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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: EAC-03-209-51206 Office: VERMONT SERVICE CENTER Date: MAY 26 2006

IN RE: Petitioner: [redacted]
Beneficiary:

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

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 9, 2004 denial, the single 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. The denial was affirmed in the director's November 24, 2004 response to the petitioner's Motion to Reconsider.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is $24.40 per hour for 35 hours per week, which amounts to $44,408.00 annually.

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]. No new evidence was submitted on appeal. Other relevant evidence in the record includes copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001, and 2002, copies of the petitioner's bank statements from January 2001 through May 2004, a letter from counsel dated July 30, 2004, and a document submitted along with the I-140 petition. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that it wants a definitive ruling and CIS's rationale on whether bank statements and depreciation can be considered in determining the petitioner's ability to pay the proffered wage.

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, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 26, 2001, the beneficiary claimed to have worked for the petitioner beginning in August 1999 and continuing through the date of the ETA 750B. However, the record does not contain any Form W-2's, Form 1099's, or other evidence to show that the beneficiary received compensation from the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

[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 evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001, and 2002. The record before the director closed on August 2, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. A close look of the petitioner's tax returns reveals that they are based on fiscal years lasting from July 1 to June 30. Thus, the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2000 is for fiscal year 2001, the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 is for fiscal year 2002, and the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002 is for fiscal year 2003. The record, therefore, does contain the petitioner's tax return for fiscal year 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the 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 show the amounts for taxable income on line 28 as shown in the table below.

Fiscal year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$6,069.00	$44,408.00*	-$38,339.00
2002	-$6,722.00	$44,408.00*	-$51,130.00
2003	-$9,971.00	$44,408.00*	-$54,379.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. 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. If a corporation's net current 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Fiscal year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-$61,912.00	$44,408.00*

2002	-$62,330.00	$44,408.00*
2003	-$57,011.00	$44,408.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003.

Counsel states on appeal that CIS erred in rejecting evidence of the balances available in the petitioner's bank accounts from January 2001 through May 2004 because those balances show that the petitioner's monthly balances were more than the monthly proffered wage, the petitioner's weekly balances were more than the weekly proffered wage, and the petitioner's daily balances were more than the weekly proffered wage. Counsel "request[s] [from the AAO] a definitive ruling on this issue and the rationale therefore." Evidence in support of this assertion includes copies of the petitioner's bank statements from January 2001 through May 2004 and a letter from counsel dated July 30, 2004.

Counsel's reliance on the balances 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 the AAO considered in determining the petitioner's net current assets. Thus, the AAO will not look at the petitioner's bank balances in this case.

Counsel also states on appeal that "depreciation figure should not be deducted from gross income, and should be added to the net income figure." Again, counsel requests a definitive ruling on this issue and the AAO's rationale. A document submitted along with the I-140 petition likewise mentions depreciation.

There is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) 719 F. Supp. at 537. Thus, the AAO does not consider depreciation in determining a petitioner's ability to pay the proffered wage.

Counsel further asserts that "[i]n our experience of over 50 years, INS and CIS have never in any of our cases, until now, rejected our argument that the amount of depreciation is not an actual expense; is a return of part of previous expenditures; should not, for visa petitioner purposes, be deducted from gross income, but should be added to net income shown on the tax return."

The record does not contain any documentary evidence showing that the AAO has, in the past, accepted counsel's argument on depreciation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, even if counsel did provide the citations of previous AAO decisions that support his assertion, counsel must show that those decisions are binding. 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).

In the Motion to Reconsider dated September 23, 2004, counsel states that officer compensation paid to the corporation's sole owner in the amount of $75,900.00 for fiscal year 2003 can be considered in determining the petitioner's ability to pay the proffered wage because "[t]he issue is not whether the [proffered wage] was actually paid; the issue is whether the petitioner had the ability to pay."

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. However, CIS, in looking at the totality of the circumstances, may examine the financial flexibility that the owners have in setting their salaries based on the profitability of their corporation. In this case, the petitioner is owned by one officer. According to the record, no evidence indicates that the beneficiary was paid in 2001, and the petitioner had a net income of $6,069.00 in fiscal year 2001. Thus, the petitioner still needed $38,339.00 to meet the proffered wage in fiscal year 2001. The officer was compensated $62,400.00 in fiscal year 2001. $38,339.00 is 61.4% of the total compensation, and the AAO finds that it is unlikely that an officer would forego over one-half of his compensation in order to pay the salary of an employee. No evidence indicates that the beneficiary was paid in 2003, and the petitioner needed $44,408.00 to meet the proffered wage because the petitioner had a negative net income and negative net current assets in fiscal year 2003. The officer was compensated $75,900.00 in fiscal year 2003. $44,408.00 is 58.5% of the total compensation, and the AAO again finds that it is unlikely that an officer would forego over one-half of his compensation in order to pay the salary of an employee. In addition, there is no evidence in the record besides counsel's statement that the officer could have or would have given up such significant percentages of his compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the AAO will not look at the amounts for officer compensation in this case. Moreover, even if the AAO does take the petitioner's officer compensation for fiscal year 2001 and 2003 into consideration, the petitioner still cannot show that it has the ability to pay the proffered wage in fiscal year 2002 because the officer was not compensated in fiscal year 2002.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decisions of the director to deny the petition and to affirm the denial were correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.