

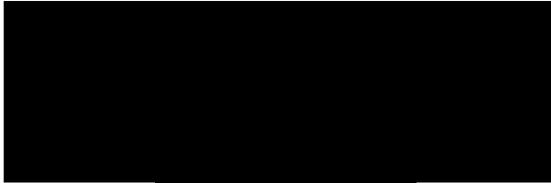
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File: [Redacted]  
EAC-04-103-50233

Office: VERMONT SERVICE CENTER

Date: MAR 29 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:



**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 petitioner filed a Motion to Reopen. The director granted the Motion to Reopen, reconsidered the petition, and affirmed her initial decision to deny the petition. The petitioner filed a second Motion to Reopen/Appeal, which the director rejected as an appeal since the director found that it was untimely filed, but considered it as a Motion to Reopen. The director affirmed the prior decision and the petition remained denied. The petitioner filed an appeal, which is before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food ("Cook – West Indian Specialty"). 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 February 23, 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

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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).

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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$18.89 per hour, based on a 35 hour work week, which is equivalent to \$34,379.80 per year. The labor certification was approved on January 21, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on February 21, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: October 29, 1996; gross annual income: \$457,891; net annual income: \$323,585; and current number of employees: five.

On August 18, 2004, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner filed a Motion to Reopen, which the director reopened and on November 15, 2004 affirmed the initial determination to deny the petition. The petitioner filed a second motion to reopen, which it intended to be treated as an appeal. The director found that the appeal was filed late,<sup>2</sup> and treated the filing as a Motion to Reopen, and the director affirmed her prior decision. The petitioner filed an appeal to the AAO, which is now before us.

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 April 23, 2001, the beneficiary listed that she has been employed with the petitioner since April 1999. The petitioner submitted the following W-2 statements for the beneficiary:

<u>Year</u>	<u>Wages Paid</u>
2001	\$8,925

The W-2 statement exhibits partial payment of the proffered wage to the beneficiary only for the year 2001. Based on the date of filing, if the petitioner continued to employ the beneficiary, the petitioner would have been able to submit the beneficiary's 2002, and 2003 W-2 Forms as well. Since the petitioner has submitted only one year of wages, which is below the proffered wage, the petitioner's prior wage payments to the beneficiary alone are insufficient to document the petitioner's ability to pay the proffered wage from the priority until the beneficiary reaches permanent residence. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage in 2001, and demonstrate through other evidence that it can pay the full proffered wage in 2002 and 2003.

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, Citizenship & Immigration Services ("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*

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<sup>2</sup> Based on 8 C.F.R. § 103.5a(b), a petitioner is allowed thirty-three days to appeal if the decision is mailed. The appeal would have been due by December 18, 2004, which was a Saturday. Accordingly, the petitioner would have been allowed until December 20, 2004, or Monday, to properly file the appeal.

*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 record demonstrates that the petitioner is 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). The petitioner lists only income from its business so that we will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2001	-\$37,649 <sup>3</sup>

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in 2001, even if the wages paid to the beneficiary were added to the petitioner's available net income.

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>
2001	-\$22,606

<sup>3</sup> The petitioner did not submit its 2002 federal tax return, which should have been available at the time of filing the I-140 petition. Further, the petitioner did not submit its 2003 federal tax return, although the 2003 return may not have been available at the time of filing the I-140, but likely would have been available at the time that the petitioner submitted its first, and subsequent, Motions to Reopen and 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.

Following this analysis, the petitioner's Federal Tax Return shows that the petitioner would lack the ability to pay the proffered wage under the net current asset test as well. Further, we note that both the petitioner's net income and net current assets reflect negative numbers in 2001.

On appeal, counsel provides that the petitioner can pay the proffered wage and references that the petitioner's federal tax return exhibits gross receipts of \$457,891 in 2001 and total assets of \$513,858.

As noted above, net income rather than gross income or gross receipts is the proper number for CIS consideration. See *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, CIS properly relied on the petitioner's net income figure rather than the petitioner's gross income. We have examined the petitioner's net income above, which is insufficient to show the petitioner's ability to pay the proffered wage.

Counsel further notes that the petitioner's Schedule L exhibits that the petitioner had cash assets in the amount of \$18,552; accounts payable in the amount of \$43,170; and other "current" liabilities of \$3,957 on Line 18. Counsel then contends that based on a formula established by the Board of Immigration Appeals (BIA),<sup>5</sup> the petitioner's assets should be calculated as: "taxable income, plus depreciation, plus cash available on Hand at yearend, plus the total Assets, minus current liabilities."

Based on the net current asset test, as set forth above, we have considered the petitioner's Schedule L cash assets, as well as other assets listed on Schedule L lines 2 through 6; however, based on the petitioner's liabilities listed on Schedule L, lines 16 through 18, the petitioner's tax return exhibits negative net current assets. The petitioner's net current assets were calculated on this basis, and not under the formula listed in the un-cited BIA test.

Regarding depreciation, as a tax concept, depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage, individually, or combined with other elements as the petitioner sets forth.

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<sup>5</sup> We note that counsel has provided no citation or date for the use of this formula.

Further, the petitioner's formula of adding "taxable income, plus depreciation, plus cash available on hand year-end, plus the total Assets, minus current liabilities" mixes concepts of accrual and cash basis accounting by seeking to combine net income and net current assets. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Counsel additionally provided the petitioner's bank statements for the time period February 28, 2001 through December 31, 2001. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. If we examined the bank statements, the bank statements reflect varying amounts from a low of \$8,817.55 (as of April 30, 2001) to a high balance of one month at \$20,704.64 (as of June 29, 2001). However, again we note that the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, and accordingly, the balances listed would not demonstrate the petitioner's ability to pay the proffered wage.

Counsel did not provide any evidence to demonstrate the petitioner's ability to pay for any year subsequent to 2001. Based on 8 C.F.R. § 204.5(g)(2), the petitioner must establish its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. As the petitioner has failed to establish its ability to pay the beneficiary the proffered wage in 2001, or any year subsequent, the petition was properly denied.

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.