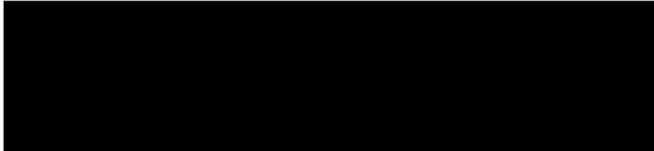




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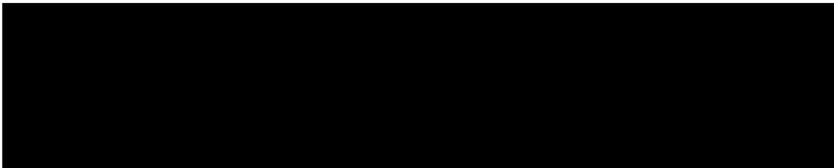
Office: VERMONT SERVICE CENTER

Date: JUN 27 2007

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn in part and affirmed in part and the petition will remain denied.

The petitioner is a custom furniture manufacturer. It seeks to employ the beneficiary permanently in the United States as a hand woodcarver. 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 the beneficiary met the education and experience requirements of the labor certification as of the priority date of the visa petition and that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of April 27, 2001. The AAO concurred with the director's decision on appeal.

The record shows that the motion is properly and timely filed. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

In the current case, counsel uses the term reconsider with regards to the filing of the motion. The regulation at 8 C.F.R. § 103.2(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Since counsel has not provided a reason supported by pertinent precedent decisions indicating that the decision was based on an incorrect application of law or CIS policy, and has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements for reconsideration.

Ordinarily when counsel requests a motion to reconsider and the motion does not meet the requirements for reconsideration, the motion will be rejected. However, in this case, counsel has pointed out that one of the reasons the AAO dismissed the petitioner's appeal was because the "beneficiary failed to submit evidence to prove that he had the education and experience specified on the labor certification as of the petition's filing date." On motion, counsel has provided evidence that he did, in fact, submit evidence of the beneficiary's experience prior to the request for evidence (RFE) due date. Therefore, the motion will be treated as a motion to reopen instead of a motion to reconsider.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage of \$33,280 and establishes that the beneficiary met the requirements of labor certification as of the priority date of April 27, 2001.

As set forth in the AAO's March 25, 2005 dismissal, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether the beneficiary met the education and experience requirements of the labor certification at the time of filing the visa petition.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 27, 2001.

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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of hand woodcarver. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |                         |                            |
|-------------------------|----------------------------|
| 14. Education           |                            |
| Grade School            | 7                          |
| High School             | 3                          |
| College                 | 2                          |
| College Degree Required | Associate                  |
| Major Field of Study    | Wood carving or processing |
| Experience              |                            |

Job Offered                      2 years

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A reflects that there are no other special requirements for the proffered position.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of hand woodcarver must have an associate's degree in wood carving or processing and two years of experience in the job offered.

In the instant case, counsel submitted a copy of the beneficiary's diploma certifying the beneficiary's completion of the full course of studies specializing in decorative wood engraving (9/1/85 – 1989) from the Ivano-Frankovsk Secondary Vocational School #14 in Lvovskaya Oblast of the Ukraine. Counsel also submitted a letter, dated February 5, 2001, from the director of EKER Joint Venture, stating that EKER Joint Venture employed the beneficiary as a decorative wood engraver from February 20, 1994 until February 1996. On April 1, 2003, the director informed the petitioner that the letter from EKER Joint Venture did not provide exact dates of employment and that without the exact dates of employment, the letter failed to verify the beneficiary's full two years of experience as a hand wood carver. On August 27, 2003, the director denied the petition noting that in response to the RFE, while other requested information was provided, the petitioner failed to submit any additional evidence that the beneficiary possessed two years of experience in the job offered. The AAO concurred with the director's decision on appeal.

On motion, counsel submits a copy of a DHL air bill showing that a delivery from counsel was received by the Vermont Service Center on June 17, 2003. The delivery included a new letter, dated May 20, 2003, from the director of EKER Joint Venture stating "[t]he present is to confirm that [the beneficiary] was employed at our company in the capacity of wood carver starting February 20, 1994 till February 24, 1996. His [sic] duties and responsibilities included: prepare blueprints for woodcarving in accordance with customers' specifications, develop and execute woodcarving work for interior and exterior designs, etc." Therefore, the petitioner has established that the beneficiary met the experience requirements of the labor certification as of the priority date, April 27, 2001. The AAO's March 25, 2005 decision is withdrawn in part.

