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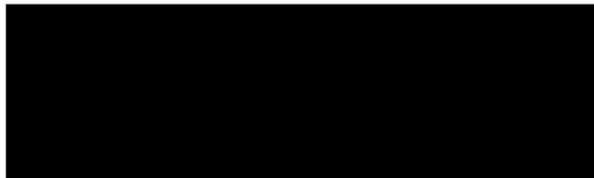


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **JAN 22 2007**  
EAC-04-036-54438

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 appeal will be dismissed.

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 March 9, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of 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.<sup>1</sup>

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

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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 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 November 26, 2001. The proffered wage as stated on Form ETA 750 for the position of a cook is \$13.01 per hour, based on a 40 hour work week, which is equivalent to \$27,060.80.<sup>2</sup> The labor certification was approved on September 24, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on November 14, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: June 1, 1996; gross annual income: \$1,362,374; net annual income: -\$15,210; and current number of employees: 25.

On June 23, 2004, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically related to the petitioner's ability to pay for the years 2001, and 2002 as the petitioner's tax returns that were submitted failed to demonstrate the employer's ability to pay. Further, the petitioner had stated that the beneficiary would replace another employee. The RFE requested that the petitioner provide evidence regarding the former employee, wages paid, date of termination, and the position vacated. On March 9, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on March 30, 2003, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not submit any evidence of wage payment, and did not claim to have employed the beneficiary. Therefore, the petitioner is unable to establish its ability to pay through prior wage payment to 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 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 petitioner is structured as 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

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<sup>2</sup> The petitioner initially listed an hourly rate of \$12.73, but the DOL required that the wage be changed to \$13.01 prior to DOL certification.

the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner's tax returns do not reflect additional income from sources other than trade or business. The petitioner does list some additional income on Schedule K in 2001, so that we will take the petitioner's net income from this schedule:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	-\$15,210 <sup>3</sup>
2001	-\$42,228

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the forgoing years.

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.<sup>4</sup> 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>
2002	-\$87,291
2001	-\$129,418

Following this analysis, the petitioner's federal tax returns show that the petitioner would lack the ability to pay the proffered wage in all of the above years under the net current asset test as well.

The petitioner had additionally asserted that the beneficiary would replace an employee that had worked part-time as a janitor and submitted evidence that the janitorial employee was paid \$300 a week. The director noted in the petition's denial that since the beneficiary would be employed as a cook, the evidence regarding pay to the janitor would not be relevant. Further, the petitioner had not demonstrated that any of the W-2

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<sup>3</sup> The petitioner did not provide its 2003 tax return, which based on the date of filing the I-140 petition would not have been available, but should have been available at the time that the petitioner responded to the RFE. Further, the petitioner did not submit its 2003 tax return on appeal.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

statements that the petitioner submitted were for a cook, or that the petitioner would replace anyone employed in the position of a cook.

On appeal, counsel contends that “two former employees who worked for the petitioner . . . both performed duties of cook, during 2001 . . . both individuals earned well in excess of \$27,060.” In support, counsel attached a W-2 for 2001 demonstrating that one worker was paid \$31,940, and the second worker was paid \$31,335 in 2001.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. While counsel has provided documentation of wages paid in 2001, the petitioner has not documented the positions, duties, and termination of the two workers that he asserts were cooks. Further, the petitioner has not provided a statement regarding these former employees and their replacement, counsel only references that the petitioner restates her intention for the beneficiary to replace other employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, counsel has provided W-2 statements for the year 2001 for both employees. If both employees left in 2001, which is unclear as counsel only references that they are “former” employees, but not the date that they left, it would be highly unlikely that the beneficiary, if he were to begin with the employer now, would be a replacement for the two identified employees. Should the petitioner be able to exist without two cooks for several years, it might be questionable whether an additional full-time cook is truly needed.

Further, the petitioner has provided no documentation to demonstrate that the petitioner had funds available in 2002 or 2003 to pay the beneficiary the proffered wage.

Counsel additionally requests that the beneficiary be allowed to use the March 12, 2001 priority date from an earlier labor certification filing. It is not necessary for us to reach or address that issue as the petitioner in the case at hand has failed to demonstrate the ability to pay the beneficiary the proffered wage.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.