U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 29 2007

LIN-04-121-50008

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, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a donut and ice cream shop and seeks to employ the beneficiary permanently in the United States as a manager, retail store ("Manager"). 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 April 27, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of 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 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 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.

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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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 for the position of manager is $20.41 per hour based on a 40 hour work week, which is equivalent to $42,452.80 per year. The labor certification was approved on January 7, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on March 16, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: November 30, 1987; gross annual income: not listed; net annual income: $2,600,000; and current number of employees: 38.

On January 27, 2005, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically: federal tax returns for the years 2002, 2003, and 2004. Counsel responded to the RFE on the petitioner's behalf and submitted only the beneficiary's 2004 tax return, and not the petitioner's federal tax return. On April 27, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not list that she has been employed with the petitioner. Further, the petitioner did not assert that it employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay through prior wage payment.

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.

The petitioner was initially organized as a C corporation.[2] For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form

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[2] The petitioner's federal tax returns list: [redacted] with a federal tax identification number (FEIN) of: [redacted], and an address of: [redacted]. Both the Form ETA 750 and Form I-140 list the petitioner as: "[redacted]" and list the same FEIN and address. Although the petitioner did not submit any business licenses, which verify the d/b/a status, the petitioner did submit bank statements, which reference the d/b/a business names. Further, the tax returns identify that the corporation is in the business of retail, specifically donuts, so that we will accept the tax returns from RMN Corporation to represent the petitioner's income.

1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 of the tax returns demonstrates the following concerning the petitioner's ability to pay the proffered wage of $42,452.80 per year:

Tax year	Net income or (loss)	Dates encompassed in tax return filing
2001[3]	$47,240	December 1, 2001 to November 30, 2002

The petitioner then reorganized as an S corporation on December 1, 2002. 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 1120 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 lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists income from other sources, so that we will take the income from Schedule K:

Tax year	Net income or (loss)	Dates encompassed in tax return filing
2004[4]	$69,795	based on calendar year 2004
2003	$74,818	based on calendar year 2003
2002[5]	$16,668	December 1, 2002 through December 31, 2002

The petitioner's net income would allow for payment of the proffered wage in the calendar years 2002, 2003, and 2004 for one beneficiary. However, the petitioner would be not be able to show its ability to pay in 2001, the year of the priority date based on the dates of the petitioner's 2001 tax year. The petitioner would need to submit its 2000 federal tax return for examination. Further, we note that as raised by the director in the petition's denial, the petitioner has filed for three additional beneficiaries, and would need to be able to demonstrate its ability to pay all petitioned for workers. The petitioner would not be able to demonstrate its ability to pay salaries for four beneficiaries based on the net income above.

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[3] The petitioner filed its federal tax return in 2001 based on a tax year, which runs from December 1, 2001 to November 30, 2002. As the petitioner files based on a tax year, rather than a calendar year, and since the priority date is April 27, 2001, the petitioner should have additionally submitted its 2000 federal tax return to reflect its financial status as of the date of filing the Form ETA 750.

[4] The petitioner submitted its 2003 and 2004 tax returns on appeal. As the petitioner submitted the beneficiary's individual tax return in response to the RFE instead of the petitioner's, the petitioner appears to have misunderstood the RFE, and the submissions on appeal will not be precluded by the application of *Soriano*. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Although we note that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

[5] The petitioner filed its 2002 tax return for the time period December 1, 2002 through December 31, 2002, with an extension granted for filing through September 15, 2003. The petitioner does not explain the reason for filing for such a short time period, but it would appear that the petitioner's filing schedule might have changed as a result of the change in its corporate structure. The petitioner's 2003 and 2004 federal tax returns appear to follow a calendar year filing schedule, as the returns do not designate a specific tax 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.[6] 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
2004	-$41,799
2003	-$78,054
2002	-$34,239
2001	-$45,480

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would lack the ability to pay the proffered wage in any year under the net current asset test. The petitioner's tax returns reflect negative net current assets for all tax returns submitted.

The petitioner additionally submitted bank statements for the company. First we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "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. Additionally, the petitioner's cash assets would be reflected on Schedule L of the petitioner's federal tax returns as an asset, and, therefore, considered under net current assets above.