The second issue in the instant case is whether the petitioner has established its ability to pay the proffered wage of \$33,280 at the time of filing and continuing until the beneficiary obtains lawful permanent residence.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which 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 CFR § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour or \$33,280 annually.

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 or motions on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.<sup>1</sup> Relevant evidence submitted on motion includes counsel's brief, a letter, dated June 2, 2003, from counsel in response to the director's RFE, a copy of a compiled financial statement for the petitioner for 2001, copies of Forms 1120, U.S. Corporation Income Tax Returns, for the years 2002 and 2003 for Tracey Table Co., Inc., copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, for the years 1998 through 2004, copies of payroll stubs, issued by Tracey Tables, Inc. for the beneficiary for the weeks January 1, 2005, January 8, 2005, and January 15, 2005, a copy of a June 27, 2002 ISD Liaison meeting minutes with the American Immigration Lawyers Association (AILA), and copies of the beneficiary's 2001 through 2004 Forms 1040, U.S. Individual Income Tax Returns. Other relevant evidence in the record includes a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 Form 1120S reflects an ordinary income or net income from Schedule K of -\$2,032 and net current assets of -\$505,487.

The 2002 and 2003 Forms 1120 for Tracey Table Co., Inc. reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$6,806 and \$23,478, respectively. The 2002 and 2003 Forms 1120 for Tracey Table Co., Inc. also reflect net current assets of -\$381,525 and -\$189,461, respectively.

The beneficiary's 1998 through 2004 Forms W-2 reflect wages earned by the beneficiary from the petitioner of \$5,847, \$19,630, \$10,110, \$14,802.50, \$12,619, and \$14,574, respectively.

The three payroll stubs for the beneficiary, issued by Tracey Tables, Inc., for January 1, 2005, January 8, 2005, and January 15, 2005 reflect wages paid to the beneficiary of \$640 each week.

The beneficiary's 2001 through 2004 Forms 1040 corroborate the wages paid to the beneficiary by the petitioner for those years.

With regard to the ISD Liaison Minutes of June 27, 2002, "[t]he Service Centers agree that in 'some' situations submission of W-2 forms confirming that the beneficiary has been paid the offered [wage] will resolve the issue of ability to pay."

On motion, counsel refers to the petitioner's response, dated June 2, 2003, to the director's RFE and states "[p]lease be advised that [the beneficiary] has not been employed at Soltrace, Inc." In addition, counsel states:

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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).

Attached as Exhibit 3 please find 2001 reviewed and audited financial statements of Soltrace, Inc. with the net profit as [sic] of \$51,893.00. Please be advised that reviewed and audited financial statements of a company are also appropriate means to demonstrate the employer's ability to pay the proffered wage.

Due to the fact that the petitioner has clearly demonstrated the ability to pay the proffered wage or salary of \$33,280.00 (\$51,893 – 2001 net income) per year as of April 27, 2001, the date of filing and continuing to the present, as well as the beneficiary demonstrated his qualifications for the position offered, I respectfully request your approval of the above captioned petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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). In evaluating whether a job offer is realistic, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 April 2, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted the beneficiary's 1998 through 2004 Forms W-2 that were issued by the petitioner thereby establishing that the petitioner employed the beneficiary during those years. The beneficiary's 1998 through 2004 Forms W-2 reflect wages earned by the beneficiary of \$5,847, \$19,630, \$10,110, \$14,802.50, \$12,619, and \$14,574, respectively. The petitioner is obligated to demonstrate that it had sufficient funds to pay the difference between the proffered wage of \$33,280 and the actual wage paid to the beneficiary in the pertinent years (2001 through 2004). Those differences were \$23,170 in 2001, \$18,477.50 in 2002, \$20,611 in 2003, and \$18,706 in 2004.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further 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.

In 2001, the petitioner was 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 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).

In the instant case, the petitioner's 2001 Form 1120S reflects a net income from Schedule K of -\$2,032 (the same as Line 21 of page one). The petitioner could not have paid the difference of \$23,170 between the proffered wage of \$33,280 and the actual wages paid of \$10,110 to the beneficiary from its negative net income in 2001.

