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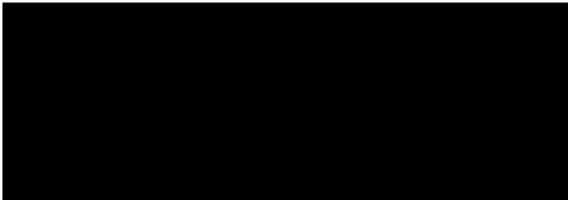
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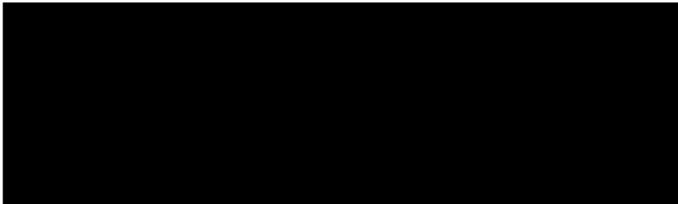
Office: VERMONT SERVICE CENTER

Date: AUG 14 2006

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a building, remodeling, and construction company that seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the January 18, 2005, denial, the director denied the case on the sole issue that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful 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 appeal¹.

The record shows that the appeal is properly and timely filed, 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.

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 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *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 750 Application for Alien 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 750 was accepted for processing by the relevant office within the DOL employment system on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$19.57 per hour, 35 hours

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).

per week, for an annual salary of \$35,617.40 per year. The Form ETA 750 states that the position requires three years of experience in the job offered, as a carpenter, or three years in a related occupation as a carpenter's assistant. The Form ETA 750 was certified on May 15, 2003. The I-140 was filed on January 20, 2004.

On the I-140 petition, the petitioner listed that it was established on January 1, 1999; gross annual income: \$270,000.00; net annual income: \$78,000.00 "with depreciation;" and current number of employees: 5. The petitioner initially submitted the company's 2001 Federal tax return. The Service Center sent a Request for Additional Evidence (RFE) on August 11, 2004, requesting that the petitioner submit additional documentation to show the petitioner's ability to pay the proffered wage, including the beneficiary's W-2 statements. The petitioner forwarded W-2 statements reflecting partial payment of the wage to the beneficiary, along with a "profit and loss statement," and the petitioner's 2000 Federal tax return. Despite these items submitted, the director found that the petitioner lacked the ability to pay the proffered wage, and denied the petition on January 18, 2005.

Counsel appealed the director's denial, and properly submitted Form I-290B. Counsel asserts in the appeal that the U.S. Citizenship & Immigration Service (CIS) failed to consider depreciation, and that if depreciation was considered, the petitioner would be able to pay and show the ability to pay the proffered wage. Additionally, counsel resubmitted the petitioner's 2001 tax return, along with a letter from a tax planning firm offering an explanation of assets apart from the petitioner's tax returns, which might be considered with respect to the petitioner's ability to pay.

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. 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. CIS will consider the totality of the circumstances affecting the petitioning business 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, on the Form ETA 750B, signed by the beneficiary, the beneficiary listed that he has been employed with the petitioner since November 2000. W-2 forms submitted show the following:

<u>Year</u>	<u>Wage Payment</u>
2003	\$10,542.00
2002	\$6,268.00
2001	\$5,072.50

While the W-2 forms demonstrate that the petitioner has paid the beneficiary, the amounts in each year are significantly less than the proffered wage of \$35,617.40. Therefore, the W-2 statements alone do not establish the petitioner's ability to pay the proffered wage.

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. 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).

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,617.40 per year from the priority date. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	not submitted ²
2002	not submitted
2001	\$22,935
2000	-\$9371

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net income.³

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on

² The petitioning company pays its taxes based on a tax year beginning on October 1 of the year and ending on September 30, so that the company's 2001 tax return would reflect filing for the time period October 1, 2001 to September 30, 2002. The petitioner's 2002 and 2003 tax returns might not have been available at the time of filing.

³ For example, in the year 2001, even if the wages paid to the beneficiary were added to the petitioner's net income, this would only equate to \$28,007.50, still less than the proffered wage.

⁴ 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.

Schedule L, lines 1 through 6. 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 net current assets were as follows:

<u>Year</u>	<u>Amount</u>
2003	not submitted
2002	not submitted
2001	\$1,604
2000	\$654

As demonstrated above, the petitioner did not have sufficient net current assets in any year to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net current asset totals.

To address counsel's additional arguments, counsel contends that the petitioner had an additional \$15,833 in available income based on depreciation listed on the petitioner's 2001 tax return. Depreciation as a tax concept 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.

Counsel further contends that the petitioner made a "discretionary decision to pay back to VSB's President, Carlos Vizaretta the sum of \$30,187 as a loan repayment. If any additional monies would have been needed during 2001 and 2002 to pay the salary in this case, some or all of the money was also available." While it may be true that the petitioner selected to use \$30,187 of discretionary funds to pay back a shareholder in 2001 and 2002, it does not appear to follow that in subsequent years, 2003 for example, that the petitioner used additional funds to pay the beneficiary additional wages as exhibited by the beneficiary's 2003 W-2 form submitted. The petitioner's argument is speculative since while the \$30,187 might have been a discretionary amount available to pay the proffered wage, since the money has now been used for another source, the funds have been allocated and would no longer be available as cash, which could be used to pay the proffered wage. If the funds used to pay the loan were available in a subsequent year, the assets should properly be

reflected on a tax return either in net income or as a net current asset, or on the beneficiary's W-2 statement. We do not have the petitioner's 2003 tax return to assess this, and the beneficiary's wages do not reflect a significant increase in earnings. Thus, the record of proceedings does not demonstrate that funds in payment for loans would be readily available for use as a current asset to pay the proffered wage.⁵

Counsel has submitted a "profit and loss" statement, along with a listing of deposits and checks, from the company's CPA. Counsel claims that this statement shows an "additional \$40,000" available in "liquid capital" between the dates October through December 2002. Under 8 C.F.R. § 204.5(g)(2), evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. A profit and loss statement is not an audited financial statement, since there is no accountant's report accompanying the statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.⁶

Additionally, the petitioner submitted a letter from the President of Riverbank Inc., the firm that prepared the petitioner's 2001 tax return. The letter addresses funds that would be available to pay the proffered wage based on depreciation, the repayment of a shareholder's loan, and based on the "Fair Market Value of the assets on the books during the time in question." We have addressed the depreciation and loan arguments above. Regarding the "fair market value of assets on the books," we have calculated the petitioning company's net current assets above, which would be the proper standard used. Fair market value might provide the price an asset would obtain on the marketplace, but counsel, or the letter from Riverbank's President does not designate, which assets might be liquidated to provide the necessary cash to pay the proffered wage. Fair market value is not relevant unless the petitioner is willing to liquidate the assets to provide additional funds to pay the proffered wage. Additionally, fair market value counts all assets, even those depreciable assets that will not be turned into cash during the year.

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. The petition cannot demonstrate this ability through: (1) prior wage payment; (2) positive net income; or (3) sufficient net current assets in the amount of the proffered wage. Accordingly, the petition was properly denied.

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.

⁵ Further, we note that the amount of the loan is less than the proffered wage on an annual basis, and would not meet the proffered wage, if we added this amount to the net income and net current assets based on the year 2000 tax returns.

⁶ Similarly, the ledger or print out of bank deposits, and checks written are unpersuasive. Bank statements show the amount in an account on a given date, and cannot show the sustained ability to pay a proffered wage. Further, the petitioner submitted no evidence to demonstrate that the funds reported on the petitioning company's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions).