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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 04 169 54445

Office: VERMONT SERVICE CENTER

Date: DEC 19 2007

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 preference visa petition was denied by the Director, Vermont 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 review and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Spanish style 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 asserts that the director was obliged to request additional evidence of the petitioner's ability to pay the proffered wage.

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 DOL's employment system. See 8 CFR § 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 \$18.89 per hour, which amounts to \$39,291.20 annually. The ETA 750B, signed by the alien beneficiary on April 25, 2001, does not indicate that the alien has worked for the petitioner.

On Part 5 of the visa petition, filed on April 29, 2004, it is claimed that the petitioner was established in February 1993, has a gross annual income of \$327,952 and currently employs three workers.

As evidence of its continuing financial ability to pay the certified wage of \$39,291.20 per year, the petitioner submitted a copy of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2001.¹ The

¹ Counsel asserts in an addendum to the I-290B that the director miscalculated the petitioner's current assets and cash in 2001, but doesn't offer another calculation.

federal tax return shows that the petitioner reported net income of -\$34.² Part III of the tax return reflects that the petitioner had \$10,677 in current assets, which combined with \$132,465 in current liabilities, yields net current assets of -\$121,788.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 Part III of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 13 and 14. 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 director denied the petition on December 29, 2004, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage. Finding that the record contained sufficient initial evidence to determine eligibility, the director noted that the petitioner's federal income tax return reflected that its current liabilities exceeded its current assets and that its ordinary income was insufficient to pay the proffered wage of \$39,291.20 at the time of filing.

On appeal, counsel notes that the petition was filed prior to a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), which the director cited in rendering his decision based on the evidence contained in the record. Counsel asserts that the director erred in not issuing a request for additional evidence, which precluded the petitioner from submitting additional documentation to supplement the record.

In this case, counsel's argument is not persuasive. It is noted that the Yates memo does not create any right or benefit or constitute a legally binding precedent, but merely is offered as guidance. The regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." The regulation at 8 C.F.R. § 204.5(g) (2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. As the federal tax return submitted with the petition failed to establish the petitioner's ability to pay the proffered wage at the time of filing, the director could reasonably conclude that the evidence was sufficient to render a final decision of ineligibility based on the petitioner's failure to establish its continuing ability to pay the proffered wage beginning at the priority date. Moreover, 8 C.F.R. § 204.5(g)(2) also allows in appropriate cases, that additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director. Here, the director's decision was not made until seven months after the filing of the petition. If the petitioner had

² For the purpose of this review, taxable income before net operating loss deduction and special deductions as shown on line 24 of Form 1120-A filed in 2001 will be treated as net income.

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.

wanted additional evidence to be considered, there was sufficient time to offer it. Further, the petitioner had the opportunity to submit any additional evidence it had of its ability to pay the wage on appeal.

Counsel submits additional documentation on appeal, including copies of the petitioner's tax returns (Form 1120-A) for 2002 and 2003. They contain the following information:

	2002	2003
Net Income	\$5,220	\$ 4,184
Current Assets (Part III)	\$6,459	\$ 7,208
Current Liabilities (Part III)	\$90,245	\$33,793
Net Current Assets	-\$83,786	-\$26,585

On appeal, counsel also provided copies of the beneficiary's Wage and Tax Statements (W-2s) which he claims represent the petitioner's employment and payment of wages to the beneficiary in 2001, 2002, and 2003. The W-2s reflect the payment of the following amounts:

2001	\$39,291.20
2002	\$39,291.20
2003	\$39,291.20

Counsel claims that these wages are included in the petitioner's corporate tax returns and that the petitioner has established its continuing ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

In this case, it is noted that the W-2s submitted on appeal appear to demonstrate that the petitioner has employed and paid the beneficiary the proffered wage in 2001, 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 (or net current assets) as 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). 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.

As shown above, neither the petitioner's net income of -\$34 in 2001, \$5,220 in 2002, or \$4,184 in 2003 could cover the proffered wage. Similarly, its net current assets of -\$121,788 in 2001, -\$83,786 in 2002, or -\$26,585 in 2003, also could not cover the proposed wage offer of \$39,291.20.

It is noted that the W-2s provided on appeal disclose the same amount of wages paid each year in the exact amount of the proffered wage and all list the same tax identification / social security number for both the beneficiary and the employer. It is unclear when the petitioner first employed the beneficiary. The record shows that such employment was not included on the ETA 750B, signed by the beneficiary in April 2001. It is also not included on the biographic questionnaire (Form G-325) submitted with the beneficiary's application for permanent residence status in 2004, however it is noted that no date appears on the Form G-325. Further corroboration of such employment and payment of wages should be requested on remand.

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 requirements of 8 C.F.R. § 204.5(g)(2). 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 consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.