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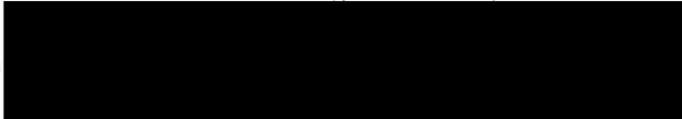


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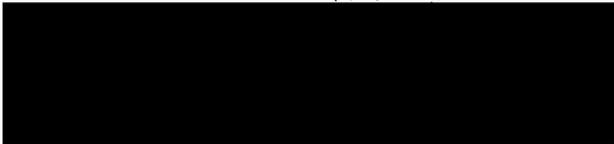
Date: MAR 01 2007

IN RE: Petitioner:  
Beneficiary:



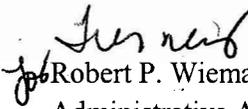
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 preference visa petition that is now before the Administrative Appeals Office (AAO) 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 tandoor chef. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14 per hour, which equals \$29,120 per year.

The Form I-140 petition in this matter was submitted on February 14, 2005. On the petition, the petitioner stated that it was established during 2000 and that it employs 30 workers. The petition states that the petitioner's gross annual income is \$300,000 and that its net annual income is \$0. On the Form ETA 750, Part B, signed by the beneficiary on October 2, 2002, 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 Boston, Massachusetts.

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 the petitioner's 2000, 2001, and 2003 Form 1120, U.S. Corporation Income Tax Returns and a letter from an accountant dated August 18, 2005. 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 tax returns show that the petitioner is a corporation, that it incorporated on September 8, 1999,<sup>2</sup> and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from July 1 of the nominal year to June 30 of the following year.

The petitioner's 2000 tax return, which covers the fiscal year from July 1, 2000 to June 30, 2001, shows that the petitioner declared a loss of \$10,274 as its taxable income before net operating loss deductions and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2001 tax return, which covers the fiscal year from July 1, 2001 to June 30, 2002, shows that the petitioner declared a loss of \$47,632 as its taxable income before net operating loss deductions and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return, which covers the fiscal year from July 1, 2003 to June 30, 2004, shows that the petitioner declared a loss of \$86,963 as its taxable income before net operating loss deductions and special deductions during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The accountant's August 18, 2005 letter notes that when the amounts of the petitioner's depreciation and amortization deductions are added back to its taxable income before net operating loss deductions and special deductions, the resulting figure is greater than the annual amount of the proffered wage. The accountant concludes, because depreciation does not require or represent a cash outlay during the year taken, that the petitioner's tax returns show its ability to pay the proffered wage during the salient years.

The director denied the petition on July 18, 2005. On appeal, counsel echoed the argument made by the accountant pertinent to depreciation and amortization. Counsel also stated that the director was incorrect in assuming that a company that shows a loss is unable to pay its workers.

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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).

<sup>2</sup> This office gathers that, although the petitioner incorporated on September 18, 1999, as is stated in its tax returns, it did not begin its restaurant operation until 2000, as is stated in the Form I-140 petition.

In making that statement pertinent to an alleged assumption made by the director counsel has stood the burden of proof in this matter on its head. The director did not assume that the petitioner is unable to meet its payroll. The director found that the petitioner has not, within the strictures of 8 C.F.R. § 204.5(g)(2), demonstrated its continuing ability to pay the additional amount of the proffered wage beginning on the priority date, despite its submission of some of its tax returns. The burden is on the petitioner to demonstrate that it has, in fact, that ability.

Counsel's argument that the petitioner's depreciation and amortization deductions should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that depreciation and amortization deductions do not require or represent a specific cash expenditure during the year claimed. They are the systematic allocation of the cost of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment. But the cost or other basis of assets 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.

A depreciation 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. *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.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient to its present purpose.

Further, amounts spent on long-term tangible and intangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, he does not offer any alternative allocation of those costs.<sup>3</sup> Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the remaining funds available to the petitioner. 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

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<sup>3</sup> Counsel does 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.

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. (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>4</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.

The proffered wage is \$29,120 per year. The priority date is April 30, 2001, which fell within the petitioner's 2000 fiscal year.

During its 2000 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 profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any additional funds available to it during its 2000 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 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 profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any additional funds available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

On March 11, 2005 the service center issued a request for evidence in this matter asking that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date.<sup>5</sup> On that date the petitioner's 2002 tax return should have been available. The petitioner did not submit that return or any other evidence pertinent to its ability to pay the proffered wage during its 2002 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

During its 2003 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 profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any additional funds available to it during its 2003 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 2003 fiscal year.

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<sup>4</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>5</sup> The actual language of the request was, "Submit evidence to establish that the employer had the ability to pay the proffered wage or salary of \$29,120 per year as of April 30, 2001, the date of filing(,) and continuing to the present."

The request for evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date was issued, as was noted above, on March 11, 2005. On that date the petitioner's tax return for its fiscal year 2004, which ran from July 1, 2004 to June 30, 2005, was unavailable. The petitioner is excused from providing evidence pertinent to its 2005 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2001, 2002, and 2003 fiscal years. 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.