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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAY 19 2006
SRC-03-143-50800

IN RE: Petitioner: [REDACTED]
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, Chief
Administrative Appeals Office

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

The petitioner is an Indian vegetarian restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 13, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.38 per hour, which amounts to \$34,070.40 annually.¹

¹ The proffered wage, as calculated, is based on the assumption that the beneficiary is employed for 40 hours per week and for 52 weeks. No evidence in the record contradicts this assumption, and the Form ETA 750 corroborates that the beneficiary is to be employed for at least 40 hours per week. In addition, a letter from counsel dated December 8, 2004

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². No new evidence was submitted on appeal. Relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2002 and 2003, copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns, a copy of the beneficiary's Form W-2 Tax and Wage Statement for 2003, copies of checks from the petitioner to the beneficiary, copies of the beneficiary's bank statements, copies of the petitioner's bank statements, a copy of a letter from the petitioner dated April 12, 2003, and a copy of a letter from counsel dated December 8, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that "financial documents, bank statements and W-2s show that the petitioner has sufficient funds." Counsel also states that the director erred in looking at the beneficiary's net pay instead of the beneficiary's gross pay, wages paid to the beneficiary in 2003 combined with the petitioner's net income exceed the proffered wage, and wages paid to other employees should be considered.

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 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 Sonegawa*, 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. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The record, however, does contain a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003 that shows compensation received from the petitioner. The record also contains copies of 17 checks that the petitioner wrote to the beneficiary from February 10, 2004 to September 21, 2004. Each check shows the beneficiary receiving \$1064.98, and each check has writing indicating that \$265.42 is subtracted from the gross pay or that \$1310.40 is the gross pay. Compensations from the petitioner to the beneficiary are shown in the table below.

states that the proffered wage is \$34,070.40. Thus, both the director in her denial and counsel on appeal erred in stating that the proffered wage is \$31,449.60.

² 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2003	\$14,414.40	\$34,070.40	\$19,656.00
2004	\$22,276.80	\$34,070.40	\$11,793.60

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003 and 2004.

Counsel states that on appeal that the director erred in using the net amount on the checks instead of the gross amount, and “[w]ith 26 pay periods in a year, the [beneficiary’s] gross pay per year is actually \$34,060.00.” If the beneficiary receives \$1310.40 every two weeks, she would receive \$34,070.40 per year, not \$34,060.00.

The AAO does look at the gross pay in determining wages paid to the beneficiary and based on the evidence in the record, the petitioner paid the beneficiary \$22,276.80 in 2004. This amount is less than the proffered wage, and those checks are not enough to show that the beneficiary would receive the proffered wage in 2004 because nothing in the record indicates that the beneficiary was paid or how much the beneficiary was paid before February 10, 2004 and after September 21, 2004.

As another means of determining the petitioner’s ability to pay the proffered wage, 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.

The evidence indicates that the petitioner is a corporation.³ The record contains copies of the petitioner’s Form 1120 U.S. Corporation Income Tax Returns for 2002 and 2003. The record before the director closed on December 10, 2004 with the receipt by the director of the petitioner’s submissions in response to the request for evidence (RFE). As of that date the petitioner’s federal tax return for 2004 was not yet due. Therefore the petitioner’s tax return for 2003 is the most recent return available. The priority date is April 30, 2001, and the petitioner has to establish its ability to pay the proffered wage as of the priority date. A copy of the petitioner’s Form 1120 U.S. Corporation Income Tax Return for 2001 does not appear in the record.

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 petitioner’s tax returns show the amounts for taxable income on line 28 as shown in the table below.

³ The director erred in stating that the petitioner submitted “2002 and 2003 1120 S tax return for an S Corporation.”

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	No Information	\$34,070.40*	No Information
2002	\$29,211.00	\$34,070.40*	-\$4,859.40
2003	\$18,735.00	\$19,656.00**	-\$921.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2002.

** Crediting the petitioner with the compensation actually paid to the beneficiary in 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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. The net current assets are expected to be converted 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, evidences 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 End of year	Wage increase needed to pay the proffered wage
2001	No Information	\$34,070.40*
2002	-\$178,164.00	\$34,070.40*
2003	-\$101,588.00	\$19,656.00**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2002.

