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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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PUBLIC COPY

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER  
SRC 04 163 51770

Date: JAN 03 2007

IN RE: Petitioner:  
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 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 a dry cleaning and laundry business. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a dry cleaning and laundry manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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 nature, for which qualified workers are not available in the United States.

The regulation 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, 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 CFR § 204.5(d).<sup>2</sup> 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.

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<sup>1</sup> The Form ETA 750 indicates another beneficiary, Ayaz Lakhani, for whom the present beneficiary has been substituted. Both the former beneficiary and the present beneficiary share the same address.

<sup>2</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

Comm. 1977). Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$55,682 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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 appeal<sup>3</sup>. On appeal counsel submits previously submitted evidence including a copy of the Yates memo entitled "Determination of Ability To Pay."<sup>4</sup> He also submits additional paychecks issued by the petitioner to the beneficiary, as well as Form 941, Employer's Federal Quarterly Tax Return for the first quarter of tax year 2004. Relevant evidence in the record includes the petitioner's Forms 1120S tax returns for tax years 2001, 2002, and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$256,742, and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 1, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the Yates memo states that the petitioner can establish its ability to pay the proffered wage if it is not only employing the beneficiary but also has paid or currently is paying the proffered wage. Counsel states that Citizenship and Immigration Services (CIS) erred when it held the petitioner to establishing its ability to pay the proffered wage as of the priority date and to the present. Counsel also states that previously the petitioner had submitted six paychecks with the petitioner's name printed on them and made payable to the beneficiary. Counsel states that there could be no other logical reason for such payments other than to compensate the beneficiary. Counsel submits a federal Form 941 to further establish the payment of wages to the beneficiary.

On appeal, counsel asserts that the petitioner has paid the beneficiary at the proffered wage rate, and, thus, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the pay checks for periods of time in 2004 and 2005 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

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<sup>3</sup> 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).

<sup>4</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 16, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2001, it must also show its continuing ability to pay the proffered wage in subsequent years. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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, contrary to counsel's assertion, 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 Yates memo that explains to adjudicators three circumstances in which they can make a positive determination of a petitioner's ability to pay the proffered wage, does not obviate the petitioner's need to establish its ability to pay the proffered wage as of the priority date and to the present. Regardless of which avenue is utilized, namely, the petitioner's net income, net current assets, or payment of the proffered wage to the beneficiary, the petitioner has to establish its ability to use these avenues as of the priority date and onward.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. In the instant case, through the submission of the Form 941 with the documentation of quarterly wages to two employees, the petitioner established that it paid the beneficiary \$8,566.48 during the first quarter of 2004. As correctly noted, the paychecks submitted to the record, without further substantiation such as Forms 941, are not viewed as sufficient to establish the beneficiary's actual wages. Thus, while the petitioner established that it paid wages to the beneficiary in the first quarter of 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date to the present. Thus the petitioner cannot establish its ability to pay the proffered wage as of the priority and onward based on wages paid to the beneficiary.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$55,682 per year from the priority date:

- In 2001, the Form 1120S stated a net income<sup>5</sup> of \$8,224.  
In 2002, the Form 1120S stated a net income of \$14,312.
- In 2003, the Form 1120S stated a net income of \$12,352.

Therefore, for the years 2001, 2002, and 2003, the petitioner did not have sufficient net income to pay the 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. The petitioner's total assets include depreciable assets that the petitioner

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<sup>5</sup>Ordinary income (loss) from trade or business activities as reported on Line 21, unless the petitioner indicated other source of income on lines 1 through 6 on its Schedule K. In this case, the petitioner's net income would be indicated on line 21.

uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.<sup>6</sup> 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$71,046.<sup>7</sup>
- The petitioner's net current assets during 2002 were \$33,932.
- The petitioner's net current assets during 2003 were \$8,483.

Therefore, as of the priority year 2001, the petitioner did have sufficient net current assets to pay the proffered wage. However, the petitioner has not established its ability to pay the proffered wage in tax year 2002 and 2003, based on either its net income, net current assets, or payment of the proffered wage to the beneficiary..

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel cites the Yates memo in stating that the petitioner only has to establish that it paid, or is currently paying the beneficiary the proffered wage. Counsel asserts that the checks submitted to the record in the amount of \$1,747.79 are sufficient to establish that the petitioner is paying the proffered wage to the beneficiary, and that the Yates memo should not be interpreted to mean the petitioner had to pay the beneficiary the proffered wage as of the priority date.

As stated previously, counsel's assertions on appeal with regard to the Yates memo are not persuasive. This memo was written to provide guidance to adjudicators as to the determination of the petitioner's ability to pay the proffered wage, and in no way, suggests that the petitioner does not have to establish this ability as of the priority date and to the present, in contravention of the regulatory requirements of 8 C.F.R. § 204.5(g)(2). Furthermore the petitioner's tax return for 2001 did establish the petitioner's ability to pay the proffered wage based on its net current assets. The evidence submitted to the record did not establish that the petitioner continued to have the ability in tax years 2002, 2003, and 2004. While the Form 941 for the first quarter of 2004 does establish the payment of wages to the petitioner's two employees in this quarter, it only establishes

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<sup>6</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.

<sup>7</sup> The director's decision had two calculations for the petitioner's 2001 net current assets. The amounts described above are the correct figures.

the wages for the first quarter and cannot be used to establish that the petitioner has the ability to pay the beneficiary's proffered wage throughout the remainder of the year. Furthermore, if the petitioner paid the same salary amount for the remaining three quarters, the beneficiary's wages would be \$34,265.92, a sum considerably less than the yearly salary of \$ 55,682.<sup>8</sup>

Counsel's assertions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that while the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor, the petitioner had not established its continuing ability to do so in tax years 2002, 2003, and 2004.

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

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>8</sup> Since the petitioner's Form 1120S for tax year 2004 was not available on appeal, the AAO cannot determine whether the petitioner's net income or net current assets in combination with the beneficiary's wages would have been sufficient to pay the difference between the beneficiary's wage and the proffered wage.