It is noted that the petitioner submitted tax returns for Tracey Table Co., Inc. for the years 2002 and 2003 as proof of the petitioner's ability to pay the proffered wage of \$33,280. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The 2002 and 2003 Forms 1120 for Tracey Table Co., Inc. demonstrate that its net incomes were \$6,806 in 2002 and \$23,478 in 2003. However, these Forms 1120 will not be considered as proof of the petitioner's ability to pay the proffered wage as they are not for the petitioner, Soltrace, Inc., but for another company.<sup>2</sup> Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's

<sup>2</sup> A review of the websites <http://www.corporations.state.pa.us/soskb/Corp.asp?40633> and <http://www.corporations.state.pa.us/corp/soskb/Corp.asp?776420>, (accessed June 21, 2007) reveals that both Soltrace, Inc. and Tracey Table Co., Inc. are active and are separate corporations. It appears that Soltrace, Inc. is involved in manufacturing and that Tracey Table Co., Inc. is involved in sales of office furniture.

ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets 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, the 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. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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. In 2001, the petitioner's net current assets were -\$505,487. The petitioner could not have paid the difference of \$23,170 between the proffered wage of \$33,280 and the actual wages paid to the beneficiary of \$10,110 from its net current assets in 2001. Again, the Forms 1120 for Tracey Table Co., Inc. will not be considered in determining the petitioner's ability to pay the proffered wage.

On motion, counsel claims that the 2001 reviewed and audited financial statements of Soltrace, Inc. demonstrates the petitioner's ability to pay the proffered wage of \$33,280.

Counsel is mistaken. The financial statements submitted for 2001 are not audited financial statements, but are, instead, compiled financial statements. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's 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. Therefore, the compiled financial statements supplied by the petitioner will not be considered when determining the petitioner's ability to pay the proffered wage of \$33,280.

On motion, counsel also claims that the payroll stubs submitted for the beneficiary for January 1, 2005, January 8, 2005, and January 15, 2005 establish the petitioner's ability to pay the proffered wage of \$33,280. If the beneficiary were continually paid \$640 each week in 2005, then his total wages would result in the proffered wage of \$33,280 for 2005. However, those payroll stubs were issued by Tracey Tables, Inc. and not the petitioner Soltrace, Inc. Neither counsel nor the petitioner has explained why the beneficiary's payroll stubs would be issued by Tracey Tables, Inc. and not the petitioner. In addition, counsel claims that the beneficiary never worked for Soltrace, Inc. However, all of the beneficiary's Forms W-2 were issued by

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<sup>3</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.

Soltrace, Inc. If Soltrace, Inc. has no plans to employ the beneficiary, then there is no bona fide job offer. If, instead, Tracey Table Co., Inc. is actually employing the beneficiary or intends to employ the beneficiary, then Tracey Table Co., Inc. should have filed the visa petition. Although Soltrace, Inc. and Tracey Table Co., Inc. appear to be owned by the same individual, they cannot be considered one and the same company as they are two separate corporations and are both currently active. Again, *see Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

In a prior letter, dated February 28, 2005, counsel claimed that depreciation, cash available at the end of the year, and loans from shareholders should be considered when determining the petitioner's ability to pay the proffered wage in 2002 and 2003.<sup>4</sup>

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.

A depreciation deduction does not require or represent a specific cash expenditure 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *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.

Counsel urges that the petitioner's cash available at the end of the year should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's cash to its net income would likely be duplicative, at least in part. The petitioner's cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income. *See* the discussion on net current assets above.

Counsel also contends the loans from shareholders should be considered in determining the petitioner's ability to pay the proffered wage. The assets and liabilities sections of the balance sheet are organized by how current the account is. So for the asset side, the accounts are classified typically from most liquid to least liquid. For the liabilities side, the accounts are organized from short to long-term borrowings and other obligations. Therefore, as loans from shareholders are considered a long-term liability, they cannot be

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<sup>4</sup> Please note the tax returns provided for 2002 and 2003 would not be considered in determining the petitioner's ability to pay the proffered wage as they are for another company, and not the petitioner. The discussion that follows counsel's assertions is merely to explain why the items counsel claims should be included in determining the petitioner's ability to pay would not be considered even if the correct tax returns were submitted for the petitioner.

considered in determining the petitioner's ability to pay the proffered wage. Again, *see* the above discussion on net current assets.

As stated above, 8 C.F.R. § 204.5(g)(2) states the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the petitioner has not established its ability to pay the proffered wage in any of the pertinent years (2001 through 2004).

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The AAO's March 25, 2005 decision is affirmed in part.

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 motion to reopen is granted. The AAO's decision of March 25, 2005 is withdrawn in part and affirmed in part. The petition remains denied.