U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 31 2006

EAC-04-169-53326

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750), 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 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).

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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.

The instant petition is for a substituted beneficiary.[2] Here, the original Form ETA 750 was accepted on January 15, 1998. The proffered wage as stated on the Form ETA 750 is $18.89 per hour ($39,291.20 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. The I-140 petition was submitted on May 1, 2004. On the petition, the petitioner claimed to have a gross annual income of $817,465, and to have a net annual income of $15,154. The petitioner did not provide information on the date of the petitioner's establishment and the number of current employees on the form. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for 1998 through 2002 pertinent to the ability to pay the proffered wage. On January 14, 2005 the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the beneficiary will replace terminated employees and that the submitted evidence on appeal establishes the petitioner's ability to pay the proffered from the priority date to the present.

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, counsel submits the beneficiary's W-2 form for 2004 on appeal. The beneficiary's W-2 form shows that the petitioner paid the beneficiary $13,644 in 2004, which was $25,647.20 less than the proffered wage. The record does not contain any evidence of the beneficiary's compensation from the petitioner for years 1998 through 2003. Therefore, the petitioner is obligated to demonstrate that it could pay the beneficiary the proffered wage in 1998 through 2003 and the difference of $25,647.20 between wages actually paid to the beneficiary and the proffered wage in 2004.

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 the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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

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[2] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memorandum from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 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. 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 copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1998 through 2003. The tax returns show that the petitioner is structured as an S corporation and the petitioner's fiscal year is based on a calendar year. The tax returns for 1998 through 2003 demonstrate the following financial information pertinent to the petitioner's ability to pay the proffered wage from the priority date of January 15, 1998 to 2003:

In 1998, the Form 1120S stated net income[3] of $535.
In 1999, the Form 1120S stated net income of $7,687.
In 2000, the Form 1120S stated net income of $485.
In 2001, the Form 1120S stated net income of $15,154.
In 2002, the Form 1120S stated net income of $8,898.
In 2003, the Form 1120S stated net income of $2,941.

Therefore, for the years 1998 through 2003, the petitioner did not have sufficient net income to pay the proffered wage of $39,291.20.

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

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[3] Ordinary income (loss) from trade or business activities reported 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.

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.

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.

Tax year	Current Assets	Current Liabilities	Net Current Assets
1998	$46,235	$1,650	$44,585
1999	$18,820	$0	$18,820
2000	$21,864	$35,215	$(13,351)
2001	$33,579	$77,285	$(43,706)
2002	$26,803	$60,444	$(33,641)
2003	$15,318	$44,454	$(29,136)

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage from the priority date to 2003 except for 1998.

Therefore, from 1999 to 2003, 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 on appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel submits a letter from [redacted] the president of the petitioning company, asserting that the beneficiary will replace terminated employees in the position as a cook. The letter states that the beneficiary will replace [redacted] and [redacted] Pursuant to the letter, the following wages paid to the employees will be used to pay the beneficiary the proffered wage:

1998	[redacted]	$74,200
1999		$72,800
2000		$72,800
2001		$28,200
2002		$3,100
		$3,150
		$13,520
		$1,500
2003		$1,575
		$6,240

The letter also states that [redacted] ceased employment on May 12, 2001, [redacted] on April 26, 2002, [redacted] on March 7, 2003, [redacted] on July 26, 2002 and [redacted] on April 19, 2002. The petitioner submits relevant W-2 forms to document wages paid to those employees. However, there are inconsistencies between [redacted] assertions and supporting documents. For example, there is evidence of wages paid to [redacted] in 2003 but [redacted] s letter does not explain how [redacted] continued to receive compensation from the petitioner in 2003 while he ceased his employment on July 26, 2002. Nor does

the letter indicate how many cooks work for the restaurant at the same time and how the beneficiary could replace four previous workers. Moreover, there is no evidence that the positions of these workers involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, and duties of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

In addition, the AAO notes that even if the beneficiary replaced the four employees in 2002 and two employees in 2003, the petitioner could not have established its ability to pay the proffered wage in those two years. In 2002, wages used to pay the proffered wage from replacing four previous employees amounts to $21,270 which is still $18,021.20 less than the proffered wage. As previously noted the petitioner had net income of $8,898 and net current assets of $(33,641) for that years, and neither the net income nor net current assets was sufficient to cover the difference between wages paid and the proffered wage in 2002. With replacement of two employees in 2003, the petitioner would have $7,815 available to pay the beneficiary the proffered wage, which is still $31,476.20 less than the proffered wage in that year. However, the petitioner's net income of $2,941 or net current assets of $(29,136) could not have been sufficient to pay the difference.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.