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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 24 2006
EAC 04 122 50247

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 director denied the employment-based preference visa petition, and the matter 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 cook of Indian food. 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 the petitioner had not established its ability to pay the proffered wage as of the priority date and onward. The director denied the petition accordingly.

On appeal, counsel states the petitioner has the ability to pay the proffered wage. Counsel submits the petitioner's amended 2001 federal income tax return.

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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$552 weekly or \$28,704 annually. On the ETA 750, the beneficiary claimed that he had worked for the petitioner since January 2000.

On the petition, the petitioner appears to indicate it was established on December 1, 1984.¹ The petitioner also indicated it has 6 employees, and a gross annual income of \$328,000. With the petition, the petitioner submitted its IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for tax year 2001. The petitioner is identified as Nico Nadia Restaurant Corp. India Passage. This document indicated that the petitioner had taxable income before net operating loss deduction and special deductions of \$3,357.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 13, 2004, the director requested additional evidence

¹ The handwritten date of establishment is somewhat illegible; however, the petitioner indicates the same date of establishment on its federal corporate income tax returns.

pertinent to that ability. The director noted the petitioner's 2001 taxable income and also noted that the petitioner's Part III Balance Sheet of its federal tax return showed current liabilities that were greater than the petitioner's current assets. The director then stated that both the petitioner's taxable income and its net current assets were less than the proffered salary. The director specifically requested that the petitioner provide copies of its 2002 and 2003 tax returns, with all schedules and attachments, or annual reports for 2002 and 2003 accompanied by audited or reviewed financial statements. The director also requested that the petitioner submit copies of the beneficiary's W-2 forms if the petitioner had employed the beneficiary in 2001, 2002, or 2003.

In response, the petitioner submitted its Form 1120 corporate tax return for the years 2002 and 2003. These tax returns indicated a taxable income of \$7,835 in 2002 and a taxable income of \$1,339 in 2003. The petitioner also submitted the first page of the beneficiary's IRS Form 1040 for tax year 2001 that indicated the beneficiary earned \$17,200 in non-employee compensation.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 28, 2004, denied the petition. The director examined all three of the petitioner's corporate tax returns and determined that the petitioner had insufficient net income and insufficient net current assets to pay the proffered wage in each year. In addition, the director stated that although the beneficiary's 2001 tax return shows \$17,200 non-employee compensation, no evidence was submitted to establish that any of the beneficiary's income was based on the petitioner's employment of the beneficiary. Thus, the director determined that the petitioner did not have the ability to pay the proffered wage as of the April 2001 priority date and onward.

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage based on an amended federal income tax return. Counsel submits IRS Form 1120X, Amended U.S. Corporation Income Tax Return. This document indicates the petitioner amended its 2001 income tax return to reflect an additional \$30,000 in income. On Part II of the amended tax return, the petitioner states that the income was erroneously omitted. With the revised amount of income, the amended 2001 federal income tax reflects taxable income before net operating loss deduction and special deductions of \$33,255.

It is noted that the petitioner submitted an amended federal income tax return for tax year 2001 which increases the petitioner's taxable income by \$30,000 with a resulting \$33,255 as the petitioner's taxable income in tax year 2001. However, neither the petitioner nor counsel provides any further explanation of the income that was erroneously omitted, or any previous discrepancies in the 2001 tax return. There is also no explanation provided as to why the petitioner chose to amend his 2001 tax return in 2004. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Ho* also states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Without more substantive explanation, the submission of an amended 2001 tax return is not viewed as sufficient to establish the petitioner's ability to pay the proffered wage in the 2001 priority year. It is further noted that the

petitioner would still have to establish its ability to pay the proffered wage in tax year 2002 and 2003, even if the amended 2001 tax return had been accepted as sufficient evidence.

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 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. The beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner since January 2000. The petitioner also submitted the beneficiary's individual income tax return for 2001 that indicates he earned \$17,200 in non-employee compensation. However, as correctly noted by the director, this document does not establish that the petitioner employed the beneficiary. The petitioner would have to submit more substantive evidentiary documentation, such as paychecks, pay slips, or IRS Forms 1099-MISC to establish it was the beneficiary's employer in 2001 or any other year. It is also noted that even if the beneficiary's wages were established as the 2001 wages paid by the petitioner, they are insufficient to establish that the petitioner paid the beneficiary the full proffered wage of \$28,704 in 2001 and onward. Thus the petitioner has not established that it paid the beneficiary a salary equal to or greater than the proffered wage in 2001 and onward.

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

The petitioner is structured as a corporation. In 2001, the petitioner's net income is the taxable income before net operating loss deduction and special deductions, identified on line 24, IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return. In 2001, the petitioner had a net income of \$3,357.² In tax years 2002 and 2003, the petitioner's net income is the taxable income before net operating loss deduction and special deductions, identified on Line 28, IRS Form 1120, U.S. Corporation Income Tax Return. In tax years 2002 and 2003, the petitioner had a net income of \$7,835 and \$1,339 respectively. None of these figures is sufficient to pay the proffered wage of \$28,704.

² As previously stated, the petitioner's amended 2001 tax return is not accepted as probative evidence that the petitioner had an amended taxable income of \$33,255.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.³ As previously stated, in 2001, the petitioner filed a Form 1120A. On Form 1120A, a corporation's year-end current assets are shown on Part III, Balance Sheet Per Books, lines 1 through 6. Its year-end current liabilities are shown on lines 13 through 14. 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 out of those net current assets. For the year 2002 and for the partial year 2003, the petitioner filed a Form 1120, corporate income tax form. On the Form 1120, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The tax returns reflect the following information for the following years:

	2001	2002	2003
Taxable income ⁴	\$ 3,357	\$ 7,835	\$ 1,339
Current Assets	\$ -3,205	\$ -825	\$ -2,606
Current Liabilities	\$ 140,981	\$ 146,758	\$ 148,559
Net current assets	\$ -144,186	\$ -147,583	\$ -151,165

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001.⁵ In 2001, as previously illustrated, the petitioner shows a taxable income of \$3,357, and negative net current assets of \$144,186, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$7,835 and negative net current assets of \$147,583, and therefore, the petitioner has not demonstrated the ability to pay the proffered wage. In 2003 as previously illustrated, the petitioner shows a taxable income of \$1,339, and negative net current

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁴ As previously stated, taxable income on Form 1120A is the sum shown on line 24, while taxable income on the Form 1120 is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

⁵ As stated previously, the petitioner did not establish that it paid the wages reported by the beneficiary on his Form 1040 individual income tax form.

assets of \$151,165, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has also not provided further evidence that was viewed as sufficient to establish additional sources of funds with which to pay the proffered wage. The petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.