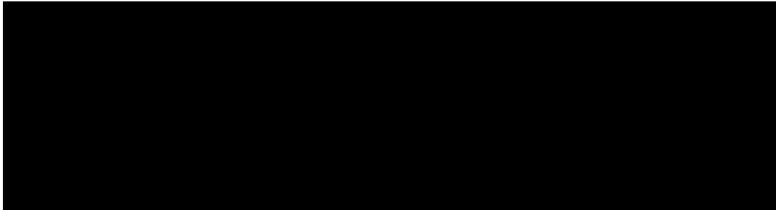




U.S. Citizenship
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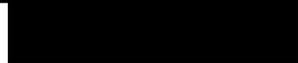
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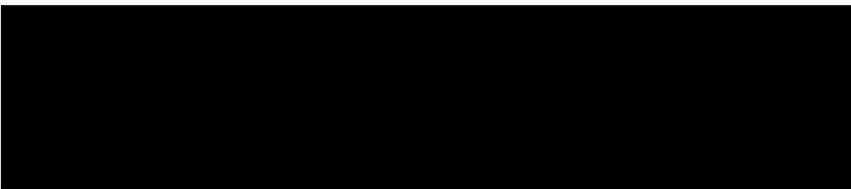
Petitioner:

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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a welding and repair business. It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor. 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 2006 priority date of the visa petition. 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 3, 2006 denial, the primary issue in this case is 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.

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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability 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, which is the date the Form ETA 9089 Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on May 15, 2006. The proffered wage as stated on the Form ETA 9089 is \$14.71 per hour (\$30,956.80 per year). The Form ETA 9089 states that the position requires two years of experience in the proffered position.

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. On appeal, counsel submits a brief as well as the following evidence: a letter from [REDACTED] the petitioner's joint owner; the petitioner's payroll record for the beneficiary for the first, second and third quarters of tax year 2006; documentation on the petitioner's Forms OS-114, Sales and Use Tax Return, a state of Connecticut tax form, for the first two quarters of tax year 2006; and a copy of the petitioner's 2004 Form 1065, U.S. Return of Partnership Income. Counsel also resubmits the petitioner's 2005 IRS Form 1065. The record also includes a letter of previous work experience from the petitioner that stated the beneficiary worked for the petitioner as an assistant welder since January 2003. This letter is dated as being notarized on August 14, 2006. The record does not contain any further evidence relevant to the petitioner's ability to pay the proffered wage.

In his letter, [REDACTED] states that the beneficiary has been the petitioner's employee since October 2005,² and the beneficiary is currently being paid ten dollars an hour, which is well above the minimum wage. [REDACTED] states that the only time he pays the beneficiary the prevailing wage is if [REDACTED] is doing a contracted job for the state or city municipality. [REDACTED] states that a he has checked around with other shops and finds that he is paying comparable wages to similar businesses. [REDACTED] in reference to the Sales Tax documents submitted to the record, states that the third quarter has not been filed yet, but that the petitioner's total gross for the third quarter is \$157,772.69. [REDACTED] then states that the petitioner reports its income only on a yearly basis from January to December and the information provided is what is currently available.

On the Form I-290B submitted with her brief, counsel asserts that the petitioner is a small limited liability company and does not regularly create audited financial statements throughout the year, and does not have any annual reports. Counsel notes that the petitioner included its 2005 tax return with the I-140 petition, but because the priority date for the petition is May 15, 2006, the petitioner submits financial documentation for tax year 2006. Counsel states that the beneficiary did not begin working for the petitioner until October 2005, and thus, the beneficiary's 2005 W-2 Wages and Tax Form shows low wages. Counsel states that in tax year 2006, the petitioner shows sufficient income to pay the proffered wage, and the beneficiary's income to date is much more substantial.

In her brief, counsel also asserts that although the petitioner understands that Citizenship and Immigration Services (CIS) does not consider the petitioner's depreciation expenses when examining the petitioner's ability to pay the proffered wage, the petitioner's depreciation in both tax years 2004 and 2005 is well in excess of the prevailing wage offered. Counsel states that the depreciation is only used as an accounting method on the petitioner's tax returns, and does not represent actual expenses to the petitioner.

Counsel notes that the priority date for the visa petition is May 15, 2006 and that the petitioner's ability to pay the proffered wage should be determined by the petitioner's net income in tax year 2006. Counsel then states that based on the payments made to the beneficiary by the petitioner during the first three quarters of 2006

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 Although [REDACTED] states on appeal that the beneficiary has been working for the petitioner since October 2005, in the petitioner's cover letter that accompanied the I-140 petition, [REDACTED] stated that the beneficiary had worked for the petitioner since January 2003.

that total \$14,720, and the net earnings in the first two quarters for 2006 that total \$31,099, the petitioner has established its ability to pay the proffered wage of \$30,597.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 1981, to have a gross annual income of \$395,078, a net annual income of \$84,073, and to currently employ two workers. On the Form ETA 9089, the beneficiary claimed to have worked for the petitioner from January 1, 2003 to May 1, 2006.³

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, 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. 612 (Reg. Comm. 1967).

