's depreciation deduction should be added to its income is unconvincing. The accountant is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's citation of non-precedent decisions for the opposite proposition is of no effect. Although 8 C.F.R. § 103.3(c) provides that published decisions of Citizenship and Immigration Services (CIS) are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

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<sup>1</sup> The term "book income" does, in fact, have a meaning in accountancy. It is not, however, merely the sum of an entity's taxable income or ordinary income and its depreciation deduction. The accountant has provided no indication that his calculation of the petitioner's book income is in accordance with generally accepted accounting principles promulgated by the Financial Accounting Standards Board or that it is in any other way a valid indicator of the petitioner's ability to pay additional wages.

<sup>2</sup> In fact, a Form 1120S, U.S. Income Tax Return for an S Corporation does not show "taxable income" as such. A subchapter S corporation is not taxed, as such, but is passed through to its owners, retaining its identity as income.

cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.<sup>3</sup> 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 reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

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<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The proffered wage is \$24,060 per year. The priority date is January 6, 2003. .

During 2003 the petitioner declared ordinary income of \$21,773. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had current assets of \$9,396. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2003.

Having failed to demonstrate its ability to pay the proffered wage during 2003 the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.