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: VERMONT SERVICE CENTER Date: JUN 01 2007

EAC-05-130-53157

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

The petitioner is an interior contracting company. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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.

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 October 6, 2005 denial, the only 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 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is $14.40 per hour ($29,952 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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]. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2004 and 1099 forms issued to subcontractors in 2002, 2003 and 2004. 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 an S corporation. On the petition, the petitioner claimed to have been established in 1995, however, the petitioner did not provide information about its gross annual income, net annual income and current number of employees on the form. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed on April 25, 2001, the beneficiary claimed to have worked for the petitioner since June 1998.

On appeal, the petitioner asserts that the director erred in not adding depreciation to its net income and not considering compensation paid to subcontractors as additional sources 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, 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).

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, although the petitioner and the beneficiary claimed that the beneficiary worked for the petitioner since June 1998, the petitioner did not submit the beneficiary's W-2 forms, 1099 forms or any other evidence such as paystubs or cancelled checks to show that the petitioner paid the beneficiary any amount of compensation during the relevant years from 2001 to 2004. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 onwards.

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*

[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) and 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).

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). Counsel's reliance on the petitioner's gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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. On appeal counsel submits a printout from Internal Revenue Service's (IRS) website regarding depreciation and argues that the depreciation expenses should be added back to net income in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further clearly 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 Form 1120S U.S. Income Tax Return for an S Corporation filed by the petitioner for 2004. The petitioner's tax return for 2004 demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage:

- In 2004, the Form 1120S stated a net income[2] of $11,814.

Therefore, for the year 2004, 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

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[2] 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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."
Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

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.[3] 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 2004 were $22,534.

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

The petitioner also submitted copies of Form 1120S U.S. Income Tax Return for an S Corporation filed by [redacted]. for 2001 through 2003 to establish the petitioner's ability to pay the proffered wage in these years. In a letter dated February 18, 2005 the petitioner claimed that the company was known as [redacted] from 1995 to 2003 and the company's name was changed to [redacted] in June 2003. However, 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)). A simple search of both business names reflects that [redacted]. is active and initially filed with the NYS Department of State's Division of Corporations on June 30, 2003, but that [redacted] is inactive.[4] Addition ally both companies have different federal employer identification number. This seems to indicate that more than mere name change occurred and there is an issue of successor-ship. The record contains no evidence that the petitioner qualifies as a successor-in-interest to [redacted] or that [redacted] is the predecessor company of the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Therefore, without objective evidence to establish the relationship between the petitioner and [redacted]. the AAO cannot consider the tax returns or other financial documentation of [redacted]c. in determining the petitioner's ability to pay the proffered wage.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. The AAO finds that the petitioner would have failed to

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[3] 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.

[4] *See* http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_ INFOR-MATION? (accessed on May 22, 2007).

demonstrate its ability to pay the proffered wage in the years 2001 through 2003 even if the petitioner had proved its successor-in-interest status to [redacted]. The tax returns filed by [redacted] for 2001 through 2003 demonstrate the following financial information concerning the ability to pay the proffered wage:

- In 2001, the Form 1120S stated a net income of $15,007 and net current assets of $(73).
- In 2002, the Form 1120S stated a net income of $19,346 and net current assets of $16,083.
- In 2003, the Form 1120S stated a net income of $22,692 and net current assets of $17,490.

Therefore, for the years 2001 through 2003, [redacted] did not have sufficient net income or 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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2004 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel advised that the beneficiary would replace subcontractors and the payments to subcontractors can be considered as an additional source of funds to pay the beneficiary the proffered wage. The submitted 1099 forms show that [redacted] paid [redacted] $77,000 in 2002 and $84,000 in 2003, and that the petitioner paid [redacted] $100,200 in 2004 as nonemployee compensation. In a letter dated October 12, 2005, the petitioner states that: "[redacted] was a subcontractor that we needed for cabinet making work. He did work for the petitioner in 2002 and 2003 but is no longer with us. ... [redacted] who did cabinet making work in 2004 but is no longer with us." The record indicates that the beneficiary has been working as a full-time cabinetmaker for [redacted] since June 1998. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that worker may be shown to be available to prove the ability to pay the wage proffered to the beneficiary. Counsel did not, however, explain how the beneficiary could replace another full-time cabinetmaker since the petitioner and/or [redacted] has been employing both the beneficiary and the subcontractors at the same time. In addition, W-2 forms and 1099 forms issued by another company, i.e. [redacted], do not establish the petitioner's ability to pay the proffered wage. Therefore, the petitioner's request for replacement would be given less weight in the proceeding. Counsel's replacement argument cannot establish the petitioner's ability to pay the proffered wage beginning on the proffered wage in the instant case.

In addition, CIS records show that the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140)[5] using the same priority date, reflected on a Form ETA 750. That petition was approved on April 26, 2005 and the beneficiary of that petition was adjusted status to permanent residence on September 13, 2006. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay all the wages from the priority date of April 27, 2001 to September 13, 2006.

[5] CIS receipt number: EAC-05-134-51654.

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 all the proffered wages to each of the beneficiaries 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 wages to the multiple beneficiaries beginning on the priority dates.

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.