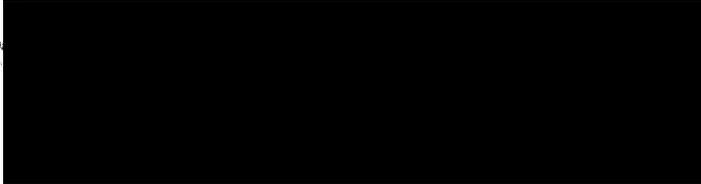




U.S. Citizenship  
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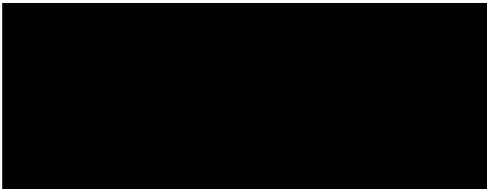
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FILE: EAC 03 116 52684 Office: VERMONT SERVICE CENTER Date: NOV 22 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker pursuant to § 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, Director  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bakery/pastry shop. It seeks to employ the beneficiary permanently in the United States as a baker/pastry maker assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting 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 a brief and additional evidence.

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 granting preference classification to 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 unavailable.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$13.17 per hour for a 35-hour week, which equals \$23,969.40 per year.

On the petition, the petitioner stated that it was established on December 10, 2000 and that it employs 69 workers. The petition states that the petitioner's gross annual income is \$2,481,825. The petitioner did not state its net annual income in the space provided on that form for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December of 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Englewood, New Jersey.

In support of the petition, counsel submitted the first page of the petitioner's 2001 Form 1065. That return shows that the petitioner commenced business on May 2, 2000 and that it reports taxes pursuant to the calendar year and accrual accounting. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage. During 2001 the petitioner declared a loss of \$493,270 as its operating income.

Because the evidence submitted was insufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Vermont Service Center, on January 26, 2004, issued a Request for Evidence requesting, *inter alia*, evidence pertinent to that ability. The Service Center stipulated that the evidence should be in the form of tax returns or annual reports. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001 that it submit copies of the 2001 Form W-2 Wage and Tax Statement showing the wages it paid to the beneficiary during that year.

In response, counsel submitted the petitioner's complete 2001 Form 1065, U.S. Return of Partnership Income and the beneficiary's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, including W-2 forms showing wages the petitioner paid to the beneficiary. Those W-2 forms show that the petitioner paid the beneficiary \$15,947.14 and \$22,834.84 during those years, respectively.

The Schedule L submitted with the petitioner's 2001 tax return shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Acting 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 July 9, 2004, denied the petition.

The Form I-290B appeal states that although the petitioner declared a loss during 2001 half of that loss was occasioned by the petitioner's depreciation deduction. Counsel notes that the IRS characterizes depreciation as "an annual income tax deduction that allows you to recover the cost or other basis of certain property over the time you use the property. It is an allowance for wear and tear, deterioration, or obsolescence of the property." Counsel did not explain how that assertion favors the petitioner's position that depreciation should not be subtracted from revenue for the purpose of demonstrating the petitioner's ability to pay the proffered wage.

Counsel submits a brief. In the brief counsel argues that the petitioner's total assets and its outside labor costs demonstrate its ability to pay the proffered wage. Counsel further notes that the Form ETA 750 indicates that the beneficiary would work 35 hours per week, and that the annual amount of the proffered wage, stated as \$27,393.60 in the decision of denial, is actually \$23,969.40. With the brief, counsel submitted a copy of a 2003 W-2 form showing that the petitioner paid the beneficiary wages of \$26,275.75 during that year.

In asserting that the payments to contract workers could have been used to pay the wages of the proffered position, counsel is necessarily asserting that those payments were for performance of the duties of the proffered position. Counsel, however, submitted no evidence in support of that assertion.

The assertions of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.<sup>1</sup>

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<sup>1</sup> Further, counsel must necessarily be asserting that the petitioner would replace those contract laborers with the alien. The purpose of the instant visa category is to provide alien workers to fill positions for which U.S. workers are

Counsel did not demonstrate that the funds paid for outside labor were for performance of the duties of the proffered. The funds paid for contract labor will not be considered in the calculations of the funds available to pay the proffered wage.

Counsel has also noted that half of the loss the petitioner declared during 2001 was occasioned by its depreciation deduction. Even if the petitioner's loss during that year was reduced by half, however, that would not demonstrate its ability to pay additional wages. Further, counsel has provided no argument for the proposition that the petitioner's 2001 depreciation deduction should be added back into its income.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real and, in some instances, large cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Even if this office were inclined to accept counsel's argument pertinent to the depreciation schedule, that scenario would be unacceptable.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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, the petitioner established that it employed the beneficiary during 2001, 2002, and 2003 and paid him \$15,947.14, \$22,834.84, and \$26,275.75 during those years, respectively.

Counsel correctly observed that the amount the petitioner paid to the beneficiary during 2003 exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage

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unavailable. If counsel is alleging that U.S. workers have been performing the duties of the proffered position, and that the petitioner is prepared to replace those U.S. workers with an alien, then counsel was obliged to demonstrate that this replacement does not violate the very purpose of the instant visa category.

during 2003. Counsel has also demonstrated, in part, the ability to pay the proffered wage during 2001 and 2002. The petitioner must demonstrate the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

However, contrary to counsel's assertion that the petitioner's total assets demonstrate its ability to pay the proffered wage, the petitioner's total assets are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay wages. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$23,969.40 per year. The priority date is April 19, 2001.

During 2001 the petitioner paid the beneficiary wages of \$15,947.14. The petitioner must demonstrate the ability to pay the \$8,022.26 balance of the proffered wage. During that year, however, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it to pay additional wages during that year. The petitioner has failed to demonstrate the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary wages of \$22,834.84. The Request for Evidence in this matter was issued on January 26, 2004. The petitioner's response is dated March 2, 2004 and was submitted on

March 5, 2004. On those dates, the petitioner's 2002 tax return should have been available. It was not submitted. Ordinarily the petitioner would be obliged to submit copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during 2002.

This office notes, however, that the Request for Evidence appears to ask for the petitioner's 2001 tax return, and not its 2002 tax return.<sup>2</sup> Although the Service Center should have requested the 2002 return, this office finds that the petitioner was implicitly excused from providing that return.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon 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>2</sup> The Request for Evidence, which should have asked for evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, instead asked the petitioner to "Submit additional evidence to establish that the employer had the ability to pay the proffered wage . . . as of April 19, 2001, the [priority date.]"