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U.S. Citizenship
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Services

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File: [Redacted] Office: VERMONT SERVICE CENTER Date: OCT 18 2006
EAC-03-153-50249

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 case will be remanded to the Service Center in accordance with below.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook. 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 September 8, 2004 denial, 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 obtains 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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 19, 2001. The proffered wage as stated on Form ETA 750 for the position of a cook is \$13 per hour, 40 hours per week, equivalent to \$27,040.00 per year. The labor certification was approved on February 21, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on April 21, 2003. On the I-140, counsel listed the following information related the petitioning entity: date established: 1996; gross annual income: \$1,159,652.00; net annual income: "see attached financial documents;" and current number of employees: 40.

On April 16, 2004, the Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to provide: copies of the beneficiary's W-2 statements and tax return for 2001 if the beneficiary were employed by the petitioner. In response, the petitioner submitted its 2001 federal tax return, the beneficiary's 2001 W-2 statement, and the petitioner's 2001 bank statements.

On September 8, 2004, the case was denied based on the director's determination that the petitioner had not established that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed. The appeal was listed as being due on Monday, October 11, 2004. The appeal was received and stamped on October 12, 2004. The Service Center initially rejected the appeal as late and untimely filed. The petitioner objected and requested that the matter be reopened as Monday, October 11, 2004 was a federal holiday, Columbus Day, and therefore, the petitioner would be entitled, similar to if the appeal was due on a Saturday or Sunday, to an additional day for filing, or until Tuesday, October 12, 2004 based on 8 CFR, Part 1, Sec. 1.1 definitions. The Service Center reopened the matter, and the appeal is now before the AAO.

We will examine the petitioner's ability to pay based on the record and then consider the petitioner's additional arguments on appeal. 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, but not dated, the beneficiary listed that she has been employed with the petitioner since September 1997. The petitioner submitted a 2001 W-2 Form showing wage payment in the amount of \$20,723.58. This was the only year that the petitioner submitted the beneficiary's W-2 Form, and the documentation submitted would be insufficient, standing alone, to demonstrate the petitioner's ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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 returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,040.00 per year from the priority date. The record demonstrates that the petitioner is an S corporation. 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:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not submitted ²
2003	not submitted
2002	not submitted
2001	-\$25,829

The petitioner's net income would not allow for payment of the beneficiary's proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner failed to submit tax returns or other evidence for the years 2002 and 2003.

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. 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.

<u>Tax year</u>	<u>Net current assets</u>
2004	not submitted
2003	not submitted
2002	not submitted
2001	-\$22,659

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner similarly lacks the ability to pay the proffered wage in any year.

The petitioner additionally submitted bank statements for the time period April 1, 2001 to December 31, 2001. The petitioner's bank statements reflect a checking account balance varied between a low ending balance of \$1,430 (December 2001) and a high ending balance of \$3,620 (April 2001) for the statements submitted. Generally, bank statements 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. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements

² The petitioner's 2003, and 2004 tax returns would not have been available at the time of filing the I-140, but the 2003 return likely would have been available at the time of filing the instant appeal.

do not reflect whether the petitioner has any outstanding liabilities. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Therefore, the bank statements are not compelling evidence to demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel contends that the director erred in failing to consider the petitioner's bank statements in addition to the amount paid to the beneficiary exhibited on the 2001 W-2 Form. We have considered the bank statements above.

Counsel challenges that the tax return exhibiting a loss in 2001 equates to the petitioner's inability to pay the proffered wage. Counsel claims that the petitioner had \$22,850 in depreciation, which should be added back into the net profit, which would reflect a positive number, and therefore, the exhibit the petitioner's ability to pay in combination with the amount already paid to the beneficiary.

Depreciation as a tax concept 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>. Therefore, depreciation is a real 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 that the petitioner's depreciation can show its ability to pay the proffered wage.

