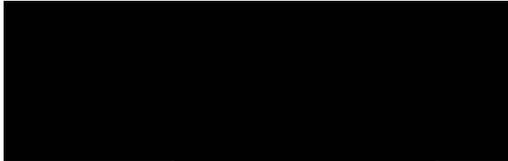




U.S. Citizenship
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Services

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FILE: [REDACTED]
WAC 06 101 50723

Office: TEXAS SERVICE CENTER Date: **OCT 25 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, Texas Service Center, and 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 restaurant 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 proffered wage from the priority date. The director denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original July 28, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of January 2, 2004.

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 or seasonal 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 either 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 January 2, 2004. The proffered wage as stated on the Form ETA 750 is \$9.95 per hour or \$20,696 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the

federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a declaration, dated September 25, 2006, from the petitioner's owner, a declaration, dated September 25, 2006, from [REDACTED] the petitioner's CPA, copies of the 2003 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years April 1 through March 31 for each year, for [REDACTED] at the address of [REDACTED] a copy of an Interoffice Memorandum from [REDACTED] for Operations, dated May 4, 2004, entitled *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*, a copy of the previously submitted 2004 Form 1065, U.S. Return of Partnership Income, for [REDACTED] [REDACTED] copies of the beneficiary's 2003 through 2005 Forms 1040, U.S. Individual Income Tax Returns, copies of crew lists showing the petitioner as being the caterer for different film productions, a copy of the petitioner's Articles of Incorporation, dated August 30, 1989, a copy of a stock certificate for the petitioner, and a copy of the petitioner's Certificate of Status, Domestic Corporation. Other relevant evidence includes a copy of the petitioner's Certificate of Incorporation, dated January 19, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2004 Form 1065 for Studio Services Partners LP reflects an ordinary income or net income of -\$1,172 from Schedule K and net current assets of \$17,648.

The 2003 through 2005 Forms [REDACTED] reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$0, \$0, and \$7,384, respectively. The 2003 through 2005 Forms 1120 also reflect net current assets of -\$332,848, -\$71,169, and -\$94,066, respectively.

The beneficiary's 2003 through 2005 Forms 1040 reflect adjusted gross incomes of \$119,097, \$100,462, and \$120,465, respectively. The beneficiary's 2003 through 2005 Forms 1040 also reflect that the beneficiary supported a family of six in those years.

The crew lists list the petitioner, [REDACTED], at several different addresses. Those addresses include [REDACTED]

The declaration³ of the petitioner's owner states:

¹ 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).

² It is noted that the address for the petitioner, both on the I-140 on the ETA 750, is listed as [REDACTED]. The ETA 750 states that the beneficiary will be employed by the petitioner at [REDACTED].

³ The declaration provided is not an affidavit as it was not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Statements made in support of an appeal 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).

I opened [REDACTED] as a California corporation in 1989. Attached to this appeal as Exhibit H is a true and correct copy of the Articles of Incorporation of [REDACTED]. I am the sole shareholder and director.

In 1990, I first hired the beneficiary, [REDACTED], as a chef assistant. Later on, in approximately 1995, he was promoted to chef/driver. He has been in my employment continuously since 1990, and he is currently still a chef/driver. He is an integral part of my business which would have a difficult time functioning without him.

Attached hereto as Exhibit G is a representative sampling of some of the catering projects which [REDACTED] Inc. has been involved in the past five years and on which [REDACTED] has participated.

The declaration⁴ of the petitioner's CPA states:

I have prepared the tax returns for [REDACTED] for 2003, 2004, and 2005. For the years 2003 and 2004, the corporation reported no profit. The profit for 2005 was \$7,384. During those years, the depreciation claimed on the tax returns was \$105,077, \$60,703, and \$35,786. Depreciation is a non-cash expenditure. If depreciation were not deducted on the tax returns, the net profit would have increased by the depreciation amounts for each year.

The attached statement of Current Assets and Current Liabilities, as reflected on Schedule L of the tax returns for the relevant years, indicates the following net current assets: 2003: \$83,379; 2004: \$43,400; 2005: \$27,331.

