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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

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 14 2007

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

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 2001 priority date of the visa petition and through tax year 2004. 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 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.

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $2,050 a month, ($24,600 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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]. On appeal, counsel submits a memorandum in support of the appeal. The record contains the petitioner's Forms 1120, U. S. Corporation Income Tax Return, for tax years 2001, 2002, 2003, and 2004, as well as the beneficiary's W-2 Forms for tax years 2003 and 2004 that documented the petitioner paid the beneficiary $2,839.98 in 2003 and $1,510.76 in tax year 2004.[2] Counsel in response to the director's request for further evidence as to the petitioner's ability to pay the proffered wage submitted a letter from [redacted] President, [redacted] Financial Inc., Seattle, Washington. In his letter, Mr. [redacted] stated that his business had provided accounting and consulting services for the petitioner since 1995, and that the company was very familiar with the petitioner's day-to-day operations and financial standings. Mr. [redacted] continues that the petitioner is in no way near bankruptcy as it continues to perform well financially, and that the petitioner is anticipated to continue to fulfill its financial obligations to the employees, the owner and the community at large. The record also contains the beneficiary's Form 1040 for tax years 2002, 2003, and 2004, with various W-2 forms for both the beneficiary and his wife. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in January 1996, to have a gross annual income of $707,697, and to currently employ 15 workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner submitted materials in response to the director's request for further evidence that the director did not consider in his decision. Counsel notes that the director did not consider the letter from Mr. [redacted] the petitioner's provider of accounting and business services, when considering the petitioner's ability to pay the proffered wage. Counsel also notes that the director did not consider the petitioner's depreciation write-offs on the petitioner's tax returns. Counsel states that these depreciation write-offs and other paper deductions not representing an actual expense, should be added to the taxable income figure to obtain a true picture of the petitioner's financial health.

Counsel notes that in tax year 2001, the combination of the petitioner's net income of $589 and depreciation expenses of $9,167 would result in a net profit of over $10,000. Counsel states that the salary of the cook who was actually working at the petitioner's when added to the $10,000 would result in a total of available funds in excess of the $24,600 proffered wage. Counsel then notes that in 2002 the petitioner had a net income of

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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).

[2] Since the social security numbers vary between the W-2 Forms and the beneficiary's Forms 1040 contained in the record, the record is not clear that the person identified as [redacted], or [redacted], on the W-2 Forms, and [redacted] on the Forms 1040 are one and the same person. Thus the record is confused. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, the two W-2 forms issued by the petitioner to [redacted] and [redacted] Jr. are given no weight in these proceedings. The record also reflects that apparently the beneficiary's wife also worked for the petitioner earning substantially higher wages during tax years 2002, 2003, and 2004.

$299 and depreciation expenses of $27,814, which is greater than the proffered wage of $24,600. Counsel adds that this figure is without considering or deducting the wages of the existing cook.

Counsel notes that in tax year 2003, the beneficiary worked for the petitioner for part of the year. Counsel also notes that the petitioner's depreciation expense in 2003 was $49,491, which is greater than the proffered wage.

Finally counsel notes that in tax year 2004, the depreciation deduction was $28,922, which is higher than the proffered wage of $24,600. Counsel notes that the petitioner paid the beneficiary $11,498.96,[3] and that the combination of the beneficiary's wages and the petitioner's depreciation was over $40,000.

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).

Although counsel asserts that the director did not consider the letter from Mr. [redacted] in his decision that the petitioner did not have the ability to pay the proffered wage, it is noted that 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.

Thus, Mr. [redacted] letter of support is not one of the three types of evidence outlined in 8 C.F.R. § 204.5(g)(2). The petitioner presented no further explanation why Mr. [redacted]s letter would be more probative of the petitioner's ability to pay the proffered than the petitioner's federal income tax returns, or other regulatorily-prescribed forms of evidence, which are considered probative of the petitioner's ability to pay the proffered wage.

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, the petitioner has submitted evidence that it

[3] The record reflects that these wages appear to have been paid to the beneficiary's wife, identified as [redacted], in tax year 2004.

employed and paid the beneficiary, only in the years 2003 and 2004. The wages paid to the beneficiary in these two years, namely, $2,839.98, and $1,510.76, as documented by the W-2 forms in the record,[4] do not establish that the petitioner paid the beneficiary a wage equal to or greater than the $24,600 proffered wage. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2002, and the difference between the beneficiary's actual wages and the proffered wage in 2003 and 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, contrary to counsel's assertion with regard to depreciation expenses, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 that 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $24,600 per year from the priority date:

> In 2001, the Form 1120 stated a net income[5] of $1,044.

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[4] While, as noted previously, the record is confused as to whether the W-2 forms submitted to the record are for the beneficiary, the AAO will examine these two W-2 forms for illustrative purposes.

[5] The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120. Both the director and counsel incorrectly refer to the petitioner's taxable incomes identified on line 30 in the petitioner's tax returns.

- In 2002, the Form 1120 stated a net income of -$299.
- In 2003, the Form 1120 stated a net income of $3,173.
- In 2004, the Form 1120 stated a net income of -$3,758.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the proffered wage of $24,600.

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.[6] 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.

- The petitioner's net current assets during 2001 were -$33,610.
- The petitioner's net current assets during 2002 were -$33,732.
- The petitioner's net current assets during 2003 were -$12,775.
- The petitioner's net current assets during 2004 were -$8,269.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. As stated previously, the AAO does not consider deprecation expenses when calculating the petitioner's net income. Counsel further states that the director failed to take into account that the petitioner was already paying another cook and that these wages would be available for the beneficiary. The record does not, however, name this worker, state his or her wages, verify any full-time employment, or provide evidence that the petitioner has replaced or will replace them with

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[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.

the beneficiary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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.

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.