Counsel contends that the director misread the petitioner's current assets and liabilities, and that the petitioner's assets would total \$361,459, and liabilities \$91,460. We have considered the petitioner's net current assets above based on the formula elaborated. In counsel's formula, he adds all of the petitioner's assets listed on the tax return, while only considering some of the petitioner's liabilities.³ We note that the petitioner's current assets and liabilities were considered in the net current asset calculation as set forth above.

³ Counsel additionally contends that stockholder equity is not a liability despite the category's listing under "liabilities" on the federal tax return. We note that stockholder equity was not included in the CIS or AAO calculation of net current assets. Additionally, we note that counsel cites to New York State Court and Texas Appellate cases in support of his position. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, State or Appellate court decisions are not

The petitioner additionally cites to the value of its capital stock, \$150,000, and the value of its additional paid-in capital in the amount of \$826,420 listed on the petitioner's 2001 tax return. Counsel contends that based on these two factors, the petitioner would have "an overwhelming amount of money available with which to pay the alien beneficiary." We note that both capital stock and paid-in capital would not be readily convertible cash assets with which to pay the beneficiary's salary.

Further, counsel additionally notes that the petitioner paid the beneficiary based on the 2001 W-2 provided in the amount of \$20,723 as noted above, which was \$6,316 less than the proffered wage. We have considered the beneficiary's wages paid above, which standing alone are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

Finally, counsel contends that the director failed to consider the cumulative factors to determine the petitioner's ability to pay the proffered wage, and cites to *Cerillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987) for the proposition that the courts will defer to administrative findings unless the agency has ignored factors, which should be taken into account. CIS and the AAO will take into account the totality of the circumstances related to the petitioner's business in determining the petitioner's ability to pay the beneficiary the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Examining the totality of the circumstances, we note that the petitioner's business was established in 1995, that the petitioner in 2001 had: gross receipts of \$1,159, 652; a gross profit of \$386,787; a total income of \$772,865; and paid salaries to employees in the amount of \$477,731. The petitioner exhibited partial payment to the beneficiary, which was only \$6,316 less than the proffered wage. Based on the totality of the circumstances, the foregoing would reflect a strong likelihood that the petitioner could pay the proffered wage. However, we will remand to the Service Center in accordance with the instructions below for further consideration of the beneficiary's experience. Additionally, the Service Center should request the petitioner's federal tax returns for the years 2002, 2003 and 2004, to determine the petitioner's continued ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

A second point not raised in the director's denial was the petitioner's failure to document that the beneficiary had all of the education, training, and experience as required in the certified ETA 750. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a cook, with duties including: "sauté, grill and broil meats, fish, chicken, seafood, vegetable and

similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

other foods according to recipe. Cook pastas, rice, sauces, and soups. Portion and garnish dishes.” The petitioner listed no educational requirements in Section 14, and listed no special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary, but undated, the beneficiary listed her prior work experience as: (1) working for the petitioner, [REDACTED] from September 1997 to the “present” (the time of filing April 2001), 40 hours per week; and (2) [REDACTED], [REDACTED], Brazil, from 1992 to 1995, 40 hours per week.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary’s prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner submitted a letter along with a certified translation to document the beneficiary’s work experience, which provided: “I declare for all due purposes that, [REDACTED] worked in my establishment, during the period from 1992 to 1995, exercising the function of COOK, in which she demonstrated to be an excellent employee, with nothing negative in her record.”

The letter provided regarding the beneficiary’s experience is unduly vague as it does not indicate the month that the beneficiary began her employment and the month that the beneficiary ended her employment, and whether the experience obtained was on a full-time or part-time basis. Consequently, we are unable to accurately calculate the exact amount of the beneficiary’s experience. For instance, if she began in December 1992 and concluded her employment in January 1995, but only worked on a part-time basis, that experience would be equivalent than less than two years of experience as a cook and the beneficiary would not qualify for the position. The petitioner did not submit any further documentation regarding the beneficiary’s prior experience. The Service Center did not request any further documentation related to the beneficiary’s prior experience. The petitioner should be afforded an opportunity to address this issue either by obtaining additional information from the original author of the letter, or by providing additional relevant documentation to address the deficiency in the letter provided.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of

time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.