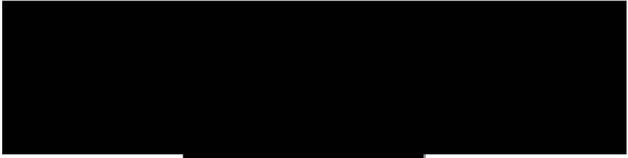




U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**
EAC-05-150-53350

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialties cook. 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.

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 October 6, 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)(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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 March 14, 2000. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 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 appeal¹. Relevant evidence submitted on appeal includes a copy of a building work permit issued by the City of New York on November 18, 2002. Other relevant evidence in the record includes copies of the beneficiary's Form G-325A Biographical Information, copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002, and 2003, and copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 2000, 2002, 2003, and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner states on appeal that it underwent remodeling and thus had little profit in 2000, the beneficiary was a big factor in helping the petitioner improve business in the past 5 years, the beneficiary was not on the petitioner's payroll until he received a work permit, the petitioner did not have an opportunity to prove that it has the ability to pay the proffered wage, and the director's analysis is inconsistent with information provided or with precedent decision.

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 February 22, 2000, the beneficiary claimed to have worked for the petitioner beginning in August 1997 and continuing through the date of the ETA 750B. On the Form G-325A Biographical Information, the beneficiary's also claimed to have worked for the petitioner beginning in 1997. However, the record does not contain any Form W-2s, Form 1099's, or other evidence to show that the beneficiary received compensation from the petitioner.

The petitioner states on appeal that CIS wants evidence showing that the beneficiary was on the petitioner's payroll, but the beneficiary did not have a work permit and thus was not on the petitioner's payroll. CIS requires evidence showing that the beneficiary received compensation from the petitioner because 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)). As stated above, CIS considers evidence that the petitioner employed the beneficiary at the proffered wage as *prima facie* proof of the petitioner's ability to pay. However, CIS, as demonstrated below, also looks to other evidence.

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).

The petitioner also states that the beneficiary was added to the petitioner's payroll once he acquired a work permit. Nothing in the record shows that the beneficiary is on the petitioner's payroll, and the petitioner's statement, 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 record contains copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 2000, 2002, 2003, and 2004. Those tax returns show that the beneficiary received \$13,100.00 as business income in 2000, \$18,200.00 as business income in 2002, \$20,400.00 as business income in 2003, and \$31,200.00 as business income in 2004. Those tax returns do not contain information regarding from whom the beneficiary received the income or whether those amounts are a combination of wages paid by different employers. Thus, without additional evidence showing that the income the beneficiary received did in fact originate from the petitioner, the AAO cannot assume that those amounts are wages paid to the beneficiary by the petitioner. Even if the AAO does consider those amounts as wages paid to the beneficiary by the petitioner, the petitioner would still fail to establish its ability to pay the proffered wage because the amounts are less than the proffered wage. A combination of the amounts listed above with the petitioner's net income or net current assets in 2000, 2002, and 2003 would still be less than the proffered wage, and the amount for 2004 is less than the proffered wage.

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 August 26, 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 2005 was not yet due. Therefore the petitioner's tax return for 2004 is the most recent return available. The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2004 does not appear in the record.

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. Where an S corporation has income from sources other than from a trade or business, that income is reported on the Schedule K. 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.

The petitioner's tax returns show the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	-\$20,484.00	\$39,291.20*	-\$59,775.20
2001	\$11,401.00	\$39,291.20*	-\$27,890.20
2002	-\$106,907.00	\$39,291.20*	-\$146,198.20
2003	-\$8,285.00	\$39,291.20*	-\$47,576.20
2004	No Information	\$39,291.20*	No Information

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage from 2000 to 2004.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 End of year	Wage increase needed to pay the proffered wage
2000	-\$27,229.00 ²	\$39,291.20*
2001	-\$20,698.00	\$39,291.20*
2002	-\$17,753.00	\$39,291.20*
2003	-\$71,219.00	\$39,291.20*
2004	No Information	\$39,291.20*

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

² Column (d) of the Schedule L on the Form 1120S U.S. Income Tax Return for an S Corporation for 2000 is the same as column (b) of the Schedule L on the Form 1120S. U.S. Income Tax Return for an S Corporation for 2001. Since column (d) of the petitioner's Schedule L for 2000 is illegible, this amount is derived from information on column (b) of the petitioner's Schedule L for 2001.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage from 2000 to 2004.