** Crediting the petitioner with the compensation actually paid to the beneficiary in 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel states on appeal that with the wages the beneficiary received in 2003 and the petitioner's net income in 2003, "the employer could have paid the employe[e] as much as \$33,149.40 in 2003 which again exceeds the required salary of \$31,449.60." The proffered wage is \$34,070.40, and as stated above, the combination of the wages the beneficiary received in 2003 and the petitioner's net income is \$33,149.40. \$33,149.40 is \$921.00 less than the proffered wage.

Counsel also states that "the employer had a net income of \$29,211.00 [in 2002]" and "someone else was cooking for the employer in 2001 and wages were paid to that person. The employer need only use \$2,238.60 of the wages paid to others in 2001 to pay the alien in 2001." Since the record does not contain any information regarding the petitioner's financial status in 2001, it appears that counsel is referring to 2002, not 2001. In 2002, the wage increase needed to pay the proffered wage after taking into consideration the petitioner's net income is \$4,859.40, not \$2,238.60.

Counsel is advising that wages paid to another worker in 2002 can be used in determining the petitioner's ability to pay the proffered wage in 2002. The record does not, however, name the worker, state his or her wage, verify his or her full-time employment, or provide evidence that the petitioner has replaced or will replace the worker with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary. Moreover, there is no evidence that the position of the other worker involves the same duties as those set forth in the Form ETA 750. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The record contains copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns. In a letter from counsel dated December 8, 2004, counsel states that "[a]s proof of [the beneficiary's employment by the petitioner], we enclose a copy of the employer[']s Form 941 for 2003 3rd quarter, 2003 4th quarter, 2004 1st quarter, 2004 2nd quarter, and 2004 3rd quarter." Those forms show the total amount the petitioner paid in wages and the petitioner's federal tax liabilities for each quarter. However, they do not show which workers were paid and how much the petitioner paid each worker. Thus, the petitioner's Form 941s are irrelevant in determining the petitioner's ability to pay the proffered wage to the beneficiary.

The record contains copies of the beneficiary's bank statements. These statements are irrelevant because the issue at hand is whether the petitioner has the financial ability to pay the proffered wage. The beneficiary's financial status is irrelevant.

The record also contains copies of the petitioner's bank statements. The letter from counsel dated December 8, 2004 states that "the employer has maintained a cash bank balance of approximately \$10,000.00 since 2003" and "[t]hese additional sums are sufficient support for the employer's ability to pay the proffered wage." Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that has been considered above in determining the petitioner's net

current assets. In addition, contrary to counsel's assertion that the petitioner has maintained a cash balance of approximately \$10,000.00 since 2003, the petitioner's balances from October to December 2003 and from February to April 2004 are well below \$10,000.00.⁴

Counsel's letter dated December 8, 2004 states that depreciation "is not a cash expense to the company but rather an accounting deduction in favor of businesses under the tax code" and thus should be included in the calculation of the petitioner's cash net income. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) 719 F.Supp. at 537.

The record contains a letter from the petitioner's president dated April 12, 2003 stating that the petitioner "is in sound financial order and had sufficient funds to support the wage offered." Documentary evidence in the record, as discussed above, does not suggest that the petitioner has sufficient funds as of the priority date.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The director erred in only requesting evidence for 2002, 2003, and 2004 in the RFE dated October 4, 2004 and in only discussing the petitioner's ability to pay the proffered wage in 2002, 2003, and 2004 in her denial. The priority date in this case is April 30, 2001, and the director should have requested that the petitioner submit evidence showing its ability to pay in 2001 and discussed the petitioner's ability to pay in 2001. The director also erred in using the wrong proffered wage and in categorizing the petitioner as an S Corporation. Nevertheless, the decision of the director to deny the petition was correct because based on the evidence before the director, the petitioner fails to show its ability to pay the proffered wage in 2002, 2003, and 2004.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.

⁴ According to the petitioner's bank statements from South Trust Bank, the petitioner had a balance of \$6,155.43 in October 2003, \$5,567.13 in November 2003, and \$5,337.78 in December 2003. According to the petitioner's bank statements from Charter Bank, the petitioner had a balance of \$7,113.01 in February 2004, \$5,187.58 in March 2004, and \$4,645.91 in April 2004.