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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN-04-126-52526

Office: TEXAS SERVICE CENTER Date: SEP 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager. 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.

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 or seasonal 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 [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 February 28, 2002. The proffered wage as stated on the Form ETA 750 is \$30.92 per hour, which amounts to \$64,313.60 annually.

The instant petition is for a substituted beneficiary. 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 (March 7, 1996).

The I-140 petition was submitted on March 9, 2004. On the petition, the items for the date on which the petitioner was established, its current number of employees, its gross annual income and its net annual income were left blank. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the new beneficiary on January 23, 2003, the beneficiary did not claim to have worked for the petitioner. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated November 8, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on January 24, 2005.

In a decision dated January 31, 2005, 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. Counsel states on appeal that the total revenues of the petitioner and the non-cash expense deductions on the petitioner's tax returns establish the petitioner's ability to pay the proffered wage during the relevant period.

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 which 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, none of the documents submitted for the first time on appeal were specifically requested by the director. 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.

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, 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*, 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 first year of 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, 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 January 23, 2003, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, 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 an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002 and 2003. The record before the director closed on January 24, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.*

In the instant petition, the petitioner's tax returns indicate some income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income.

In the instant case, the petitioner's tax returns state amounts for income on line 23, Schedule K as shown in the table below:

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	-\$247.00	\$64,313.60*	-\$64,580.60
2001	-\$29,194.00	\$64,313.60*	-\$93,507.60
2002	-\$30,446.00	\$64,313.60*	-\$94,759.60
2003	\$23,916.00	\$64,313.60*	-\$88,229.60

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003, the two years at issue in the instant petition.

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 expected to be converted 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
	Beginning of year	End of year	
2000	\$57,296.00	\$40,256.00	not applicable
2001	\$40,256.00	\$32,184.00	not applicable
2002	\$32,184.00	\$11,454.00	\$64,313.60*
2003	\$11,454.00	-\$1,181.00	\$64,313.60*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures also fail to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003, the two years at issue in the instant petition.

The record contains copies of financial analyses of the petitioner for 2000 through 2003 done by an enrolled agent. An enrolled agent is a person who has been certified by the Internal Revenue Service to represent taxpayers before the IRS. Certification is based on either passing a special examination or having past service and technical experience with the IRS. See Internal Revenue Service, *Enrolled Agents, Enrollment Overview*, <http://www.irs.gov/taxpros/agents/> (accessed September 7, 2005).

Financial analyses by enrolled agents are not among the types of evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the information in the financial analyses in the record fails to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003. The enrolled agent bases his analyses on the petitioner's tax returns. The enrolled agent asserts that certain non-cash expense deductions for depreciation and for amortization should be added to the petitioner's net income when considering the petitioner's ability to pay the proffered wage.

Concerning depreciation deductions, while it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization*

(Including Information on Listed Property) (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Moreover, in asserting that depreciation deductions do not represent cash expenditures, the enrolled agent fails to acknowledge the fact that many purchases of business equipment and other business property are financed by loans, which normally require periodic payments of both principal and interest to the lender. See Small Business Administration, *Growing and Managing Your Business, Financing, Borrowing Money*, <http://www.sba.gov/managing/financing/borrowing.html> (accessed September 9, 2005); see, e.g., Inc.com, *The Lowdown on Business Loans*, <http://www.inc.com/articles/2000/04/19196.html> (April 2000).

The interest portions of any periodic payments to a lender may be claimed as deductions on a petitioner's federal taxes, but the principal portions of any periodic payments to a lender are not tax deductible. See Internal Revenue Service, *Instructions for Schedule C, Profit or Loss from a Business* (2004), at C-4, available at <http://www.irs.gov/pub/irs-pdf/i1040sc.pdf>; *Instructions for Form 1120 and 1120A* (2004), at 13-14, available at http://www.irs.gov/pub/irs-pdf/i1120_a.pdf. Therefore, when a taxpayer's purchases of business equipment or other property have been financed by loans, the taxpayer will typically have operating expenses for periodic payments on the loans which cannot be fully claimed as expense deductions on the taxpayer's tax returns. The non-deductible principal portions of loan repayments reflect the taxpayer's costs for the purchase price of the equipment or other property, amortized over the life of the loan. More specifically, the principal portions of such loan repayments reflect the portion of the purchase price which was financed by the loan. Although the principal portions of any periodic loan payments are not deductible as expenses, the taxpayer's total costs for the purchase price of the equipment or other property are reflected in the taxpayer's depreciation deductions for the property. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

