U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: LIN-03-146-51717 Office: NEBRASKA SERVICE CENTER Date: AUG 15 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner is a car dealership. It seeks to employ the beneficiary permanently in the United States as an automotive electrician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 priority date of the visa petition. The director denied the petition accordingly.

On appeal counsel submits a brief and additional evidence.[1]

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 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 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 on June 25, 2002. The proffered wage as stated on the Form ETA 750 is $16.44 per hour ($34,195.20 per year[2]). The Form ETA 750 states that the position requires four (4) years experience in the job offered. On the Form ETA 750B signed by the beneficiary on June 20, 2002, he did not

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[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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

[2] The director erred in calculating the annual proffered wage in the decision. The annual proffered wage should be $34,195.20 instead of $43,264.

claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of $1,110,469, to have a net annual income of $420,000, and to currently employ three (3) workers.

With the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and unaudited financial statements as of August 31, 2002 pertinent to its ability to pay the proffered wage.

The director issued a request for evidence (RFE) on December 22, 2003 requesting additional evidence to establish that the petitioner had the financial ability to pay the proffered wage as of June 25, 2002 and continues to have such ability.

In response to the RFE, the petitioner submitted its 2002 tax return, financial statements as of December 31, 2003 and corporate bank statements.

On February 16, 2005 the director denied the petition, finding that the evidence submitted with initial filing and in response to the RFE did not establish that the petitioner had the ability to pay the proffered wage at the time of the priority date was established and continuing to the present.

On appeal, counsel submits the petitioner's bank statements, 2002 and 2003 tax returns and argues that the petitioner did establish its ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not submit any documents showing the petitioner paid the beneficiary any compensation in any year and the beneficiary did not claim to have worked for the petitioner. Therefore, the petitioner failed to demonstrate its ability to pay the proffered wage through wages already paid to the beneficiary and is obligated to demonstrate that it could pay the full proffered wage from 2002, the year of the priority date, to the present.

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 its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to employees 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.

In the brief accompanying the instant appeal, counsel asserts that the depreciation of $7,006 in 2001 should be added back to the net income in determining the petitioner's financial viability. Counsel's reliance on depreciation in determining the petitioner's ability to pay the proffered wage is misplaced. The court in *Chi-Feng Chang* further clearly 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.

The record contains incomplete copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001, 2002 and 2003. The evidence indicates that the petitioner is an S corporation. According to the tax returns the petitioner's fiscal year is based on a calendar year. The priority date in the instant case is June 25, 2002, therefore, the tax return for 2001 is not necessarily dispositive. The AAO will review the petitioner's tax returns for 2002 and 2003. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $34,195.20 per year in 2002 and 2003.

> In 2002, the Form 1120S stated net income[3] of $30,586.
> In 2003, the Form 1120S stated net income of $30,959.

Therefore, for the years 2002 and 2003 the petitioner did not have sufficient net income to pay the proffered wage of $34,195.20.

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.[4] 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 the total of a corporation's end-of-year net current assets and

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[3] Ordinary income (loss) from trade or business activities as reported on Line 21.

[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.

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.

However, counsel submitted only the first page of the petitioner's tax returns for 2002 and 2003 without all schedules and attachments. Without the schedule L of the Form 1120S, the AAO cannot assess net current assets to see whether the petitioner had sufficient net current assets to pay the proffered wage and further to establish its ability to pay in 2002 and 2003. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the petitioner failed to establish that it had sufficient net current assets to pay the proffered wage in 2002 and 2003, and further failed to demonstrate its ability to pay the proffered wage through its net current assets for 2002 and 2003.

Therefore, from the date the Form ETA 750 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel refers to a decision issued by the AAO concerning pro-rating the annual proffered wage to support his assertions, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal, counsel asserts that the petitioner established its ability to pay the proffered wage according to the language in Mr. Yates' May 4, 2004 memorandum. Counsel states that: "[this memorandum] instructs CIS officers to **approve [an I-140 petition] if the petitioner's net income or assets are equal to or greater than the proffered wage.**" (Emphasis added by counsel). The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's quotation of the language in that memorandum is misplaced. The memorandum clearly uses "Net Current Assets" instead of "assets" as counsel refers. As previously noted, without Schedule L of the Form 1120S the petitioner did not demonstrate the petitioner's net current assets in 2002 and 2003, and further failed to establish the petitioner's ability to pay through its net current assets in 2002 and 2003.

Counsel contends that the submitted petitioner's bank statements demonstrate the petitioner's cash in hand which can establish its ability to pay the proffered wage. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot

show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner'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) or the cash specified on Schedule L that would have been considered in determining the petitioner's net current asset if Schedule L had been provided.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in the year of the priority date.

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.