



U.S. Citizenship
and Immigration
Services

KWAN PING, INC., DBA KING WOK CHINESE RESTAURANT
ATTENTION: KWAN PING CHAN
203 WEST MCMILLAN STREET
CINCINNATI, OH 45219

FILE: LIN 04 174 51317 Office: NEBRASKA SERVICE CENTER Date: **JAN 20 2006**

IN RE: Petitioner: KWAN PING, INC., DBA KING WOK CHINESE RESTAURANT
Beneficiary: YUK KAM AUYANG


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:

CHARLESTON C.K. WANG, ESQ.
WANG LAW BUILDING
6924 PLAINFIELD ROAD
CINCINNATI OH 45236

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, Director
Administrative Appeals Office

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

The petitioner is a restaurant specializing in Chinese cuisine. 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, 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 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 March 26, 2002. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which amounts to \$20,800 annually. On the Form ETA 750B, signed by the beneficiary on December 28, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 28, 2004. The petition does not state when the petitioner was established or the amount of its gross annual income or of its net annual income, but claimed to currently have four employees.

In support of the petition, the petitioner submitted:

- An original of the Form ETA 750;
- Letters of experience from the beneficiary's former employers; and,
- The petitioner's Form 1120 returns for 2000–2002.

The director did not issue a request for evidence (RFE).

In a decision dated July 7, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. The evidence submitted on appeal includes:

- A doctor's note dated August 2, 2004, indicating he is treating Kwan Ping Chan (Mr. Chan), the petitioner's sole shareholder, for coronary heart disease and high levels of cholesterol.
- The petitioner's W-2 Form Wage and Tax Statement for 2003 issued to Mr. Chan for \$28,300 in wages, attached to Mr. Chan's Joint Form 1040EZ return for 2003;
- The petitioner's W-2 Form for 2002 indicating \$19,200 in wages paid to Mr. Chan attached to Mr. Chan's Form 1040 EZ for 2002
- The petitioner's W-2 for 2001 issued to Mr. Chan reporting \$19,200 in wages paid, attached to Mr. Chan's Form 1040EZ for 2001; and,
- Mr. Chan's affidavit of August 2, 2004, stating he intends to retire and replace himself by hiring the beneficiary.

Counsel states on appeal that the petitioner plans to replace its cook, Mr. Chan, with the beneficiary, and that therefore the petitioner has the ability to pay the proffered wage with the wage with funds it will no longer need for paying Mr. Chan.

At the outset this office notes that on the Immigrant Petition for Alien Worker (Form I-140), which counsel also signed, the petitioner marked the "yes" box asking, "Is this a new position," indicating the proffered position was not a new position. This is contrary to petitioner's statement, first made on appeal, that the beneficiary would be replacing a previously hired employee, that is, Mr. Chan. The petitioner's assertion that the beneficiary would be a replacement employee is inconsistent with the petitioner that indicates the proffered position is new in the petitioner's business. Thus, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

A review of the record also does not support the assertion that Mr. Chan will soon retire as head chef. A review of Mr. Chan's own joint federal income tax returns shows that he is the principal source of income in his family, which cannot easily survive if he is no longer receiving his wages as head chef.

The petitioner must establish that its job offer to the beneficiary is a realistic one. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). 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*. *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 wage in each pertinent year, 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 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 December 28, 2001, the beneficiary did not claim to have worked for the petitioner.

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. Finally, 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 evidence indicates that the petitioner is a corporation. 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. In the instant case, the petitioner's tax return for 2002 show a net income of \$13,593 for 2002, which is less than the proffered wage of \$20,800. Thus, based on the net income of the petitioner, counsel has not established the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, 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 those an employer might convert 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	Wage Increase Needed To Pay The Proffered Wage
2002	\$24,820	\$20,800

Since the petitioner's net current assets for 2002 exceeds the amount by which its wages must increase, this method of analyzing the petitioner's financial strength establishes the ability of the petitioner to pay the proffered wage.

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). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director did not specifically request any of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude

any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

After a review of the federal tax returns, it is concluded that the petitioner has established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

ORDER: The appeal is sustained. The petition is granted.