The amortization schedule for repayment of principal on a business loan need not correspond to the depreciation deduction in a given year for the property financed by the loan. Moreover, some property purchased for business use, such as land, is not depreciable. *Id.*, at 1. For these reasons, a taxpayer's cash operating expenses in any given year may be even higher than the deductions shown on the taxpayer's tax returns.

In the instant case, the record does not indicate how the purchases of the petitioner's depreciable property were financed. But the Schedule L's attached to the petitioner's tax returns in the record show substantial amounts of liabilities on line 20 for mortgages, notes, and bonds payable in one year or longer. During the years at issue in the instant petition, the amounts on Line 20 of the petitioner's Schedule L's ranged from approximately \$725,000.00 to approximately \$765,000.00. Those figures suggest that the petitioner had substantial operating expenses during the relevant period for loan payments of both principal and interest. The record contains no evidence indicating any reason not to include the petitioner's depreciation deductions in an analysis of the petitioner's ability to pay the proffered wage.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. See *Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

In the instant case, the petitioner claimed certain deductions for amortization on its returns for 2002 and 2003, though the basis for such deductions is not itemized on the copies of any of the petitioner's tax returns in the

record. In any event, for reasons analogous to those discussed above, deductions allowed for amortization are considered to reflect actual costs of operating a business.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, 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 the instant case, for the reasons discussed above, the enrolled agent's assertions about depreciation and other non-cash deductions fail to establish that the petitioner has additional financial resources which should be added to the petitioner's net income.

In addition to his assertions about depreciation and other non-cash deductions, the enrolled agent asserts that cash on hand at year end represents additional financial resources available to the petitioner. However, CIS does not combine balance sheet items such as cash on hand with income and expense figures, since items comprising income and expenses affect the year-end balance sheet figures. Therefore counting cash on the balance sheet may result in double counting funds already considered in calculating a figure for net income.

The enrolled agent also asserts that "reconstituted positive cash flow carryover" from a prior tax year should be considered as additional financial resources in each of the relevant years. (Financial Analysis for 2002, at 1; Financial Analysis for 2003, at 1). The enrolled agent does not explain the term "reconstituted positive cash flow carryover," and it is unclear which item or items on the petitioner's tax returns provide the basis for any such figures.

Finally, the enrolled agent states that certain living expenses of the petitioner's owner are shown as deductions on the petitioner's Form 1120S tax returns and that such expenses are legally allowed as a deduction for an owner who is required to live on the premises. The enrolled agent states that those expenses are discretionary expenses of the petitioner's owner. However, the record contains no evidence to substantiate the enrolled agent's assertion that the owner's living expenses are discretionary expenses. In analyzing a petitioner's net income based on its tax returns, CIS considers all expenses claimed by the petitioner on its returns. In the instant petition, all such expenses are fully considered in the analysis of net income shown above.

For the foregoing reasons, the financial analyses of the enrolled agent fail to provide additional support to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage.

In his decision, the director correctly found that the petitioner's net income figures failed to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003. The director relied only on the petitioner's figures for ordinary income as the measure of the petitioner's net income, without considering the additional income shown on the Schedule K's attached to the petitioner's Form 1120S tax returns. However, the additional income shown on those Schedule K's is not great enough to materially affect the director's analysis. The director

also correctly found that the petitioner's net current income in each of the relevant years was insufficient to establish the petitioner's ability to pay the proffered wage. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are insufficient to overcome the decision of the director.

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.