

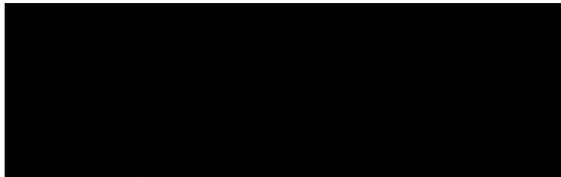
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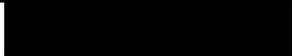
U.S. Citizenship  
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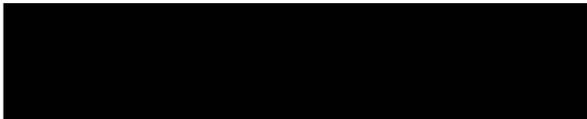
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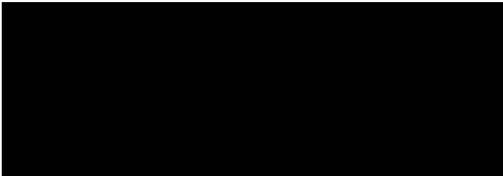
Petitioner:



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 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 an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a sous-chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

*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. 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 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 April 24, 2001. The current beneficiary is offered as a substitute for the beneficiary named on the ETA 750. The proffered wage as stated on the Form ETA 750 is \$32,200 per year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed in January, 2003, the petitioner claims to have been established in 1999, to currently employ approximately eleven workers and to have a gross annual income of over \$500,000. In support of its ability to pay the beneficiary's proposed wage offer of \$32,200 per year, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 through 2001. They reflect that the

petitioner files its federal tax returns using a fiscal year running from June 1st to May 31st of the following year. Thus, the 2000 return represents financial data covering June 1, 2000 to May 31, 2001. The tax returns also indicate that the petitioner was incorporated on July 6, 2000. They contain the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	2000	2001
Taxable Income before NOL	-\$200	\$13,814
Deduction (Form 1040)		
Current Assets (Sched. L)	\$ none listed	\$ 50,719
Current Liabilities (Sched. L)	\$ none listed	\$ 53,569
Net current assets	\$ n/a	-\$ 2,850

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.<sup>1</sup> Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On April 1, 2003, the director instructed the petitioner to submit evidence of the beneficiary's qualifying experience as well as evidence in support of its ability to pay the proffered salary. Relevant to the ability to pay the certified wage, the director requested the petitioner to provide a copy of its 2000 federal return as well as copies any Wage and Tax Statements (W-2s) issued to the beneficiary if the petitioner employed him in 2000, 2001, or 2002.

In response, the petitioner, through counsel, provided documentation pertinent to the beneficiary's qualifying prior experience and resubmitted a copy of its 2000 corporate tax return. The petitioner also supplied a copy of a March 2003 issue of a regional magazine discussing the petitioning restaurant, as well as a memo from its accountant, ██████████ CPA. Mr. ██████████ memo recalculates the petitioner's net income from the 2001 tax return by adding back the depreciation expense of \$11,530, and additionally advises that, combined with its accounts payable of \$48,219 from the Schedule L balance sheet, the net income of \$25,344 plus accounts payable represents its ability to pay in the form of \$73,563 in "working capital from operations."

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The director reviewed the petitioner's financial data contained within its corporate tax returns from 2000 and 2001 and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 24, 2001. The director denied the petition on December 1, 2003. The director rejected the accountant's recalculation of the petitioner's ability to pay the proffered wage, noting that even if the 2001 depreciation expense was added back to net income, the resulting sum would still be less than the proffered wage. The director further noted that accounts payable is a current liability used to calculate net current assets and would not be added back to the petitioner's net income.

On December 31, 2003, counsel filed a motion to reopen/reconsider the director's decision. Together with the motion, counsel submitted letter, dated December 30, 2003, from Mr. [REDACTED]. He asks CIS to permit the reclassification of the 2001 tax return balance sheet to reflect officer/investors loans as additional capital as well as adding notes payable to contractors as a total restated balance of additional capital as \$231,076.

On June 24, 2004, the director found that the grounds of the denial had not been overcome and reaffirmed his previous decision. The director rejected the reclassification of the balance sheet that was submitted with the 2001 tax return to the Internal Revenue Service (IRS). He noted that capital is not a liquid asset and that the balance sheet's stated current assets for the year would not be changed by the recalculation.

On appeal, counsel submits provides copies of the petitioner's federal corporate tax returns for 2002 and 2003, as well as copies of the petitioner's bank statements covering a period from May 23, 2001 to May 22, 2003. With these documents, a letter, dated August 14, 2004, from [REDACTED] CPA, is also supplied. Mr. [REDACTED] offers an analysis of the petitioner's 2001 - 2003 tax returns, which includes adding back the depreciation expense to determine "income available to pay proffered wage" and uses a current asset calculation that extracts an average cash balance from the bank statements submitted rather than the cash reported on Schedule L of the income tax returns for 2001 and 2002.

Counsel provides a copy of a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), asserting that the petitioner has met the requirements of memo in demonstrating its ability to pay the certified wage as presented by the documents submitted to the underlying record and on appeal as explained by Mr. Aggarwal.<sup>2</sup>

Counsel's contention is not persuasive. It is noted that the 2002 and 2003 corporate tax returns contain following:

	2002	2003
Taxable Income before NOL	\$13,601	\$ 35,482
Deduction (Form 1040)		

<sup>2</sup> In counsel's August 16, 2004, transmittal letter submitted with the appeal, reference is also made to some copies of the petitioner's 2004 bank statements included with the appeal. Such copies are not present in the materials submitted.

Current Assets (Sched. L)	\$61,188	\$167,423
Current Liabilities (Sched. L)	\$ 31,677	\$ 38,687
Net current assets	\$ 29,511	\$128,736

It is further noted that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9<sup>th</sup> Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the 2004 Yates Memorandum, it is noted that this document is not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.<sup>3</sup> Binding precedents are referenced at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

That said, the review process employed in this case is basically consistent with the guidance offered in the Yates Memorandum. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed the alien.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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

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<sup>3</sup>See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. It is further noted that depreciation 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 cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

Rejecting the addition of depreciation back to a petitioner's net income, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

It is further noted that counsel's reliance on the petitioner's 2001-2003 bank statements is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, somehow show additional available funds that would not be reflected on a corresponding tax return.

In this matter, counsel is correct in identifying the petitioner's ability to pay the certified wage of \$32,200 per year through its declared net taxable income of \$35,482 in 2003. The other information contained in the tax returns for 2000 through 2002 do not, however, demonstrate this ability beginning at the priority date of April 24, 2001. Neither the reported -\$200 in net taxable income or "-0-" in net current assets shows the ability to pay an annual salary of \$32,200. Neither the 2001 tax return's reported net taxable income of \$13,814, nor net current assets of -\$2,850 could cover the proffered wage. Similarly, the 2002 tax return shows that neither the \$13,601 in net taxable income, nor the \$29,511 in net current assets, could meet the proposed wage offer of \$32,200 per annum. In three out of the

four corporate federal tax returns provided to the record, the petitioner's continuing ability to pay the proffered wage has not been established beginning at the priority date of April 24, 2001.<sup>4</sup>

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.

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<sup>4</sup> . If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.