



U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 19 2007
SRC 06 156 51903

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:

[REDACTED]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is a full-service beauty salon and spa. It seeks to employ the beneficiary permanently in the United States as an assistant manager of the beauty salon. 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 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 ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R.

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).

§ 204.5(d). Here, the ETA 750 was accepted for processing on April 30, 2001.² The proffered wage as stated on the ETA 750A is \$10.80 per hour, annualized to \$22,464 per year. Part B of the ETA 750, signed by the alien beneficiary on April 27, 2001, indicates that she has worked for the petitioner since April 2000.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on April 18, 2006, it is claimed that the petitioner was established on February 3, 1998, claims an annual gross income of \$2,040,535, an annual net income of -\$47,667 and currently employs fifteen full-time and fifteen part-time workers.

In support of its continuing financial ability to pay the certified wage of \$22,464 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003 and 2004. They indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2001	2002	2003	2004
Net Income ³ (Form 1120S)	\$111,019	\$37,738	\$ 58,849	-\$47,731
Current Assets (Sched. L)	\$117,977	\$88,127	\$ 35,066	\$36,999
Current Liabilities (Sched. L)	\$ 89,735	\$33,701	\$101,751	\$78,361
Net Current Assets	\$ 28,242	\$54,426	-\$ 66,685	-\$47,667

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

² The director erroneously stated that the priority date is April 27, 2001. However, this error does not affect the outcome of the appeal.

³ 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 IRS Form 1120S. The petitioner's net income is shown on line 21 of its 2001 tax return. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) line 17e* (2004-2005) line 18* (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2002, 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns for 2002, 2003 and 2004.

By request on May 13, 2006, the director instructed the petitioner to submit its 2005 tax return with all schedules for 2005 as well as Wage and Tax Statements (W-2s) reflecting the petitioner's payment of wages to the beneficiary.

In response, the petitioner did not submit a 2005 tax return but provided a copy of an Internal Revenue Service (IRS) application for extension of time to file the return. The petitioner provided copies of Wage and Tax Statements (W-2) reflecting the wages paid to the beneficiary. For the years 2001, 2002, 2003, 2004, and 2005, her wages were:

2001	\$15,822.47
2002	\$16,210.41
2003	\$14,805.75
2004	\$17,458.13
2005	\$11,889.54

It is noted that an additional W-2 was submitted by the petitioner for 2005. The wages reflected on the W-2 as \$7,200 were paid by a differently named entity identified as [REDACTED] with a different federal tax identification number than that reflected on the petitioner's tax returns and on the I-140. As such, this employment may not be considered.

In response, former counsel also submitted a letter asserting that the previously supplied documentation established the petitioner's ability to pay the proffered wage. Accompanying this letter were copies of two employment verification letters relating to the beneficiary's past qualifying employment.

The director denied the petition on September 1, 2006. The director concluded that the petitioner had demonstrated its ability to pay the certified wage in 2001, 2002 and 2003 but had failed to establish its ability to pay in 2004⁴ and in 2005.

On appeal, counsel does not submit a brief but directs a review of additional evidence in the form of a copy of the petitioner's 2005 federal income tax return and a letter from an investment advisor and enrolled agent, Rod Dabbondanza of RMD Financial, Inc. The tax return reflects the following information:

	2005
Net Income (Form 1120S)	-\$ 6,320
Current Assets (Sched. L)	\$38,052
Current Liabilities (Sched. L)	\$66,699
Net Current Assets	-\$28,647

⁴ The director miscalculated the current assets and difference between the current assets and current liabilities.

Mr. [REDACTED] letter asserts that the petitioner has the ability to pay the proffered wage. He emphasizes that the petitioner grossed over two million in revenue in 2005. He also states that the petitioner's non-cash deductions of depreciation and amortization should be added back to the net income. He further states that the beneficiary has been paid \$19,443.56 as of August 31, 2006 and is working full-time. Mr. [REDACTED] further suggests that the value of fixed assets should be considered and that invested capital of almost \$500,000 was used to buy the equipment and make capital improvements.⁵

The AAO does not find these assertions persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner has employed the beneficiary and has paid \$15,822.47 to her in 2001; \$16,210.41 in 2002; \$14,805.75 in 2003; \$17,458.13 in 2004; and \$11,889.54 in 2005. The shortfalls between the actual wages paid to the beneficiary and the proffered wage may be expressed as follows:

	(Proffered wage less Actual Wage)
2001	-\$ 6,641.53
2002	-\$ 6,253.59
2003	-\$ 7,658.25
2004	-\$ 5,005.87
2005	-\$10,574.46

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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 as is asserted here by Mr. [REDACTED]. The court specifically

⁵ The tax returns do not support this assertion of re-invested capital and no other evidence was submitted to support this claim.

rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng Chang* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. CIS rejects the inclusion of total or fixed assets in this analysis, as referred to by Mr. [REDACTED], because they include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, a petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

In this matter, as referenced by the director, the petitioner established its ability to pay the proffered wage of \$22,464 in 2001 and 2002 because either it reported sufficient net income or had enough net current assets to cover payment of the proposed wage offer or any difference between the actual wages paid to the beneficiary and the certified salary. In 2003, the petitioner's net income of \$58,849 was sufficient to cover the proffered wage, however, in 2004 and 2005, it may not be concluded that either the petitioner's net income or its net current assets demonstrated its continuing ability to pay the proffered wage.

In 2004, neither the petitioner's net income of -\$47,731, nor its net current assets of -\$41,362 could cover the shortfall of \$5,005.87 resulting from the comparison of the beneficiary's actual wages of \$17,458.13 and the proffered wage of \$22,464. The petitioner has not demonstrated its ability to pay the proffered wage in this year.

Similarly, in 2005, the -\$6,320 reported as net income, as well as the -\$28,647 shown as net current assets were each inadequate to cover the shortfall of \$10,574.46 resulting from the comparison of the actual wages of

\$11,889.54 paid by the petitioner and the certified salary of \$22,464. The petitioner has not established its ability to pay the proffered wage during this year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.