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FILE: LIN-04-091-52067 Office: NEBRASKA SERVICE CENTER Date: **JAN 13 2006**

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: SELF-REPRESENTED

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 dismissed.

The petitioner is a automobile repair company. It seeks to employ the beneficiary permanently in the United States as an automobile technician. 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 May 13, 2003. The proffered wage as stated on the Form ETA 750 is \$24.02 per hour, which amounts to \$49,961.60 annually. On the Form ETA 750B, signed by the beneficiary on January 16, 2003, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on January 14, 2004.

The I-140 petition was submitted on February 12, 2004. On the petition, the petitioner claimed to have been established in 1994 and to currently have six employees. In the items for gross annual income and for net annual income were written the words "see attached documents." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 5, 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 June 24, 2004.

In a second RFE, dated July 23, 2004, the director again requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by the director on September 7, 2004.

In an undated decision, 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. CIS electronic records indicate that the decision was mailed to the petitioner on September 30, 2004.

On appeal, the petitioner submits no brief and no additional evidence. The petitioner also submits additional copies of some of the documents which were submitted previously. The petitioner states on appeal that copies of the petitioner's bank statements in evidence establish the petitioner's ability to pay the proffered wage during the relevant period.

In the proceedings before the director, the petitioner was represented by counsel. The I-290B notice of appeal was submitted by a second attorney, who submitted a new G-28 Notice of Entry of Appearance as Attorney or Representative, dated October 26, 2004 and cosigned by an authorized agent for the petitioner. The AAO notes that since that time, however, the petitioner's second counsel has become an employee of CIS. No new G-28 form has been submitted on behalf of the petitioner on appeal. The record indicates no relationship between the petitioner's first counsel and the petitioner's second counsel. Therefore it cannot be assumed that the petitioner's first counsel is representing the petitioner on appeal. For the foregoing reasons, it is concluded that the petitioner is now self-represented on appeal. The petitioner's second counsel, who is now working for CIS, is taking no part in the adjudication of the instant appeal.

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).

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 January 16, 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 a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002. The record before the director closed on September 7, 2004 with the receipt by the director of the petitioner's submissions in response to the second RFE. As of that date the petitioner's federal tax return for 2003 would normally have been available. In a letter dated September 2, 2004, the petitioner's first counsel states, "The Petitioner has not yet filed a 2003 return as of this date, but has filed and received permission for an extension." (Letter from first counsel, September 2, 2004, at 1). The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No documentation corroborating an extension of the petitioner's federal tax return for 2003 is found in the record. Nor has a copy of the petitioner's federal tax return for 2003 been submitted on appeal.

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, that income is reported 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), 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>.

Similarly, some deductions appear only on the Schedule K. *See, e.g.*, Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax return for 2002 indicates no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return will be considered as the petitioner's net income for that year. The petitioner's tax return for 2002 states the amount of ordinary income as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	-\$16,494.00	not applicable	not applicable
2003	not submitted	\$49,961.60*	no information

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003, which is the only year 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 attached to the petitioner's tax return for 2002 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	
2002	\$38,911.00	\$23,042.00	not applicable
2003	not submitted	not submitted	\$49,961.60*

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

The figure for the end of the year for 2002 is the same in accounting terms as that for the beginning of the year 2003. Those assets could be drawn upon by the petitioner, if necessary, to pay the proffered wage to the beneficiary during the year 2003. However, since the petitioner's net current assets for the end of 2002 are less than the proffered wage, the above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2003, which is the only year at issue in the instant petition.

The record also contains copies of bank statements for an account of the petitioner for the months May 2003, through August 2004. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that

regulation allows 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 paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	2003	2004
January	-	\$16,086.98
February	-	\$22,082.49
March	-	\$23,097.14
April	-	\$27,752.65
May	\$16,392.85	-
June	\$10,438.00	-
July	\$12,281.85	-
August	\$24,125.24	-
September	\$12,731.31	-
October	\$17,908.53	-
November	\$23,204.68	-
December	\$18,391.08	-

In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that would not be reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets. The bank statements cover the period from May 2003 through April 2004, which is the one year-period beginning in the month of the priority date. However, as noted above, the petitioner has not submitted for the record a copy of its federal tax return for the year 2003.

In a letter dated June 22, 2004, the petitioner's first counsel states that a calculation of average daily bank balances presents a more complete picture of the petitioner's bank account activity than does an analysis based only on the monthly ending balances. With the letter, counsel submitted an Excel spreadsheet which sets out the average daily bank balance in the petitioner's account for each of the months from May 2003 through April 2004, along with a bar graph showing those monthly averages and showing the average of the monthly balances. Although counsel's calculations may indeed present a more precise picture of the petitioner's bank account activity than an analysis of only the monthly ending balances, the calculations provided by counsel produce results which do not differ significantly from an analysis of the monthly ending balances.

On none of the bank statements is the closing monthly balance sufficient to pay the first year of the proffered wage to the beneficiary. Similarly, in counsel's analysis, in none of the months is the daily average balance sufficient to pay the first year of the proffered wage to the beneficiary. For this reason, the bank account statements in the record provide no additional support to establish the petitioner's ability to pay the proffered wage during the relevant time period.

In the notice of appeal, the petitioner's second counsel states that the petitioner had available cash in its business account of \$145,016.00 for the eight-month period from May through December 2003. It is not clear from the record how this calculation was made. The petitioner's monthly deposits during that period averaged about

\$50,000.00 per month, for total deposits during that period of about \$400,000.00. But not all of that cash was available to pay the proffered wage, since the withdrawals and other debits during that period were nearly the same amount. The petitioner's beginning bank balance on May 1, 2003 was \$8,369.96 and its ending bank balance on December 31, 2003 was \$18,391.08. Those figures show that the petitioner's deposits during that period were only \$10,029.12 more than its withdrawals and other debits. For the foregoing reasons, the assertions of the petitioner's second counsel in the notice of appeal are not persuasive.

CIS records indicate that about seven weeks prior to the filing date of the instant I-140 petition, the petitioner filed another I-140 petition on behalf of a different beneficiary. The receipt number in that petition is LIN-04-056-52150, and the petition was filed on December 22, 2003. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (holding that the petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

The evidence in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition. Therefore the evidence also fails to establish the petitioner's additional ability to pay the proffered wage to the beneficiary of the other petition which has been pending at the same time as the instant petition. CIS electronic records indicate that the other petition was denied by the director on July 29, 2004 and that an appeal was taken to the AAO, which is still pending.

In his decision, the director noted that the petitioner's federal tax return for 2003 had not been submitted in evidence. The director correctly stated the petitioner's net income as shown on its federal tax return for 2002. The director failed to calculate the petitioner's net current assets, but considered only the petitioner's cash assets. The director found that the above amounts failed to establish the petitioner's ability to pay the proffered wage in those years. Although the analysis of the director was incomplete with regard to the consideration of the petitioner's net current assets, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal fail 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.