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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

B6

File: EAC-05-007-51058 Office: VERMONT SERVICE CENTER Date: OCT 20 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 Director, Vermont Service Center, denied the immigrant visa petition. The petitioner filed an appeal, which the Service Center considered as a motion to reopen as the appeal was filed beyond the allowed time period. The Service Center then denied the motion to reopen and the petitioner appealed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a business that bakes traditional Persian pastries and seeks to employ the beneficiary permanently in the United States as a baker/specialty. 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 August 31, 2004 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from 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 of the denied motion to reopen 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 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

[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 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on January 22, 2002. The proffered wage as stated on Form ETA 750 for the position of a baker is $10.00 per hour, 35 hours per week, equivalent to $18,200.00 per year. The labor certification was approved on August 14, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on September 10, 2003.[2] On the I-140, counsel listed the following information related the petitioning entity: date established: May 21, 1996; gross annual income: $150,000; net annual income: not listed; number of employees: one full-time.

The Service Center issued a Request for Additional Evidence ("RFE") on June 9, 2004, which requested that the petitioner provide its 2003 Federal Income Tax Return, and additional evidence to demonstrate the petitioner's ability to pay the proffered wage.

On August 31, 2004, the case was denied based on the petitioner's inability to demonstrate that it could pay the proffered wage for the beneficiary. The petitioner appealed to the AAO.

We will examine the petitioner's ability to pay based on the record and then consider the petitioner's additional arguments on appeal.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 case at hand, on Form ETA 750B, signed by the beneficiary, the beneficiary did not list that she was employed with the petitioner, but rather the forms indicate that the beneficiary is still residing in her home country and would consular process should the I-140 petition be approved, and a visa number available. Therefore, the petitioner cannot establish its ability to pay based on prior payments to the beneficiary.

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.

---

[2] The petition initially filed, EAC-03-252-52486, was denied on August 31, 2004. The petitioner filed an appeal, which was received late and treated by the Service Center as a motion to reopen. The Service Center denied the motion to reopen on the basis that the petitioner could not overcome the grounds of the original denial, that the petitioner could not demonstrate its ability to pay the beneficiary the proffered wage.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $18,200.00 per year from the priority date. 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. Line 21 indicates ordinary income as follows:

Tax year	Net income or (loss)
2002	-$19,365[3]
2001	not submitted
2000	$6,560

The petitioner did not submit its 2001 tax return in response to the RFE or on appeal. Based on the above net income, the petitioner cannot demonstrate the ability to pay the beneficiary in any year.

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. 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 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
2002	-$51,536
2001	not submitted
2000	-$33,442

Following this analysis, the petitioner's Federal Tax Returns show that the petitioner similarly lacks the ability to pay the beneficiary the proffered wage in any of the above years.

As additional evidence and on appeal, counsel argues that the petitioner had depreciation in the amount of $22,373, which would offset the loss of $19,165. Counsel asserts that depreciation should be accounted for based on the "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes). Counsel's reliance on the AILA minutes is misplaced. Published minutes does not a constitute binding published citation relating to the use of total assets or depreciation.[4]

---

[3] The petitioner did not submit its 2001 tax return, which based on the January 2002 priority date would not be required, but would be relevant to the petitioner's additional arguments addressed below. Further, the petitioner's 2003 federal tax return would have been available at the time that the petitioner filed the appeal, but the 2003 federal tax return was not submitted.

[4] Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Further, with respect to depreciation, 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, which even if accepted, would not demonstrate the petitioner's ability to pay the proffered wage.

Similarly, counsel asserts the petitioner's $10,000 line of credit should be considered and cites to several non-precedent cases, *Matter of [name not provided],* A28-914-502 (AAU Apr. 22, 1992), *Matter of [name not provided]*, EAC-90-55-50520 (AAU Apr. 17, 1992) for the proposition that the AAO should consider the petitioner's line of credit. First, we note that 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).

Further, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment T*erms, 45 (1998). Further, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Therefore, while counsel is correct that the line would be "considered," the line of credit would be one factor in consideration of the petitioner's total circumstances.

Next, counsel submitted bank statements for the time period January 1, 2002 through December 31, 2002. The bank statements exhibited that the petitioner has had varying amounts in its business checking account ranging from a low of $113.03 (the ending balance for December 31, 2002) to a high of $10,052.49 (the ending balance in September 30, 2002). The bank statements additionally reflect that the petitioner had a monthly ending balance of under $1,000 in five months, and under $200 in four of those five months in 2002,

and, therefore, the bank statements would not demonstrate a consistent ability to pay the proffered wage. Further, we note that bank statements generally are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "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. Further, 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 will be considered below in determining the petitioner's net current assets.

