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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 27 2007

SRC 06 172 53567

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, Texas Service Center, denied the preference visa petition. The matter is presently 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 specialty chef. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent 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 2005 priority date of the visa petition. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 25, 2006 denial, the primary 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.[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 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent 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).

---

[1] The AAO notes that although the director denied the instant petition based on the petitioner's inability to pay the proffered wage, he erroneously stated in his decision that the petitioner had the ability to pay the proffered wages in the 2005 priority year. The AAO regards this statement as a typographical error.

Here, the Form ETA 9089 was accepted on September 8, 2005. The proffered wage as stated on the Form ETA 9089 is $13 an hour, or $27,040 per year. The Form ETA 9089 states that the position requires two years of experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[2] Relevant evidence submitted on appeal includes counsel's brief, and a copy of the petitioner's amended IRS Form 1120S U.S. Income tax Return for an S Corporation for tax year 2005 that contains a Schedule L Balance Sheet. The record also contains the petitioner's initial Form 1120S, for tax year 2005 submitted without Schedule L; and the petitioner's IRS Form 1120S for tax year 2004, submitted with a Schedule L.[3] In response to the director's request for further evidence dated June 15, 2006, the petitioner submitted copies of the petitioner's business checking bank account with Wachovia Bank for the following months: July 2004; April, May, July, and November 2005; and February, March, April, and May of 2006. The record also contains a letter from [redacted] Financial Center Manager, Wachovia Bank, Baltimore, Maryland dated May 9, 2006. In her letter, Ms. [redacted] states that the petitioner's business checking account was opened in March 2005, and that as of May 9, 2006, the account balance was $32,180.45. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the petitioner's total receipts for tax year 2005 were less than $250,000 and total assets were less than $250,000, and that the petitioner answered question 9, Schedule B of the same tax return affirmatively, and thus, the petitioner did not need to complete a Schedule L. Counsel then resubmits the petitioner's amended tax return for tax year 2005 that contains a Schedule L Balance Sheet.[4] Counsel also notes that the petitioner's 2005 tax return includes depreciation deductions of $5,037. Counsel states that depreciation is a non-cash item and can be added back to net income to arrive at cash basis income. Counsel then states that the petitioner's cash basis income, after adding back the petitioner's depreciation deduction, is $30,553, which is sufficient to pay the proffered wage of $27,040.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 29, 2003, to have a gross annual income of $329,000, a net annual income of $37,000, and to currently have seven employees. On the Form ETA 9089, signed by the beneficiary on May 2, 2006, the beneficiary did not claim to have worked for the petitioner.

---

[2] 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).

[3] The AAO notes that the top part of the 2004 Schedule L submitted with the petitioner's IRS Form 1120S for tax year 2004 is illegible. The petitioner's net income for tax year 2004 is -$7,934.

[4] The AAO also notes that on appeal counsel states that the director's decision refers to the petitioner's 2004 tax return; however, counsel is mistaken. The director only examined the petitioner's 2005 tax return in her decision.

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, Citizenship and Immigration Services (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).

The AAO notes that the petitioner on appeal submits an amended tax return that the petitioner ostensibly has submitted to the IRS.[5] A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Thus, the AAO gives no weight to the amended 2005 tax return, and will only examine the version of the petitioner's 2005 tax return that was initially submitted to the record.

On appeal, counsel also states that the petitioner's depreciation expenses should be added back to the petitioner's net income in determining the petitioner's ability to pay the proffered wage. However, the AAO does not consider depreciation expenses when it examines the petitioner's net income, as will be discussed further in these proceedings. Thus, counsel's assertion with regard to depreciation expenses is not viewed as persuasive.

The AAO also notes that the director in her request for further evidence asked the petitioner to submit additional evidence to demonstrate its ability to pay the proffered wage, such as copies of the petitioner's bank statements for the last six months. In response, former counsel submitted the petitioner's business checking account statements for the months February to May 2006, and for other months in tax years 2004 and 2005. However, the director's and former 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, even if former counsel had submitted the requested six months of bank statements prior to June 2006, the date of the director's request, such documents would not have established the petitioner's ability to pay the proffered wage as of the September 2005 priority date.

---

[5] The amended tax return shows no evidence of submission to the IRS or its receipt or acceptance by the IRS. CIS requires IRS-certified copies of the amended return to establish that the amended return was actually processed by the IRS. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2005 or subsequently. Thus the petitioner has to establish its ability to pay the entire proffered wage as of the 2005 priority date.

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, contrary to counsel's assertion, 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 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 Chang* at 537.

The petitioner submitted its tax returns for tax years 2004 and 2005. Since 2004 is prior to the 2005 priority date, the petitioner's 2004 tax return is not dispositive in these proceedings. Thus, the AAO will only examine the petitioner's 2005 tax return. The petitioner's tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of $27,040 per year from the priority date:

- In 2005, the Form 1120S stated a net income[6] of $25,516.

[6]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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income,

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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.[7] 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 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. As stated previously, the petitioner did not submit a Schedule L, with the initial IRS Form 1120S submitted to the record. Therefore, the AAO cannot determine whether the petitioner's net current assets were sufficient to pay the proffered wage of $27,040.[8]

Therefore, from the date the Form 9089 was filed with CIS, 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'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 the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO notes that the record raises questions as whether the proffered position is a bona fide position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043

---

credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income/loss or deductions shown on its Schedule K for tax year 2005, the petitioner's net income is found on line 21, of the petitioner's IRS Form 1120S.

[7] 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.

[8] Even if the AAO accepted the petitioner's amended tax return for tax year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage in 2005.

(E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

In the instant matter, both the petitioner's owner and the beneficiary have the same surname. In addition, the address noted on the I-140 petition[9] as the beneficiary's residence, namely, [redacted], is the same address used by the petitioner's majority shareholder on Schedule K-1 of the petitioner's IRS Form 1120S for tax year 2005. Both the beneficiary and the petitioner's majority shareholder also appear to have listed a second address, [redacted] Maryland as their residence.[10] Thus, the record raises questions as to the actual relationship between the beneficiary and the petitioner. Thus the petitioner has not established that the proffered position is a bona fide job.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

[9] Filed in May 2006.

[10] The petitioner's owner noted this address as his residence on Schedule K-1 of the petitioner's IRS Form 1120S for tax year 2004, while the beneficiary noted this address as his residence on the ETA Form 9089.