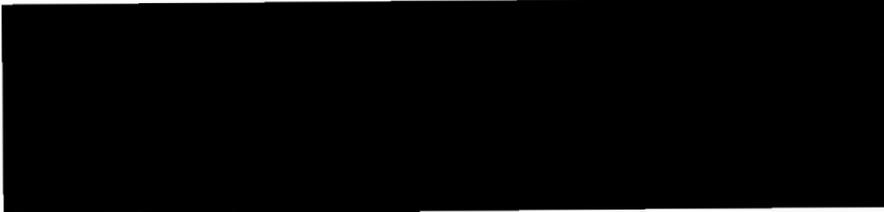


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



bc

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: **JUL 17 2008**
SRC 06 058 53210

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 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 convenience store. It seeks to employ the beneficiary permanently in the United States as an evening manager.¹ The petition is accompanied by a copy of part of a “draft” of a Form ETA 750, Application for Alien Employment Certification.² The director determined that the petitioner had not

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (CIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the Department of Labor’s final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed February 26, 2008).

² Further, as noted by the director in her decision, the record lacks an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of Section 203(b)(3) of the Immigration and Nationality Act (the Act) be accompanied by a labor certification.

The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [CIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: “In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.” (emphasis added). Counsel has not provided any authority permitting CIS to accept a photocopy of the Form ETA 750. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the Department of Labor (DOL) only upon the written request of a consular or immigration officer. The record contains no evidence that the petitioner has obtained an official duplicate labor certification. In response to the director’s request for evidence (RFE) dated March 3, 2006, whereby the director requested the original labor certification application, the petitioner indicated that its previous attorney retained the original labor certification application and that its repeated attempts to contact the prior attorney were unsuccessful. The petitioner indicated that it has not filed another I-140 petition based on the labor certification application. If the petitioner pursues this matter further, the director shall confirm that the labor certification has not been used for another beneficiary. The record contains correspondence from the Texas Workforce Commission, Alien Labor Certification Unit, indicating that the Form ETA 750 filed by the petitioner on behalf of the original beneficiary on January 14, 1998, was certified by the DOL on November 29, 2001. The director notes in her decision that the Texas Service Center has been unable to retrieve a copy of such an old case. For purposes of this appeal, the AAO will review the copy of the Form ETA 750 in the record.

established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.³

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 August 30, 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 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 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

³ The director also noted that the beneficiary claimed on Form ETA 750B to be working for an overseas company as of December 21, 2005, although he last entered the United States in May 2005. This office notes that the beneficiary also claimed on Form G-325A, submitted in connection with the beneficiary's adjustment of status application, to have worked for an overseas company through December 12, 2005, the date he signed the Form G-325A. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). On Form I-290B, counsel states that the beneficiary was employed with the overseas company until the end of April 2005, and that the date listed on Form ETA 750B is a "typographic error." However, 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). The petitioner failed to resolve the inconsistency noted by the director with competent objective evidence.

Here, according to the copy of the “draft” of the form, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$19.66 per hour (\$40,892.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 appeal.⁴ On appeal, counsel submits a copy of the petitioner’s IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005; a copy of the petitioner’s Schedule L to its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2004; and a copy of IRS Form W-2, Wage and Tax Statement, issued by the petitioner to ██████████ for 2005.⁵ Relevant evidence in the record includes the petitioner’s IRS Forms 1120, U.S. Corporation Income Tax Returns, for 1998 through 2001; and the petitioner’s IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2002 through 2004. The record does not contain any other evidence relevant to the petitioner’s ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from May 15, 1997 through December 31, 2001. On January 1, 2002, the petitioner elected S corporation status. On the petition, the petitioner claimed to have been established on May 15, 1997, to have a gross annual income of \$1.99 million, and to currently employ eight workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 12, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had total sales of over \$2.8 million in 2005 and a net income of \$53,199 in 2005. Counsel also asserts on Form I-290B that “[f]ollowing receipt and review of the 1998 tax return, we will also address the ability to pay the wage at such time.” As previously noted, counsel did not file a supplementary brief within 30 days of filing the appeal as indicated on Form I-290B. Further, the petitioner’s 1998 federal income tax return was submitted to the director with the petitioner’s response to the director’s RFE. It is unclear why counsel was unable to address the ability to pay issue on appeal.

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

⁴ 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).

⁵ On Form I-290B, counsel for the petitioner indicated that she would send a brief with the necessary evidence to the AAO within 30 days. On December 10, 2007, the AAO sent a fax to counsel. The fax advised counsel that no evidence or brief had ever been received in this matter, and requested that counsel submit a copy of the originally submitted brief and/or additional evidence, if in fact such evidence had been submitted, within five business days. On December 14, 2007, the AAO received a fax from counsel’s office indicating that no brief was filed and attaching a copy of the petitioner’s Schedule L to its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2004, and a copy of IRS Form W-2, Wage and Tax Statement, issued by the petitioner to Akber Gilani for 2005.

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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1998 or subsequently.

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, 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.

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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. For 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 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's tax returns demonstrate its net income for 1998 through 2005, as shown in the table below.

- In 1998, the Form 1120 stated net income of \$2,213.00.
- In 1999, the Form 1120 stated net income of \$5,591.00.
In 2000, the Form 1120 stated net income of \$7,755.00.
- In 2001, the Form 1120 stated net income of \$20,162.00.
- In 2002, the Form 1120S stated net income of \$21,836.00.
In 2003, the Form 1120S stated net income of \$30,334.00.
- In 2004, the Form 1120S stated net income of -\$154,443.00.
In 2005, the Form 1120S stated net income of \$53,199.00.

Therefore, for the years 1998 through 2004, the petitioner did not have sufficient net income to pay the proffered wage of \$40,892.80. For the year 2005, the petitioner had sufficient net income to pay the 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 net current assets. 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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation'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. The petitioner's tax returns demonstrate its end-of-year net current assets for 1998 through 2004, as shown in the table below.

- In 1998, the Form 1120 stated net current assets of \$25,961.00.
- In 1999, the Form 1120 stated net current assets of \$37,153.00.
- In 2000, the Form 1120 stated net current assets of \$43,451.00.
- In 2001, the Form 1120 stated net current assets of \$52,894.00.
- In 2002, the Form 1120S stated net current assets of \$124,295.00.
In 2003, the Form 1120S stated net current assets of \$131,929.00.
- In 2004, the Form 1120S stated net current assets of \$12,792.00.

Therefore, for the years 1998, 1999 and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage of \$40,892.80.⁷ For the years 2000, 2001, 2002 and 2003, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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 except for 2000, 2001, 2002, 2003 and 2005.

⁶According 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.

⁷ The director erred in her determination that the petitioner had sufficient net current assets to pay the proffered wage in 1999. However, this error does not affect the ultimate outcome of the appeal.

On appeal, counsel provides the petitioner's 2005 federal income tax return and the petitioner's Schedule L to its 2004 federal income tax return and asserts that the petitioner had total sales of over \$2.8 million in 2005 and a net income of \$53,199 in 2005. As set forth above, the petitioner has established its ability to pay the proffered wage in 2005. Counsel makes no argument regarding the petitioner's inability to pay the proffered wage in prior years, specifically 1998, 1999 and 2004. Counsel's assertions on appeal 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 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.