

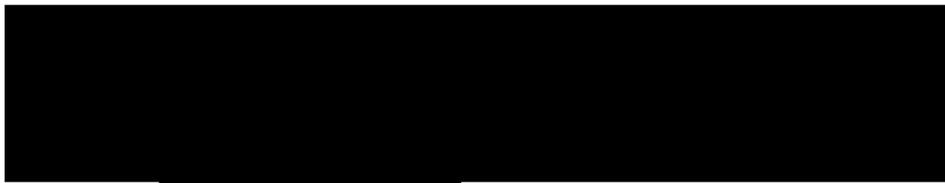
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U.S. Citizenship
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FILE: [REDACTED]
LIN 04 203 50473

Office: NEBRASKA SERVICE CENTER

Date: OCT 24 2006

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:
[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 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 a South Indian cuisine restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cuisine 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 stated that petitioner does have the ability to pay the proffered wage. 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 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 December 10, 2002. The proffered wage as stated on the Form ETA 750 is \$2,005 a month, which amounts to \$24,060 annually. On the Form ETA 750, the beneficiary did not claim to have worked for the petitioner, as of the date he signed the ETA 750, Part B on November 26, 2002.

On the petition, the petitioner indicated it was established in May of 2001, has two employees, a gross annual income of \$467,793, and a net annual income of \$25,000. With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax return, for the years 2002 and 2003; Form 941, Employer's Quarterly Federal Tax Return from the first quarter of 2003 to the first quarter of 2004; Form 940-EZ, Employer's Annual Federal Unemployment Tax Return for the first quarter of 2003 to the first quarter of 2004 that listed two employees; and monthly bank statements for what appears to be the petitioner's two Colonial Bank checking accounts, Account

Number [REDACTED] and Account Number [REDACTED]. These statements were accompanied by copies of checks issued by the petitioner. The petitioner also submitted its eight-page menu, as well as two letters of work verification of the employment of the beneficiary by Indian restaurants located in Kurukshetra, India. The petitioner's federal income tax returns indicated the petitioner had taxable income before net operating loss deduction and special deductions of -\$3,922 in 2002, and \$6,976 in 2003.

Furthermore, the petitioner submitted an I-797 Approval Notice dated November 19, 2003 that indicated the beneficiary had been approved for an H-1B visa petition from September 22, 2003 to September 15, 2006, with Syscom Enterprise Solutions, Inc., in West Des Moines, Iowa, as well as a copy of the beneficiary's I-94 Arrival Record that indicated the beneficiary had entered the United States to work for Antartica Infosys, Inc. as a software programmer on February 13, 2003.

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 March 30, 2005, denied the petition. The director stated that the petitioner's 2002 federal income tax return indicated the petitioner had a total income of \$148,050, a taxable income loss of \$3,922, and cash assets of \$3,000. With regard to the petitioner's 2003 tax return, the director stated that this return indicated a total income of \$153,518, a taxable income of \$6,976 and available cash of \$8,200. The director then stated that the evidence did not establish that the petitioner had the ability to pay the proffered wage of \$24,060 as of the 2002 priority date and to the present, and denied the petition.

On appeal, counsel states that the petitioner had a cash balance of \$3,000 available on December 31, 2002, and that this sum was more than sufficient to pay the proffered monthly wage of \$2,005 at the time the priority date was established on December 10, 2002. Counsel then notes the petitioner's depreciation expenses from tax year 2002 and 2003 could be added back to the respective annual taxable profits in order to determine the cash flow of the petitioner. With regard to tax year 2002, counsel noted that the negative profit for the year, namely -\$3,922, when added to the depreciation expenses of \$7,572, resulted in available funds in the amount of \$3,650, and that the monthly salary to be paid for December 2002, namely, \$2,005, was less than this sum.

Counsel also notes that in tax year 2003, the petitioner had profits of \$6,976, depreciation of \$14,102, and a write-off for net operation loss from year 2002 of \$3,922 that resulted in available funds of \$25,000 with which to pay the proffered wage of \$24,060. Based on the availability of funds to pay the monthly salary for December 2002, and the yearly salary for the entire year of 2003, counsel contends that the petitioner does have the ability to pay the proffered wage. Counsel also looks at the net current assets of the petitioner, and stated that they were \$3,500 in tax year 2002 and \$15,500 in tax year 2003.¹

Counsel also submits a letter from [REDACTED] the petitioner's president. In this letter [REDACTED] stated that he had worked at the petitioner since its opening in May 2001 as a cook, and had been paying himself a salary of \$1,500 a month. [REDACTED] states that his plan is to have the beneficiary take

¹ The AAO will examine the petitioner's net current assets for tax years 2002 and 2003 further in these proceedings.

over the cooking and to relieve him as a cook, and that the salary paid to the president, namely \$18,000, will be available to the beneficiary as the petitioner's new chef.

