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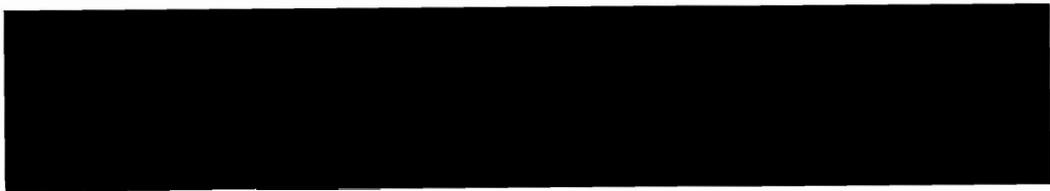
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
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U.S. Citizenship  
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FILE: EAC 04 235 50962 Office: VERMONT SERVICE CENTER Date: **JAN 16 2007**

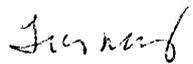
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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.

*for*   
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 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 July 15, 2003. The proffered wage as stated on the Form ETA 750 is \$12 per hour for a 35-hour week, which equals \$21,840 per year.

The Form I-140 petition in this matter was submitted on August 13, 2004. On the petition, the petitioner stated that it was established on September 14, 1994 and that it employs two part-time workers. The petition states that the petitioner's gross annual income is \$572,529 and that its net annual income is \$17,138. On the Form ETA 750, Part B, signed by the beneficiary on June 17, 2003, the beneficiary did not claim to have worked for the petitioner. The petition indicates that the petitioner would employ the beneficiary in Dublin, Pennsylvania.

The AAO reviews *de novo* issues raised in decisions challenged 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>1</sup>

In the instant case the record contains a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return. 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 record does contain a letter dated October 12, 2004 from counsel. In that letter counsel stated that "... the average sum of the petitioner's cash on hand over the [previous] four quarters" was \$21,834. Counsel, however, provided no evidence in support of that assertion. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The petitioner's 2002 tax return shows that it is a corporation, that it incorporated on September 14, 1994, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from October 1 of the nominal year to September 30 of the following year. During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared a loss of \$218 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner had current assets of \$29,924 and current liabilities of \$21,372, which yields net current assets of \$8,552.

The director denied the petition on January 19, 2005. On appeal, counsel asserted:

[CIS] erred in holding that the petitioner did not have sufficient funds to pay the proffered wage to the alien beneficiary [sic] at the time that the offer of employment was made. The business showed depreciation in an amount sufficient to cover the pro-rata share of the salary as of July of 2003. Moreover, the business continued to be physically solvent [sic] throughout 2003 and 2004, which will be proven through submission of the income taxes from those years. In 30 days the petitioner will be supplying a supplemental brief, along with evidence to support these claims.

No additional evidence or argument was received, either with the appeal or subsequently. On October 24, 2006 this office sent counsel a facsimile transmission asking whether she had submitted any such additional information, argument, or documentation. Counsel did not respond to that facsimile transmission. The petition will be adjudicated on the evidence of record.

In letters previously submitted to CIS in this matter counsel cited non-precedent decisions of this office in support of various propositions. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although

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<sup>1</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).

counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel requests that CIS prorate the proffered wage during 2003 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel's argument that the petitioner's 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). 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 counsel asserts that they should not be charged against income according to their depreciation schedule, she does not offer any alternative allocation of those costs.<sup>2</sup> Counsel appears to be asserting 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,

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<sup>2</sup> Counsel 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.

although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. (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 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>3</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 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.

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<sup>3</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The proffered wage is \$21,840 per year. The priority date is July 15, 2003. The petitioner is obliged to show its ability to pay the proffered wage beginning on that date.

The petitioner submitted its 2002 tax return. The 2002 return covers the petitioner's 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003. The priority date fell within that fiscal year.

During its 2002 fiscal year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that fiscal year the petitioner had net current assets of \$8,552. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during its 2002 fiscal year.

The petitioner's 2003 tax return was unavailable when the visa petition in this matter was filed. On September 16, 2004 the service center issued a request for evidence in this matter, asking for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date, however, the petitioner's 2003 tax return was still unavailable, as its 2003 fiscal year did not end until September 30, 2004. On the date counsel responded to that request for evidence, December 3, 2004, that return may still have been unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during its 2003 fiscal year and during subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2002 fiscal year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.