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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
SRC 04 174 52900

Office: TEXAS SERVICE CENTER Date: **AUG 14 2007**

IN RE: Petitioner:  
Beneficiary:



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: 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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner does not appear to be represented. The record contains a Form G-28 Entry of Appearance signed by a representative of the petitioner recognizing a representative. That ostensible representative, however, does not claim to be an attorney and his name does not appear on CIS's list of accredited representatives. See <http://www.usdoj.gov/eoir/statpub/accreditedreproster.pdf>. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. The petitioner's president filed the instant appeal, apparently without the assistance of a representative. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$23.39 per hour, which equals \$48,651.20 per year.

The Form I-140 petition in this matter was submitted on May 3, 2004. On the petition, the petitioner stated that it was established on May 15, 1998. The space reserved for the petitioner to report the number of workers it employs was left blank. The petition states that the petitioner's gross annual income is \$1,920,479 and that its net annual income is \$163,886.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary on March 3, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Houston, Texas.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the petitioner's 2000, 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) an "Affidavit of Financial Responsibility" attested to by the petitioner's president and dated April 23, 2004, (3) spreadsheet printouts pertinent to various statistics that the petitioner asserted show the petitioner's ability to pay the proffered wage during various years, and (4) the petitioner's unaudited August 31, 2003 balance sheet and an income and expense statement for the previous eight months. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's income tax returns show that it is a corporation, that it incorporated on June 15, 1998, and that it reports taxes based on accrual convention accounting and the calendar year.

During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of \$18,938.47.<sup>3</sup> At the end of that year the petitioner had current assets of \$71,173<sup>4</sup> and current liabilities of \$40,000, which yields net current assets of \$31,173. Because the priority date of the visa petition in this matter is April 9, 2001, however, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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<sup>1</sup> Tax returns submitted show that the petitioner's 2002 gross receipts were, in fact, \$1,920,479. Its Line 11, Total Income during that year was \$163,886. This office notes that total income is not net income. The petitioner's net income never exceeded \$40,000 during any of the salient years.

<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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> Form 1120, U.S. Corporation Income Tax Return, Line 28 taxable income before net operating loss deduction and special deductions is considered net income for the purpose of analyzing a petitioner's ability to pay the proffered wage.

<sup>4</sup> Of that amount, \$21,612.90 was in the form of inventory.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,547.72. At the end of that year the petitioner had current assets of \$71,113<sup>5</sup> and current liabilities of \$37,932, which yields net current assets of \$33,181.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$16,611. At the end of that year the petitioner had current assets of \$66,859<sup>6</sup> and current liabilities of \$5,267, which yields net current assets of \$61,592.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,700. At the end of that year the petitioner had current assets of \$69,779<sup>7</sup> and current liabilities of \$6,827, which yields net current assets of \$62,952.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$39,280. At the end of that year the petitioner had current assets of \$94,779<sup>8</sup> and current liabilities of \$10,362, which yields net current assets of \$84,417.

In the April 23, 2004 affidavit the petitioner's president presented calculations that he indicates demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In those calculations the petitioner's president included the petitioner's depreciation deductions as a fund available to pay wages.

The spreadsheets submitted discuss the petitioner's "Financial Liquidity Ratio," which is defined, on those spreadsheets, as the ratio between the sum of the petitioner's net current assets and its net income; and the proffered wage. The spreadsheets further state that the preferred ratio is 1:1 or better, indicating that, in the petitioner's view, the petitioner has demonstrated the ability to pay the proffered wage during a given year if its net income added to its net current assets is greater than the annual amount of the proffered wage.

The director denied the petition on October 11, 2005.<sup>9</sup>

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<sup>5</sup> That amount consisted entirely of the petitioner's inventory.

<sup>6</sup> Of that amount, \$64,872 was in the form of inventory.

<sup>7</sup> Of that amount, \$45,506 was in the form of inventory.

<sup>8</sup> Of that amount, \$53,625 was in the form of inventory.

<sup>9</sup> In that decision the director noted that the Schedule L attached to the version of the petitioner's 2001 tax return originally submitted was not completed. The director stated that she could not; therefore determine whether the incomplete version or the complete version subsequently submitted was the petitioner's authentic tax return. In an affidavit submitted on appeal the petitioner's president attested to the authenticity of the corrected 2001 Schedule L. He also noted that the end-of-year 2001 figures can be verified because they correspond to the beginning-of-year 2002 figures. This office finds that the corrected Schedule L is apparently authentic.

