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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

[Redacted]  
EAC 04 068 54080

Office: VERMONT SERVICE CENTER

Date: DEC 18 2006

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, Chief  
Administrative Appeals Office

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

The petitioner is a German restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a German specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 on the priority date of the visa petition, and on August 16, 2004, denied the petition.

Upon review of the petitioner's motion to reopen, filed on September 14, 2004, the director granted the petitioner's motion, and, then on November 26, 2004, affirmed its prior decision that denied the petition. The petitioner filed a second motion to reopen on December 28, 2004. The director granted the petitioner's motion, and, then on February 16, 2005, affirmed its prior decision dated August 16, 2004 that denied the petition.

According to the petition, the petitioner's business was established in 1990, and, at the time the petition was prepared, employed two individuals.

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) 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 regulation at 8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information

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<sup>1</sup> According to the record of proceeding, the restaurant also specializes in Hungarian food specialties.

Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$17.61 per hour (\$36,628.80 per year). The Form ETA 750 states that the position requires two years of experience.

On appeal, counsel submits a legal brief.

With the petition, counsel submitted copies of the following documents: a support letter dated December 9, 2003; the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002; eight Wage and Tax Statements (W-2); NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns<sup>3</sup> for all of 2001, all of 2002, the first and second quarters of 2003; an Employers Quarterly Federal Tax Form (Form-941) dated June 30, 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on August 16, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the salary paid to the owner of petitioner for the two years for which tax returns were submitted is evidence of the ability of the petitioner to pay the proffered wage despite the losses stated for years 2001 and 2002. According to counsel, the petitioner through evidence submitted in its two tax returns, according to CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004 has demonstrated the petitioner's continued profitability and that its net income is equal to or greater than the proffered wage. Counsel contends that the actual net income for the business is derived by adding the owner's salary for each year to the loss suffered by the business in 2001 and 2002.

Counsel also contends because the business is organized as an S corporation, the compensation of the owner should be considered an asset and a source of revenue to pay the proffered wage.

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<sup>2</sup> It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>3</sup> New York State, NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns and Employers Quarterly Federal Tax Forms (Form-941) submitted for time periods before the priority date have no probative value in the determination whether or not the petitioner had the ability to pay the proffered wage from the priority date.

Counsel has submitted copies of the following documents to accompany the motions to reopen and appeal statements: explanatory letters dated September 10, 2004 and December 22, 2004; a CIS Form I-797C; a legal brief; the director's decision dated August 16, 2004; the 75% owner of petitioner, [REDACTED] Wage and Tax Statements (W-2) for years 2001 and 2002; a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; and, U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002 as well as other documents.

With the legal brief counsel submitted the following copies of documents: a CIS Form I-797C; the CIS Form I-290B filed September 14, 2004; the director's decision dated August 16, 2004; NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns<sup>4</sup> for all of 2001, all of 2002, and also the first and second quarters of 2003; an Employers Quarterly Federal Tax Form (Form 941) dated June 30, 2002; the 75% owner of petitioner, [REDACTED] Wage and Tax Statements (W-2) for years 2000, 2001 and 2002 as well as three other W-2 statements; U.S. Internal Revenue Service Form 1120S tax returns for 2001 and 2002; U.S. Citizenship and Immigration Services (CIS) Forms I-797C; the director's decisions; counsel's letter dated December 22, 2004; and, a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004 as well as other documentation.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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. No evidence was submitted to show that the petitioner employed the beneficiary.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,628.80 per year from the priority date of April 27, 2001:

- In 2001, the Form 1120S<sup>5</sup> stated a loss<sup>6</sup> of <\$4,021.00>.<sup>7</sup>

<sup>4</sup> New York State, NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Returns and Employers Quarterly Federal Tax Forms (Form-941) submitted for time periods before the priority date have slight probative value in the determination whether or not the petitioner had the ability to pay the proffered wage from the priority date.

<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on

- In 2002, the Form 1120S stated a loss of <\$8,160.00>.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$29,409.00 and \$63,907.00 in current liabilities. Therefore, the petitioner had <\$34,498.00> in net current assets. Since the proffered wage is \$36,628.80 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$27,638.00 and \$34,581.00 in current liabilities. Therefore, the petitioner had <\$6,943.00><sup>9</sup> in net current assets. Since the proffered wage is \$36,628.80 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

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the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

<sup>6</sup> IRS Form 1120S, Line 21 that states the petitioner's ordinary income (loss).

<sup>7</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>8</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>9</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Counsel asserts in her brief accompanying appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>10</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel contends because the business is organized as an S corporation, the compensation of the owner should be considered an asset and a source of revenue to pay the proffered wage.<sup>11</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As stated above, counsel contends that the actual net income for the business is derived by adding the owner's salary for each year to the loss suffered by the business in 2001 and 2002. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There is no statement from the owners of petitioner found in the record of proceeding that they would be willing to forgoe the profits from their enterprise received for their labor and investment in the business to pay the proffered wage. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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>10</sup> 8 C.F.R. § 204.5(g)(2).

<sup>11</sup> By implication, counsel is contending that the AAO should examine the personal tax returns of the shareholder owners for evidence of the ability to pay the proffered wage. Counsel's premise is incorrect. There are Schedule "K" forms submitted with petitioner's return for each shareholder owner. Additional deductions, for example, charitable deductions, Section 179 expense deductions, and additional depreciation and income may be included on Schedule "K." In most instances, the apportioned taxable income of the petitioner as reported on Line 21 is further reduced by deductions taken on each shareholders Schedule "K." Therefore to respond to counsel's contention, while income or loss is "reported out" from petitioner through the Schedule "K" statements, the income can be reduced by additional deductions. Therefore, there is no advantage to petitioner through the use of Schedule "K" income or loss figures to determine the ability to pay the proffered wage.