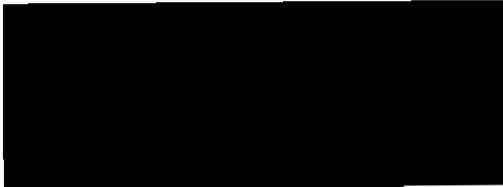


Identify the date deleted to  
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Invitation to interview

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



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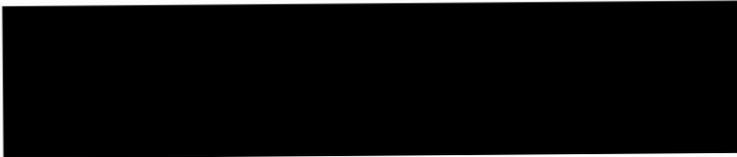
Office: VERMONT SERVICE CENTER

Date: DEC 20 2006

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:



ADMINISTRATIVE OFFICE OF IMMIGRATION AND NATURALIZATION

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 a subsequent appeal was rejected by the Administrative Appeals Office (AAO) as untimely filed. Upon receipt of additional information regarding the untimely filed appeal, the AAO is reopening the petition on its own motion.<sup>1</sup> The previous decision of the AAO is withdrawn, the appeal is sustained, and the petition is approved.

The regulation at 8 C.F.R. § 103.5(a)(5)(i) states in pertinent part:

*[Citizenship and Immigration Services (CIS)] motion with decision favorable to affected party.* When a CIS officer, on his or her own motion, reopens a CIS proceeding or reconsiders a CIS decision in order to make a new decision favorable to the affected party, the CIS Officer shall combine the motion and the favorable decision in one action.

The petitioner is a youth camp. It seeks to employ the beneficiary permanently in the United States as a freight traffic consultant. 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.

Upon review, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 28, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 the granting of 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 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. 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

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<sup>1</sup> Because Citizenship and Immigration Service (CIS) motions are critical to the correction of agency error, any director, including the AAO director, may reopen or reconsider a decision *sua sponte*, on his or her own motion, at any time and without numerical limits.

appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by CIS.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the 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 CFR § 204.5(d). The priority date in the instant petition is November 3, 2003. The proffered wage as stated on the Form ETA 750 is \$32,800 annually.

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<sup>2</sup>. Relevant evidence submitted on appeal includes counsel's brief, a copy of a May 4, 2004 memorandum by William R. Yates on "Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)", a letter, dated December 20, 2005, from [REDACTED] Certified Public Accountant (CPA), a copy of 8 C.F.R. § 204.5, a copy of the August 2004 Visa Bulletin, a copy of the Internal Revenue Code (IRC) 2005 Section 1361 S Corporation Defined, and a copy of a 2004 Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary. Other relevant evidence includes copies of the petitioner's 2001 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, affidavits from the petitioner's owner, the petitioner's manager, and the beneficiary, and a letter from the petitioner's CPA, [REDACTED] dated August 8, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

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, as in the instant case, 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. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

The petitioner's 2001<sup>3</sup> through 2004 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of \$127,055, -\$24,611, -\$14,574, and \$57,897, respectively. The petitioner's 2001 through 2004 Forms 1120S also reflect net current assets of -\$625,313, -\$857,359, -\$1,000,119, and -\$1,088,001, respectively.

The beneficiary's 2004 Form W-2, issued by the petitioner, reflects wages earned in 2004 of \$5,288.47.

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<sup>2</sup> 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).

<sup>3</sup> It is noted that the petitioner's 2001 and 2002 Forms 1120S are before the priority date of November 3, 2003, and, therefore, have little relevance when determining the petitioner's ability to pay the proffered wage of \$32,800 from the priority date and continuing to the present. Therefore, the AAO will not consider those forms in its determination of the petitioner's ability to pay the proffered wage.

The letters from the petitioner's accountant state in pertinent part:

The operating results of the company continue to improve each year. The 2004 net operating results of the company resulted in the company having net income of \$27,174.

Based on the company's improving operating results, we feel the company will continue to operate into the future as a viable operating entity and be able to pay the salary in question.