On appeal, counsel notes that the petitioner's depreciation expenses in tax years 2004 and 2005 are in excess of the proffered wage. Counsel also notes that the AAO does not consider depreciation expenses when determining whether a petitioner has established its ability to pay the proffered wage. The AAO will discuss depreciation expenses further in these proceedings when it examines whether the petitioner's net income in tax years 2004 and 2005 were sufficient to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 submitted a Form W-2 that established the petitioner paid the beneficiary \$3,830 in tax year 2005. The AAO notes that both the beneficiary in the Form ETA 9089 and the petitioner's owner in his letter of previous work experience submitted with the I-140 petition indicated that the beneficiary worked for the petitioner prior to October 2005. Thus, the beneficiary should have received additional wages or compensation from the petitioner as of 2003 and through May 2006. Thus, the record contains conflicting evidence with regard to the beneficiary's prior employment with the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Based on this conflicting evidence, the AAO gives no weight to the 2005 W-2 form.

With regard to the beneficiary's wages during tax year 2006, the petitioner's payroll records for the beneficiary indicate he earned either \$13,820 or \$13,020 during that period of time.⁴ Based on the

³ The Form ETA 9089 does not indicate the date that the beneficiary signed the document; although the petitioner signed it on May 10, 2006.

⁴ In the third quarter, the payroll record is not clear as to whether the beneficiary received gross wages of \$400 during the weeks of September 2 and September 9, 2006.

inconsistencies in the employment verification letters, the AAO will only give limited evidentiary weight to the 2006 payroll records submitted to the record. The AAO notes that IRS Forms W-2 or Forms 1099-MISC are more probative evidence of any wages that the petitioner may have paid the beneficiary. The AAO acknowledges that at the time the petitioner submitted its brief and appeal materials on October 30, 2006, the beneficiary's W-2 Form for tax year 2006 would not have been available. Nevertheless, the AAO would note that in tax year 2006, the petitioner would have to establish more clearly the beneficiary's actual wages, by submitting an IRS W-2 Form, or Form 1099-MISC, and that if such wages could be established, the petitioner would still have to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in the 2006 priority year.⁵

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, as counsel correctly noted, 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. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expense should be considered as cash is misplaced. 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 court in *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 Chang* at 537.

The evidence indicates that the petitioner is a limited liability company taxed as a partnership. The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2004 and 2005. The record

⁵ The AAO notes that neither of the tax returns submitted to the record, namely, Forms 1065 for tax years 2004 and 2005, is dispositive of the petitioner's ability to pay the proffered wage as of the 2006 priority date year. However, the AAO acknowledges that the petitioner's 2006 tax return would not have been available at the time the record closed, on September 19, 2006. Therefore the AAO will examine the petitioner's tax returns for 2004 and 2005 in determining whether the petitioner established its ability to pay the proffered wage.

before the director closed on September 19, 2006. Thus, as previously stated, the petitioner's tax return for 2005 is the most recent return available.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's tax returns for 2004 and 2005 show the amounts for net income on Schedule K as shown in the table below:

Tax Year	Net Income	Wage increase needed to pay the proffered wage	Surplus or deficit
2004	\$33,877	\$30,596.80 ⁶	\$3,280.20 (surplus)
2005	\$18,471	\$30,596.80	\$12,125.80 (deficit)

With regard to tax year 2004, the petitioner has established that it had sufficient net income to pay the entire proffered wage; however, the petitioner did not establish that it had sufficient net income to pay the proffered wage in tax year 2005. Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$30,596.80 in tax year 2005, the tax year most relevant to the 2006 priority date.

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.⁷ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17. If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In examining the petitioner's tax returns for tax years 2004 and 2005, the AAO notes that the partnership did not submit any information on Schedule L for tax year 2005, therefore the AAO cannot examine whether the petitioner's net

⁶ The full proffered wage, since the record contains conflicting evidence as to the wages or compensation paid to the beneficiary during 2004 and 2005. As previously stated, based on the evidentiary conflicts, the petitioner has to establish its ability to pay the entire wage to the beneficiary in these years.

⁷ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current assets are sufficient to pay the proffered wage in the tax year most relevant to the 2006 priority date. Therefore, the petitioner has not established its ability to pay the proffered wage based on its net current assets.

Therefore, from the date the Form ETA 9089 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets with the exception of tax year 2004.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the 2006 priority date.

Counsel's assertions on appeal with regard to depreciation expenses and the petitioner's wages paid to the beneficiary in 2006 cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the Department of Labor.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.