The petitioner submitted bank statements for the time period September 2003 to February 2004. The petitioner owns five separate franchise stores under the same corporate name and the statements appear to reflect balances for each of the five branches. The lowest monthly statement for one branch would reflect $4,810 in November 2003 and the highest statement for one branch of $19,582 in December 2003. While the statements demonstrate that the petitioner had cash assets in the later part of 2003 and early 2004, the statements do not allow us to conclude that the petitioner can pay the proffered wage in the year of the priority date, 2001. Further, the cash assets alone would not be sufficient to demonstrate that the petitioner could pay the wages for four sponsored beneficiaries.

On appeal, counsel contends that the petitioner had the ability to pay the proffered wage. That in the year 2001, the petitioner would only need to show its ability to pay $28,754, equivalent to 35 of 52 weeks of the year based on an April 27, 2001 priority date. CIS will only prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs,

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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 petitioner has not submitted such evidence. Here, the record does not contain such evidence. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage.

Further, counsel contends that the petitioner had net income of $47,240, as well as cash assets available to pay the proffered wage in the amount of $4,233 for total funds of $51,473, more than sufficient to pay the proffered wage. Additionally, counsel contends that the petitioner's 2001 tax return indicates depreciation in the amount of $101,273, which should be considered as funds available to pay the proffered wage.

First, regarding the petitioner's cash assets of $4,233, those assets would have been reflected on Schedule L of the petitioner's 2001 federal tax return and considered within the petitioner's net current assets. Second, as noted in the director's denial, the petitioner has filed three additional Immigrant Petition for Alien Worker (Form I-140). Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. While the petitioner would be able to demonstrate funds available, based on the petitioner's 2001 federal tax return and net income, to pay one worker, the petitioner cannot demonstrate its ability to pay four workers. Further, we note that the petitioner's federal tax return reflects income from mostly 2002. Since the petitioner previously filed on a tax year basis, the petitioner should have submitted its 2000 federal tax return to properly reflect its income from 2001.

With respect to counsel's argument regarding 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.

Counsel then looks at the petitioner's tax returns for 2002, and notes that the petitioner had retained earnings in the amount of $205,644 for the year, which would be sufficient to pay the proffered wage. Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Without the retained earnings, the petitioner's 2002 tax return would leave only $16,668 in funds available to pay the four sponsored employees in 2002, an amount deficient to pay even one sponsored worker.[7] Counsel notes that the petitioner's 2003 and 2004 net incomes of $74,818 and $69,795 respectively would be sufficient to pay the proffered wage in both years. While this would be sufficient to demonstrate payment of the beneficiary, the amounts would be deficient to exhibit payment of four beneficiaries.

Counsel cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and claims that the petitioner has a reasonable expectation of profits, and further that employment of the beneficiary, and the additional beneficiaries that the petitioner filed for shows that the petitioner's business is successful and expects to grow.

In *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), 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 evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the proffered wage. 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. While we note several positive factors, length of time in business, high gross receipts, and wages paid, the petitioner's business also reflects negative factors, including negative net current assets, and low net income. Most importantly, however, the petitioner has failed to provide documentation for the year of the priority date to allow us to conclude that the petitioner may pay the proffered wage in this year.

Further, we note that in any future proceedings, the petitioner should obtain an expanded letter to properly document the beneficiary's prior work experience as the present letter is deficient to demonstrate that the

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[7] If we instead examined the petitioner's 2001 federal tax return encompassing most of the year 2002, the return would demonstrate the ability to pay for one worker.

beneficiary meets the requirements of the certified ETA 750. 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*, 229 F. Supp. 2d 1025, 1043 (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).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner initially submitted the following letter:

1. Letter from [redacted] Owner, Madison Submarine, dated March 11, 2004;
   Dates of employment: November 1998 through November 2000;
   Title: Shift Manager (full time);
   Job Duties: "responsible for overall management of sandwich shop and store personnel. Supervised preparation of all food being prepared. Directed store advertising and monitored business records."

The letter provided does not give the address of Madison Submarine. Further, we note that the Form ETA 750B, while it lists that the beneficiary worked at Madison Submarine, the form does not list the company's address, but only generally lists "Chicago, Il." The letter as provided is deficient, and, therefore, fails to establish that the beneficiary meets the experience requirements of the certified ETA 750.

Accordingly, 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.