\* \* \*

To further clarify our point regarding the actual "net profits" of the company, we will expand and clarify how certain expenses and year-end tax planning decisions effect the final outcome of operations and/or the ability to pay the proffered wages. There are many reasons as to why the figures outlined above do not adequately represent an employer's ability to pay a proffered wage to an employee.

For example, the above net operating results for each of the years include depreciation expense. The expense is a non-cash item representing the write-off of previously expended funds for property and equipment. The operating results are also net of contributions to the company's pension plan. These contributions are entirely discretionary and are determined annually by company management. The officers of the company have also taken compensation in each of these years. The officers' final compensation is often dictated by the results of operations and tax planning.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$32,800 as explained in the letters submitted by the petitioner's CPA.

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 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 October 20, 2003, the beneficiary does not claim the petitioner as a past or current employer. However, counsel has submitted a copy of a Form W-2, issued by the petitioner for the beneficiary, indicating that the beneficiary earned \$5,288.47 in 2004. Therefore, the petitioner has established that it employed the beneficiary during part of 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$32,800

and the actual wages paid to the beneficiary. In this case, that difference is \$27,511.53 for 2004. The petitioner did not employ the beneficiary in 2003.

As an alternative 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, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets in 2001 through 2004 were -\$625,313, -\$857,359, -\$1,000,119, and -\$1,088,001, respectively. The petitioner could not have paid the difference between the actual wages paid to the beneficiary and the proffered wage in 2001 through 2004 from its net current assets.

Counsel contends that the petitioner's depreciation should be considered when determining the petitioner's ability to pay the proffered wage. Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

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

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

equipment and buildings. But the cost of equipment and buildings and the value lost as they 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.

Counsel asserts that the value of the petitioner's property and building should be considered an asset and should be considered when determining the petitioner's ability to pay the proffered wage. However, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary.

The petitioner's CPA claims that the petitioner's contributions to the company's pension plan are discretionary and should be considered when determining the petitioner's ability to pay the proffered wage of \$32,800. Any reliance on the assertion that the petitioner could simply avoid paying into its pension fund as necessary in order to pay the proffered wage is misplaced. The record contains no evidence that the petitioner could merely decline to pay into its pension fund without otherwise negatively affecting its business' financial position. Having already used funds on various expenses such as paying into the pension fund, the burden is on the petitioner to document that the funds were also somehow available to pay the proffered wage during the relative period of analysis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's CPA also states that the petitioner's compensation of officers is discretionary and should be considered when determining the petitioner's ability to pay the proffered wage of \$32,800. The sole shareholder of a corporation does have the authority to allocate certain expenses of the corporation such as officers' compensation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. For this reason and in this particular case<sup>5</sup>, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an

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<sup>5</sup> Please note that when determining the petitioner's ability to pay the proffered wage, CIS will only consider compensation of officers on a case-by-case basis. The best example of this would be when the petitioner's gross profit and compensation of officers far exceed the proffered wage, as in this case.

array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant case, as noted by counsel, the petitioner has two shareholders, husband and wife, who took \$275,000 total as officer compensation in 2003 and 2004. While the proffered wage is \$32,800 or approximately 12% of the amount of officer compensation, the shareholders need not pay the entire proffered wage from the officer compensation in 2004, but just the difference between the wages actually paid to the beneficiary and the proffered wage of \$32,800. The difference would have been \$27,511.53 in 2004, resulting in the officer compensation being \$247,488.47. In 2003, the petitioner would have had to establish that it had sufficient funds to pay the entire proffered wage of \$32,800 as it did not employ the beneficiary that year<sup>6</sup>. After paying the proffered wage of \$32,800 in 2003, the resulting officer compensation would have been \$242,200. Furthermore, the petitioner has shown that it consistently grosses more than two million dollars each year and that it pays wages of \$397,000.00 to \$450,000.00 each year. Since the shareholders would need to decrease their officer compensation only by a meager amount, and because the petitioner's gross profit is consistently over two million dollars each year, the AAO finds that the petitioner has demonstrated the ability to pay the proffered wage in 2003 and 2004.

After a review of the record, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above and the assertions of counsel on appeal, the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

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<sup>6</sup> Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

**ORDER:** The previous decision of the AAO is withdrawn, and the appeal is sustained. The petition is approved.