

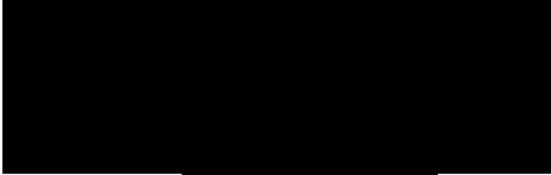


U.S. Citizenship
and Immigration
Services

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File: [Redacted]
EAC-04-139-54229

Office: VERMONT SERVICE CENTER

Date: AUG 14 200

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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a seafood restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty, foreign food. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's December 8, 2004, denial of the petitioner's motion to reopen, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtained permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. 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 Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 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.

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 for the position of a cook is \$13.80 per hour (\$20.70 per hour for overtime), 40 hours per week, which is equivalent to \$28,704 per year. The labor certification was approved on January 23, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on April 3, 2004. On the I-140, counsel listed the following information related the petitioning entity: established 1996; gross annual income: \$386,258; net annual income: not listed; and current number of employees: 9; wages per week: \$552.

The case was initially denied on September 7, 2004, based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner filed a motion to reopen, which was then denied on December 8, 2004 for failing to overcome the reason for denial. The petitioner then appealed to the AAO. We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will examine whether the petitioner 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. In the case at hand, on Form ETA 750B, signed by the beneficiary, the beneficiary does not list that he was employed with the petitioner. The petitioner has not claimed that it employed, or now employs the beneficiary. Therefore, the record contains no evidence of wage payment.

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 reflected on the petitioner's federal income tax return. 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); *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. 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.

The tax returns² demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,704 per year from the priority date. 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. Line 21 indicates ordinary income as follows:

² We note that the tax returns submitted are for the "Gialos Corporation" and lists the tax identification number of: 11-3328649. The address listed on the tax return is the same address listed for the restaurant on the I-140 form, and additionally, the petitioning company, Galini Seafood, lists the same tax identification number on the I-140 petition.

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	not submitted ³
2002	-\$12,508
2001	-\$28,965
2000	-\$84,610 ⁴

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in of the years above.

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 the difference between the petitioner's current assets and current liabilities.⁵ 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 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due. The petitioner's federal tax returns demonstrate the following in net current assets:

<u>Tax year</u>	<u>Net current assets</u>
2003	not submitted
2002	\$14,404
2001	\$2,724
2000	-\$3,082

Following this second analysis, the petitioner's federal tax returns show that the petitioner lacks the ability to pay the required wage in any year under the net current assets test as well.

On appeal, counsel contends that the petitioner's 2001 tax return showed that the company had \$194,772.00 in "total assets." However, we reject the use of total assets. The petitioner's "total assets" would include depreciable assets that the petitioner uses in its business. The petitioner's depreciable assets would not be converted to cash during the ordinary course of business and, therefore, are not funds available to pay the beneficiary's proffered wage. Further, the petitioner's total assets must be balanced against the petitioner's liabilities, which would be accounted for in the net current assets method of demonstrating the ability to pay the proffered wage, which factors in liabilities, as noted in the formulation above.

Further, counsel contends that the 2001 tax return showed depreciation in the amount of \$23,769.00, which should be added to the total assets. Depreciation as a tax concept is a measure of the decline in the value of a

³ We note that this tax return might not have been available at the time of filing the I-140 petition, but would have been available at the time that the petitioner filed the Motion to Reopen, and additionally, when the petitioner filed to appeal the denied Motion to Reopen.

⁴ We note that the tax returns submitted for the year 2000 are not relevant to this inquiry, since the beneficiary's priority date is April 30, 2001.

⁵ 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.

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>. Therefore, depreciation is an actual cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Therefore, the AAO is not persuaded by counsel's assertion that depreciation should be included.

On appeal, counsel also contends that CIS "relied heavily on the interoffice memorandum from William P. Yates [sic], Associate Director for Operations, dated May 4, 2004 which failed to set forth a formula as to how the adjudicator should calculate the Net Current Assets. The adjudicator is left with the discretion of the method of calculating which is not known to the petitioner. The memorandum is vague and is an abuse of discretion." The Yates Memo⁶ addresses ability to pay issues, and provides guidance for adjudicators in determining a petitioner's ability to pay the beneficiary's proffered wage. While the memo may not set forth the exact method of calculating net current assets, we note that in the director's December 8, 2004, denial of the petitioner's motion to reopen, the decision provides the formulation for determining net current assets.

Counsel additionally has submitted monthly bank statements for the years 2001 and 2002, and contends that the statements demonstrate that the petitioner had enough money in the bank to pay the beneficiary's proffered wage on a monthly basis. Bank statements, however, are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. While this regulation allows for consideration of additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise does not provide an accurate financial picture of the petitioner. Additionally, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds to the amounts listed on the petitioner's tax return, such as the cash specified on Schedule L, which would already be considered in determining the petitioner's net current assets.⁷

⁶ May 4, 2004, William R. Yates Memo, "Determination of Ability to Pay under 8CFR 204.5(g)(2)."

⁷ Further, we note that the petitioner listed on Form I-140 that it employs nine people. The petitioner's tax returns submitted show that the company has reported the following amounts in wages paid: 2002: \$56,573; 2001: \$35,998; and 2000: \$37,197. Based on the wages reported, more than one employee might be paid from the bank funds available.

The petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. The petition cannot demonstrate this ability through: (1) prior wage payment; (2) positive net income; or (3) sufficient net current assets in the amount of the proffered wage. Accordingly, the petition was properly denied.

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.