Counsel has provided a copy of a case In re: [redacted], EAC-95-192-50171 (AAU Jan. 26, 1996), in which counsel asserts that the AAO relied on the petitioner's bank statements to allow the petitioner to demonstrate its ability to pay the proffered wage. First, we note that 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). Second, the AAO decision in the case that counsel cites to, the AAO examines the petitioner's tax returns, which reflected higher gross receipts than in the case at hand, and the fact that the petitioner had $7,598 in cash assets at the end of 1994, reflected on the tax return. Those assets, in addition to $14,560 already paid to the beneficiary since the filing of the petition, allowed the AAO to conclude that the petitioner could pay the proffered wage of $22,401. The petitioner had additionally submitted payroll records and commercial banking statements, which may have been considered in the AAO's determination. The AAO's determination, however, did not rest solely on the commercial banking statements.

The petitioner additionally provided a deed demonstrating that the petitioner owned its business premises and demonstrated financial viability.[5] We note that the AAO's concern is the petitioner ability to pay the proffered wage, and while owning the petitioner's business premises would reduce the petitioner's liabilities, the petitioner has not demonstrated its ability to pay.

Further, the petitioner submitted an article published in *the Sun*, June 5, 1998, which discusses how the petitioning business's owner overcame personal physical pain, and worked to establish her catering business. While the article is entitled that the caterer "finds success in Stafford," we note that the article is from a number of years ago, and as the petitioner acknowledges, business conditions do change. The article, by itself, is not compelling evidence.

[5] It appears that counsel has provided the deed to help demonstrate the petitioning company's viability, rather than as an asset to show the petitioner's ability to pay. We note that consideration of individual assets would be appropriate in the case of a sole proprietorship. A sole proprietorship, unlike a corporation, does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Accordingly, a sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. However, the petitioner here is structured as an S corporation, and therefore, personal assets would not be considered. In the case of a corporation, CIS may not "pierce the corporate veil" and look to the assets of the owner to satisfy the petitioner's ability to pay the proffered wage. Therefore, while the petitioner's owner may have substantial individual assets, those assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner's ability to pay the proffered wage.

Counsel cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and provides a letter that the petitioner's owner wrote, which explained that her business had suffered a temporary downturn following the events of September 11, 2001, and thus resulted in a loss on the business's 2002 tax return. We note that the net income and net current assets exhibited by the 2000 tax return, while higher than the 2002 tax returns, would also not allow for payment of the proffered wage, and the 2000 tax return does not demonstrate that the business reached a high level of volume, or generated significant revenue prior to September 11. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. This argument is speculative. The AAO also notes that the petitioner did not submit its 2001 tax return to allow us to examine the petitioner's revenue against prior and subsequent years to determine what impact if any, the petitioning business faced in the year 2001.

In *Matter of Sonegawa,* the petitioner provided evidence to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner's decrease in ability to pay the required wages. The petitioner in *Sonegawa* also provided magazine articles, which helped to establish the petitioner's reputation, and potential future growth. Counsel, here, has not provided any specific evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the prevailing wage. As noted above, the petitioner has only referenced a general overall decline in the catering business climate following September 11. The petitioner in *Matter of Sonegawa* was a fashion designer whose work had been featured in significant magazines, including *Time* and *Look.* The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance. Additionally, by reviewing the petitioner's net income, as well as the petitioner's net current assets, the petitioner's financial status has been fairly considered.

Counsel also provided W-2 Forms for part-time employees paid in 2002 exhibiting a total of $19,050 in wages paid. Counsel asserts that the petitioner would replace the part-time workers no longer employed with the beneficiary, and therefore, the wages paid to the other part-time workers would demonstrate the petitioner's ability to pay the beneficiary the proffered wage. Counsel cites to *Matter of X,* EAC-02-086-53457, where the AAO upheld the petitioner's ability to pay on the theory of a replacement worker. While the petitioner has provided W-2 statements, and asserts that the beneficiary will replace workers who preformed the same duties, the petitioner has not indicated when these employees ceased employment and whether they have already been employed.

We note that the petitioner has filed applications for permanent residence for four employees, and two other applications were approved in the year 2002. The petitioner would need to be able to demonstrate its ability to pay all three workers the proffered wage, and that the petitioner has not demonstrated its ability to pay one beneficiary based on its tax return. Further, the two other sponsored employees would have been full-time positions, and have likely already served to replace the part-time workers. Therefore, we do not find the replacement worker theory compelling.

Based on the foregoing, and a review of the totality of the circumstances, the petitioner has failed to establish that it has the ability to pay the beneficiary and other sponsored workers the required wages from the priority date until the time of adjustment.

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.