On appeal, the petitioner asserted that the evidence submitted demonstrates its continuing ability to pay the proffered wage beginning on the priority date. As to 2001 the petitioner noted that the sum of the petitioner's net profit and its net current assets exceeds the proffered wage.

On appeal, the petitioner submitted its financial statements for the eight months ended August 31, 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner submitted a statistic in which its net income for 2001 was added to its 2001 end-of-year inventory, implying that those statistics demonstrate the petitioner's ability to pay the proffered wage during that year. The computation of net income takes end-of-year inventory into account. That is, Gross Profits equals Gross Receipts minus Cost of Goods Sold. Cost of Goods Sold is beginning-of-year inventory plus purchases during the year minus end-of-year inventory. An increase in end-of-year inventory decreases Cost of Goods Sold and thereby increases net profit. Any calculation that adds net profit and inventory is therefore duplicative because, as was noted above, end-of-year inventory has already been taken into account in calculating net profit.

The petitioner may show its ability to pay the proffered wage with its net profit or it may show its ability to pay the proffered wage with net current assets. It may not, however, show the ability to pay additional wages by adding its inventory, or any component of its net current assets,<sup>10</sup> to its net profit. Such a statistic would not show funds available to pay additional wages.

The petitioner's argument that its depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay 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 equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989).

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<sup>10</sup> This principle, as it applies to some other assets, is less easily demonstrated. In the instant case, however, in 2001, the year in which the petitioner sought to add net income and assets, only the addition of net profit to inventory is at issue.

*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. Although the petitioner asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>11</sup> The petitioner appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (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 during a given period, CIS will examine whether the petitioner employed 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 instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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

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<sup>11</sup> The petitioner did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>12</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is generally expected to be able to pay the proffered wage out of those net current assets. Ordinarily, the net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$48,651.20 per year. The priority date is April 9, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,547.72. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner net current assets of \$33,181. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$16,611. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$61,592. That amount exceeds the proffered wage.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,700. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$62,952. That amount exceeds the proffered wage.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$39,280. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$84,417. That amount exceeds the proffered wage.

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<sup>12</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petition in this matter was submitted on May 3, 2004. On that date the petitioner's 2005 tax return was unavailable. On August 23, 2005 the service center issued a notice of intent to deny in this matter. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

As a general rule, end-of-year net current assets in a given year in an amount greater than the annual amount of the proffered wage are held by CIS to demonstrate a petitioner's ability to pay the proffered wage during that year. The assumption underlying this approach to demonstrating ability to pay the proffered wage is that the petitioner will be able to convert its net current assets to cash or cash equivalent and to pay wages with it.

The instant petitioner, however, is a retailer, and a considerable amount of each year's net current assets consist of its inventory. A retailer that intends to continue in business is not in a position to liquidate its inventory and use the proceeds to pay wages without replenishing that inventory. The petitioner's net current assets during 2001, 2002, 2003, and 2004, net of its inventory, were \$11,568.10, -\$3,280, \$17,446, and \$30,792, respectively. Unless it relies upon the theory that it could sell its inventory and continue in business without replacing it, the petitioner cannot show the ability to pay the proffered wage with its net current assets.

Whether a petitioner that is a retailer should be able to rely on its net current assets, including its inventory, as an index of its ability to pay additional wages would apparently, if decided, be a matter of first impression. This office need not reach it today, however, as even with its inventory included, the petitioner has not shown the ability to pay the proffered wage during 2001.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The visa petition was correctly denied on that basis, which has not been overcome on appeal. This office declines to determine whether the petitioner has demonstrated the ability to pay the proffered wage during 2002, 2003, and 2004.

The record suggests an additional issue that was not addressed in the decision of denial.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 Form ETA 750 labor certification in the instant case shows that the proffered position requires two years of experience in the job offered, retail store manager, or two years in the related occupation of assistant manager. The only evidence in the record pertinent to the beneficiary's employment history, however, is a January 19, 2004 letter from the president of [REDACTED] in Manor, Texas. That letter states that the beneficiary worked at that store as its assistant manager from November 17, 1999 to March 30, 2001. This office notes that period does not encompass two years and does not, therefore, establish that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification in this case.

In evaluating the beneficiary's qualifications CIS must look to the job offer portion of the 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).

Because the decision of denial did not discuss this issue, the petitioner has not been accorded the opportunity to address it, and today's decision does not rely on that issue. If the petitioner wishes to further pursue this matter, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.