Counsel also submits a letter from [REDACTED] Centennial, Colorado. In his letter, [REDACTED] stated that he reviewed the petitioner's 2002 and 2003 tax returns and also the quarterly and annual payroll tax returns for 2003. [REDACTED] then compiled the petitioner's 2002 taxable income, depreciation, and the salary paid to the petitioner's owner to arrive at an adjusted net income of \$21,650, and cash on hand per balance sheet of \$3,000. [REDACTED] also compiled the petitioner's 2003 taxable income, depreciation, 2002 net operating loss of \$3,922, and the petitioner's current chef's salary of \$18,000 to arrive at an adjusted net income of \$21,650. [REDACTED] states that in his professional opinion, if the existing chef is replaced by the beneficiary, then the petitioner has more than adequate funds to pay an annual salary of \$24,060 in 2003. With regard to tax year 2002, [REDACTED] states that the petitioner has sufficient adjusted net income to pay the beneficiary's monthly salary of \$2,005.

The petitioner and counsel in the initial petition submitted petitioner's bank statements for various months in tax year 2004. The petitioner and counsel's reliance on the balance in the petitioner's bank account 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 will be considered below in determining the petitioner's net current assets.

On appeal, counsel asserts that the petitioner only has to establish its ability to pay the beneficiary's monthly salary of \$2,005 in tax year 2002, based on the December 10, 2002 priority date. However, we will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. As stated previously, counsel asserts that the petitioner's negative net income in tax year 2002 can be combined with its depreciation expenses to arrive at available funds of \$3,650 with which to pay the beneficiary's monthly salary. This analysis is erroneous on two grounds. First, the record reflects that the petitioner's net income for the entire year, not just the final month of the year, is negative. Second, the petitioner cannot add back depreciation expenses to its net income when computing its ability to pay the proffered wage.²

On appeal, the petitioner's owner and sole shareholder states that he has been working as a cook for the petitioner, and seeks to replace himself with the beneficiary. The evidence in the record, namely, the Unemployment Insurance Reports names the petitioner's two workers, and the Forms 940 contains competent evidence of the

² The AAO will examine depreciation and its role in the examination of a petitioner's ability to pay a proffered wage more completely further in these proceedings.

wages paid. The letter from the petitioner's owner verifies that he has been performing the duties of a cook that are similar to the proffered position as set forth on the ETA 750, and wishes to have the beneficiary replace him as cook. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be 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. Thus the wages paid to [REDACTED] and shown as officer compensation on the petitioner's tax returns can be utilized to show the petitioner's ability to pay the proffered wage. It is noted that if the officer performed other duties, not all of the officer's compensation can be utilized to show the petitioner's ability to pay the proffered wage.

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 petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 and onward. It is the petitioner's obligation, therefore, to establish its ability to pay the entire proffered wage in tax year 2002 and 2003.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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. Contrary to counsel's assertions with regard to adding back depreciation costs to the petitioner's net income, the court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner is structured as a corporation. The petitioner's net income is the taxable income shown on line 28, taxable income before NOL deduction and special deductions on its IRS Form 1120. In tax years 2002 and 2003, the petitioner's net income is -\$3,922 and \$6,976. Neither sum is sufficient to pay the proffered wage of \$24,060.

Nevertheless, 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 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 tax years 2002 and 2003:

	2002	2003
Taxable income ⁴	\$ -3,922	\$ 6,976
Current Assets	\$ 3,000	\$ 15,000
Current Liabilities	\$ 2,000	\$ 1,020
Net current assets	\$ 1,000	\$ 13,980

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, as previously illustrated, the petitioner shows a taxable income of -\$3,922, and negative net current assets of \$3,922, 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 2003. In 2003, the petitioner shows a taxable income of \$6,976 and net current assets of \$13,980. In neither year was the petitioner able to establish its ability to pay the proffered wage based on its net income or net current assets.

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 is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

As stated previously, the petitioner's owner submits a letter on appeal and states that he is presently working as a cook with the petitioner, and would give his salary to the beneficiary to replace him as cook. The petitioner's tax returns for 2002 and 2003 reflect wages of \$18,000 each year. The use of the petitioner's claimed wages to establish the proffered wage is problematic. First, the record reflects that the petitioner has two employees. Thus, it is not clear that the entire \$18,000 listed as wages in both 2002 and 2003 would be available to pay the proffered wage. Second, wages, as opposed to officer compensation, are not discretionary expenses. Third, even if the petitioner's owner earned wages of \$18,000 both in tax year 2002 and 2003, in 2003 the petitioner's owner's salary of \$18,000 and the petitioner's net current assets of \$1,000 combined are only \$19,000, which is insufficient to pay the proffered wage in the priority year 2002. In tax year 2003, the combination of the petitioner's owner's compensation/salary and the petitioner's net income of \$6,992 or its net current assets of \$13,980 are sufficient to pay the proffered wage of \$24,060. Thus, if the owner's wages could be used to replace the owner with the beneficiary, the petitioner had the ability to pay the proffered wage during 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2002 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.