On appeal, counsel asserts:

[that] the ability to pay the wage is derived from a review and analysis of a host of factors. In viewing the totality of the petitioner's circumstances, the USCIS should examine the overall circumstances of the petitioner's business operations and the sole proprietor's financial viability. In particular, it should consider that the petitioner has employed the beneficiary since 1990, that the petitioner has a thriving catering business that depends on the skills of the beneficiary, and that for the last 3 years the beneficiary had made five times the proffered wage. Since the petitioner has established by prima facie evidence that it has the ability to pay the proffered wage from 2003 to the present, the decision of the Director of the Texas Service Center should be reversed, and the I-140 petition be approved.

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

⁴ See footnote 3.

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 750, signed by the beneficiary on December 18, 2003, the beneficiary claims to have been employed by the petitioner at [REDACTED] from January 1990 to the present. However, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary in support of the beneficiary's claim. Therefore, any wages paid to the beneficiary during the pertinent years (2004 to the present) cannot be considered when determining the petitioner's ability to pay the proffered wage of \$20,676.

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 (9th 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 (7th 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.

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 petitioner's tax returns demonstrate that its net incomes in 2003 through 2005 were \$0, \$0, and \$7,384, respectively. The petitioner could not have paid the proffered wage of \$20,696 out of its net income in those years. In addition, the address listed on the petitioner's 2003 through 2005 tax returns is [REDACTED] and not the address listed on the I-140 of [REDACTED] the address listed on the ETA 750 for where the beneficiary will work of [REDACTED]. Furthermore, neither the Articles of Incorporation nor the Certificate of Incorporation provide an address for the petitioner; and, therefore, the AAO is unable to determine if the three entities are one and the same or if they are three different entities.

Also, a review of public databases does not provide conclusive evidence that the petitioner's business is still operational and in good standing.⁵

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's 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.⁶ 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. The petitioner's net current assets in 2003 through 2005 were -\$332,848, -\$71,169, and -\$94,066, respectively. The petitioner could not have paid the proffered wage of \$20,696 from its net current assets in those years.

On appeal, the petitioner's CPA asserts that depreciation should be added back to the net income when determining the petitioner's ability to pay the proffered wage of \$20,696. However, the CPA'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

⁵ The website at [REDACTED] accessed on October 16, 2007, shows that [REDACTED] Inc. at [REDACTED] have been suspended. There is no evidence in the record of proceeding that would indicate that the two companies have been reinstated. The only business that appears to be still active is Studio Services Partners, L.P., at [REDACTED]

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

On appeal, counsel cites *Masonry Masters Inc. v. Thornburg*, 875 F.2d 898 (D.C. App. 1989) and contends that CIS must look at the expectation of the petitioner for earning new income as well when determining the petitioner's ability to pay the proffered wage of \$20,696. However, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of the decision in *Masonry Masters Inc. v. Thornburg* mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage.⁷ Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a restaurant cook will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel points to the beneficiary's 2003 through 2005 Forms 1040 and claims that according to the Interoffice Memorandum, dated May 4, 2004, the petitioner has submitted *prima facie* proof of its ability to pay the proffered wage during those years, as the beneficiary listed wages earned of over \$117,000 in 2003, of wages earned of \$98,437 in 2004, and of wages earned of \$118,194 in 2005.

Counsel is mistaken. The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage." In the instant case, counsel has not submitted any Forms W-2 or Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, that establish that the wages listed on the beneficiary's Forms 1040 were actually paid by the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). **Without credible evidence to support counsel's contention, the AAO will not assume that the wages listed on the beneficiary's Forms 1040 were paid to the beneficiary by the petitioner.**

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the

⁷ CIS now has a formula to be used when determining the petitioner's ability to pay the proffered wage. The formula consists of first determining if the beneficiary was employed by the petitioner at a salary equal to or greater than the proffered wage. Second, CIS will next consider the petitioner's net income figure as reflected on its federal income tax return, without consideration of depreciation or other expenses. Finally, CIS will review the petitioner's net current assets (Current assets – current liabilities = net current assets).

employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1989. The petitioner has provided tax returns for the years 2003 through 2005 for a different address than that listed on the I-140 and from that listed on the ETA 750. In addition, none of those tax returns establish the petitioner's ability to pay the proffered wage of \$20,696. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Furthermore, a review of public databases reveals that the petitioner has been suspended. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons stated above, the petitioner has not established its ability to pay the proffered wage of \$20,696 from the priority date of January 2, 2004 and continuing to the present.

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.