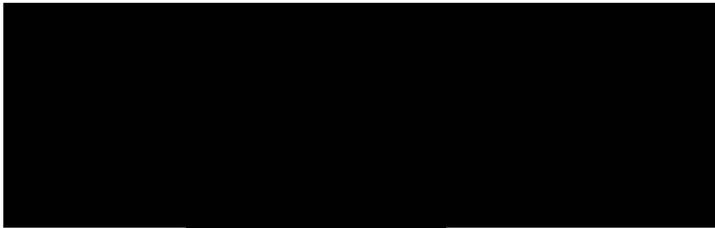


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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington DC 20529-2090



U.S. Citizenship
and Immigration
Services



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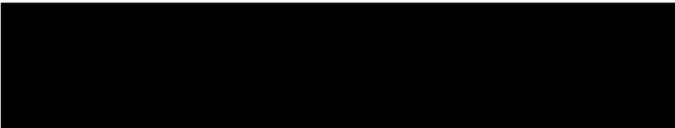
Office: TEXAS SERVICE CENTER Date: MAR 04 2009

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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:

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 [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is realistic. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Therefore, 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.

Here, the ETA 750 was accepted for processing on April 16, 2001. The proffered wage as stated on Part A of the ETA 750 is \$18.00 per hour, which amounts to \$37,440 per year. On Part B of the ETA 750, originally signed by the beneficiary on April 2, 2001, he claims to have worked for the petitioner since July 1999 to the present. An initialed correction dated July 29, 2004, amends this claim of employment for the petitioner to a start date of July 2000 to an end date of April 2001.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on May 24, 2007, the petitioner states that it was established on January 27, 1972 and employs 25 workers.

Other initialed corrections appear multiple times on Part(s) A and B of the Form ETA 750. They appear to have been entered by one of the petitioner's owners and the beneficiary.¹ One stamp, dated December 19, 2006, from the DOL Regional Office is shown. It indicates "Correction Approved By DOL Regional Office," but is uninitialed. It is unclear whether this correction stamp applies to all initialed corrections. On item 14 of Part A of the Form ETA 750, the requirement for work experience has been corrected to "0-2" years of experience in a related occupation of "cook 1" with "willing to train" inserted as a notation above. This change was dated December 1, 2006. USCIS electronic records indicate that at least one other petition with the same priority date as the instant case was approved on February 28, 2008, designating that beneficiary as either a skilled worker or professional, not an unskilled worker as in this case.

Based on the above and the reasons explained below, the director should confirm on remand whether the original Form ETA 750 filed with the instant petition is the same as the Form ETA 750 actually approved by DOL. The director should also obtain information related to any other beneficiaries sponsored by the petitioner as to their positions and salaries so that it may be determined that the petitioner has had the ability to pay all sponsored beneficiaries. Where a petitioner files I-140s for

¹All but one of the changes are initialed and dated July 29, 2004.

multiple beneficiaries, it is incumbent upon the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its Form ETA 750 job offer is a realistic one for each beneficiary that it sponsors.

As evidence of its continuing financial ability to pay the proposed wage offer of \$37,440 per annum on appeal, the petitioner has provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, and 2003, 2004, 2005, and 2006.² The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns also contain the following information:

	2001	2002	2003	2004	2005	2006
Net Income ³	\$ 12,653	\$ 1,514	-\$74,735	\$16,007	\$ 8,083	\$ 3,857
Current Assets	\$123,800	\$128,047	\$76,745	\$77,934	\$91,283	\$98,224
Current Liabilities	\$ 6,037	\$ 5,269	\$ 5,201	\$ 6,882	\$ 8,647	\$ 8,230
Net Current Assets	\$117,763	\$122,778	\$71,544	\$71,052	\$82,636	\$89,994

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6

³ For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

⁴ 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.

and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner additionally submitted copies of payroll records indicating that it had paid the beneficiary the hourly rate of \$18.00 in 2007 and had paid year-to-date wages of \$23,360 as of November 21, 2007, which is \$14,080 less than the proffered wage. On remand, the director should ascertain whether the petitioner's intent is to employ the beneficiary in a full-time permanent job as set forth in the terms of the labor certification. *See* 20 C.F.R. § 656.30.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record indicates that the petitioner paid the beneficiary wages of \$23,909 in 2007 as of November 21, 2007. As there is no federal tax return to provide additional information relevant to the petitioner's net income or net current assets, it is unclear if the petitioner's ability to pay the proffered wage of \$37,440 in this year has been established.⁵

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, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. . *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

⁵Although Form ETA 750 lists that the beneficiary was employed with the petitioner as of July 1999 or July 2000 (as amended), the petitioner did not submit any W-2s, Form 1099s or payroll information for any years prior to 2007.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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.

Keeping in mind that the other sponsored beneficiary's proffered salary will affect the petitioner's ability to pay, the petitioner may have established its ability to pay this beneficiary in 2001 through 2006 because its net current assets of \$117,763 in 2001; \$122,778 in 2002; \$71,544 in 2003; \$71,052 in 2004; \$82,636 in 2005; and \$89,994 could cover the proffered wage of \$37,440. As set forth above, all of the petitioner's totals for net income were insufficient to pay the proffered wage. However, from the record, it is unclear how much was the amount of the second sponsored worker's salary and whether the petitioner can pay both sponsored workers.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the regulatory requirements. Specifically, as noted above, the director should confirm whether the Form ETA 750 actually approved by DOL is the same as the one submitted with the petition and review whether the visa classification requested is appropriate. The director should also determine whether the petitioner has had the ability to pay all sponsored beneficiaries as of their respective priority dates to the present, taking into consideration the requirements of 8 C.F.R. § 204.5(g)(2), as well as actual wages that may have been paid. The director should also confirm whether the petitioner intends to provide a full-time permanent job to the beneficiary. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.