The petitioner states on appeal that “[d]uring the year 2000 [it] remodeled [its] [b]usiness . . . [and thus it made] little profit during that year.” The record contains a copy of a building work permit issued by the City of New York on November 18, 2002. According to the permit, the date of issuance is November 18, 2002 and the expiration date is May 19, 2003. Thus, this permit does not show that the petitioner underwent remodeling in 2000, and going on record without supporting documentary evidence showing that renovation took place in 2000 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)). Additionally, the fact that the petitioner states that the remodeling took place in 2000 and the documentary evidence suggests that the remodeling took place in 2002 calls into question when exactly the remodeling took place or whether the petitioner underwent more than one remodeling. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Moreover, the petitioner states that its profit in 2000 was affected by the remodeling of the business. 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). *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

Even though the petitioner claims that an unusual circumstance exists in this case in that its profit in 2000 was affected by the remodeling of the business, it has not been established that 2000 was an uncharacteristically unprofitable year in a framework of profitable or successful years. According to the petitioner’s Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002, and 2003, the petitioner’s gross receipts or sales are \$387,601.00, \$429,086.00, \$388,863.00, and \$555,911.00 respectively. Thus, the petitioner’s profit in 2000 is comparable to, and not significantly less than, its profits in 2001 and 2002. In addition, it has a negative net income for all the years in question except 2001 and negative net current assets for all the years in question, and no information regarding its profitability in 2004 is available.

The petitioner also states that the beneficiary is a “big factor” in the petitioner’s attempt to improve business in the past 5 years. The fact that the beneficiary may have aided in the improvement of the petitioner’s business is

irrelevant to the issue at hand; the issue is whether or not the petitioner has the ability to pay the beneficiary the proffered wage and the petitioner has not shown that it has the ability to pay the proffered wage. In addition, even though the petitioner seems to be asserting that CIS should consider the beneficiary's potential to increase the petitioner's revenues, the petitioner has not provided any standard or criterion for the evaluation of such assertion. For example, the petitioner has not demonstrated that the beneficiary has replaced or will replace less productive workers, or has a reputation that would increase the number of customers.

The petitioner likewise states that "[its does] not have the opportunity to pro[ve] [it] could pay [the beneficiary's] salary." The petitioner appears to be referring to the fact that the beneficiary was not on the petitioner's payroll until the beneficiary acquired a work permit, and thus the petitioner is unable to provide CIS with documentary evidence showing that the beneficiary was employed by the petitioner. As stated above, evidence that the petitioner employed the beneficiary at the proffered wage is not required because CIS also looks to other evidence.

The petitioner may also be referring to the fact that it was not given the opportunity to establish the petitioner's ability to pay the proffered wage. The petitioner submitted supporting evidence along with its I-140 petition. A request for evidence (RFE) was issued on July 8, 2005 specifically requesting evidence of ability to pay, and the petitioner submitted additional evidence. The petitioner likewise had the opportunity to submit any other additional evidence on appeal, and it did. Thus, the petitioner in this case had three different opportunities to establish its ability to pay the proffered wage, and the petitioner took advantage of each one of these opportunities.

The petitioner further states that "the analysis used in reaching [the director's] decision [is] inconsistent with the information [it] provided or with precedent decision." As shown above, the AAO's analysis of evidence in the record results in the same conclusion as the director that the petitioner has not established its ability to pay the proffered wage. The petitioner also states that the director's decision is inconsistent with precedent decision, but the petitioner fails to identify those precedent decisions or elaborate on why the director's decision contradicts the holdings or dicta in those other decisions.

After a review of the evidence, it is concluded that the petitioner has not 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. 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 and the evidence submitted 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.