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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 07 2006

EAC-04-259-52032

In re: Petitioner:
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:

[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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign ("Italian Specialty Cook"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 29, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains 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 appeal.[1]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 3, 2001. The proffered wage as stated on Form ETA 750 for the position of cook is $18.00 per hour based on a 40 hour work week, which is equivalent to $37,440 per year. The labor certification was approved on April 6, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on September 15, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: September 13, 1994; gross annual income: $1,080,705; net annual income: not listed; and current number of employees: not listed.

On November 16, 2004, the Service Center issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically: related to the petitioner's ability to pay, including the petitioner's federal tax returns for the years 2001, and 2003[2]. Alternatively, the RFE request allowed that the petitioner could provide audited or reviewed financial statements for 2001 and 2003. The request also sought copies of the beneficiary's W-2 statements if the petitioner employed the beneficiary in 2001, 2002, or 2003.

Counsel responded to the RFE on the petitioner's behalf and submitted 2001 "General Ledger" statements for the petitioner, along with the petitioner's 2002 and 2003 federal tax returns. Counsel additionally provided that the position the beneficiary would fill was created in 1994, and that the prior specialty cook was the owner [redacted] On March 29, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

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. 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 on April 25, 2001, the beneficiary did not list that he has been employed with the petitioner. The petitioner submitted a letter with the I-140 petition that the petitioner has employed the beneficiary from September 1998 to the present (the letter was signed on February 20, 2001). The petitioner did not submit any W-2 statements. On appeal, the petitioner submitted two hand written paystubs dated March 28 to April 03, and April 4 to April 10, with no year listed, showing payment for each time period in the amount of $632.80. **The evidence of prior wage payment submitted, standing alone, is wholly insufficient to** demonstrate the petitioner's ability to pay.

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).

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[2] The petitioner initially submitted only its 2002 return.

[3] The petitioner did not submit any evidence to show wages paid to [redacted] to compensate him for his role as cook, or demonstrate that funds previously available to pay [redacted] for his work as a cook would then be available to pay the beneficiary.

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 record demonstrates that the petitioner is 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists only income from its business so that we will take the income from line 21:

Tax year	Net income or (loss)
2003	$36,685
2002	$41,478
2001	not submitted[4]

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in the year 2003,[5] but would be able to show its ability to pay in the year 2002. The petitioner did not submit its 2001 tax return.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current

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[4] Based on the priority date of May 3, 2001, the petitioner would need to submit evidence of its ability to pay since 2001. The petitioner did not submit its 2001 federal tax return with the initial filing. The RFE specifically requested the 2001 tax return, or other regulatory prescribed evidence. The petitioner did not submit other regulatory prescribed evidence for the year 2001 in response to the RFE, or on appeal. The petitioner did not provide any explanation of why it was unable to submit the 2001 federal tax return. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner failed to provide copies of its 2001 tax return. **Failure to submit requested evidence can be grounds for denying the petition.** ***See*** **8 C.F.R. §** 103.2(b)(14).

[5] Although, we note that based on the proffered wage, the petitioner's net income would only be deficient $755.

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

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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2003	-$170,532
2002	-$186,194
2001	not submitted

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would lack the ability to pay the proffered wage in 2003 under the net current asset test.

The petitioner additionally submitted General Ledger statements for the company, which exhibited bank balances, employee payroll, savings, inventory, revolving credit lines, and other factors. First we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Additionally, the petitioner's cash assets would be reflected on Schedule L of the petitioner's federal tax returns as an asset, and, therefore, considered under net current assets above. Further, the general ledger account would not be equivalent to acceptable evidence under 8 C.F.R. § 204.5(g)(2), such as an audited financial statement. Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The general ledger submitted would be similar to an unaudited financial statement, and would not be persuasive evidence.

Further, if we were to examine the general ledger submitted, nothing contained therein leads us to conclude that the petitioner can demonstrate its ability to pay the proffered wage in the year 2001. The bank account balances exhibit that the petitioner incurred nineteen insufficient funds charges in 2001. The ledger reflects a high balance of $15,400 at the beginning of the year, and a low balance of -$95,436.19 in April 2001. The year ending balance on December 30, 2001 was -$50,719. The ledger further shows the petitioner had a $350.81 balance in savings for the year. The petitioner had a revolving credit line of -$17,866.02 as of January 1, 2001, and an ending revolving credit line of -$1,666.03. The ledger does demonstrate regular issuance of employee payroll, however, nothing demonstrates that the payroll distributions went to pay the beneficiary specifically. Nothing contained within the general ledger statements would allow us to determine that the petitioner had sufficient assets to pay the proffered wage in the year 2001.

On appeal, counsel contends that the petitioner had the ability to pay the proffered wage. The only new evidence submitted on appeal is a letter regarding the petitioner's bank account. The letter from Citibank is dated April 13, 2005, and provides that "the business referred to above maintains the following accounts with Citibank" and lists one checking account with a current balance of $40,912.85, and a second checking account with a balance of $4,240.57. While the letter provided demonstrates that the petitioner had sufficient funds available on April 13, 2005, the bank letter provided does not address the amount that the petitioner had available in the year 2001. The petitioner must demonstrate its ability to pay the proffered wage from the priority date of May 3, 2001 to the time that the beneficiary obtains permanent residence. Funds available in 2005 would not exhibit that the petitioner had sufficient funds available in 2001 to demonstrate the petitioner's ability to pay the proffered wage.

Counsel additionally provided two hand written paystubs as noted above, which are insufficient to document the petitioner's ability to pay the proffered wage, and resubmitted the petitioner's 2001 general ledger statements, along with the petitioner's 2002 and 2003 federal tax returns. The petitioner failed to submit its 2001 federal tax return, or other evidence to account for the petitioner's ability to pay the proffered wage in the year 2001.

Based on the evidence submitted, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from May 2001 to the time that the beneficiary obtains permanent residence. 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.