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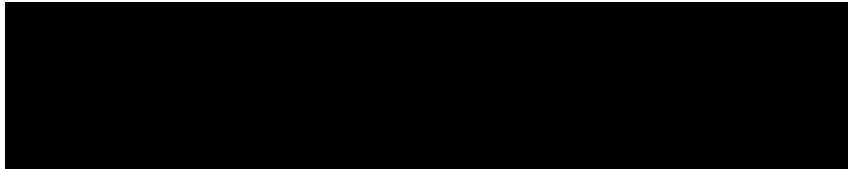
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
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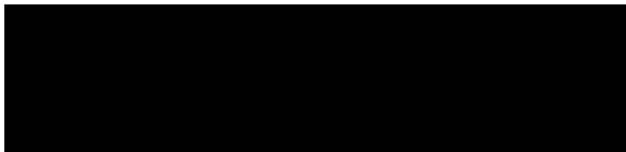
Office: TEXAS SERVICE CENTER

Date: MAY 29 2007

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:



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.

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The acting 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 convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a evening store manager. 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 while the petitioner had established its ability to pay the proffered wage as of tax years 2002 and 2003,¹ 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. 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 14, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date.

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).

¹ Although the director did not explicitly state in his decision how the petitioner established its ability to pay the proffered wage in tax years 2002 and 2003, the petitioner's net current assets of \$37,150 in tax year 2002 and the petitioner's ordinary income from trade or business activities of \$46,638 in tax year 2003 were sufficient to establish the petitioner's ability to pay the proffered wage during those two years.

Here, the Form ETA 750 was accepted on March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$2,800 per month or \$33,600 per year. The Form ETA 750 states that the position requires two years of 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.² On appeal, counsel submits the petitioner's amended tax return for tax year 2001. Counsel also submits a letter dated November 8, 2005, from [REDACTED], Personalized Business Service, Houston, Texas. In his letter, Mr. [REDACTED] states that in the petitioner's original tax return, the interest expense was overstated by \$4,741 and that items on the petitioner's Schedule L such as cash on hand, notes payable in less than one year, loans from shareholders and notes payable in more than one year were incorrect. [REDACTED] also notes that if the petitioner had used another method of depreciation election, the petitioner's depreciation expense in tax year 2001 would have been \$44,584 and the tax return as a result would have shown a profit of \$11,112.

Other relevant evidence in the record includes the petitioner's original Form 1120 for tax year 2001, the petitioner's Forms 1120S for tax years 2002 and 2003, an IRS Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for tax year 2004, and an unaudited two page document entitled "Income Statement" and "Assets, Liabilities, and Shareholders' Equity." The record also contains an earlier letter from [REDACTED] dated August 4, 2004. In this letter, [REDACTED] calculated the petitioner's net income by combining the petitioner's ordinary income, its salaries to a partner and depreciation expenses for tax years 2001, 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 a C corporation in tax year 2001 and as an S corporation in tax years 2002 and 2003. On the petition, the petitioner claimed to have been established on June 14, 1996, to have a gross annual income of \$1.15 million, to have a net annual income of \$100,000, and to currently employ three workers. 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 by the beneficiary on March 21, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) established that the petitioner had the ability to pay the proffered wage in tax years 2002 and 2003, and that the only issue remaining was whether the petitioner had the ability to pay the proffered wage in the 2001 priority year. Counsel notes that the petitioner's amended tax return for tax year 2001 indicates current assets of \$101,148, in contrast to \$68,537 in the original tax return, and current liabilities of \$43,538 in contrast to the \$107,760 in the original tax returns. Counsel states that the petitioner's net assets are now \$57,610 in contrast to the -\$39,223 of the original tax return. Counsel states that based on these current assets, the petitioner has established its ability to pay the proffered wage in 2001. Counsel further notes that the petitioner's officer receives a salary that he will not receive once the beneficiary works for the petitioner, and that these salaries would also be available to pay the proffered wage. Counsel finally notes that, based on an excerpt from the *American Immigration Lawyers Association (AILA) Handbook*, depreciation expenses can be added back to net income in evaluating a petitioner's ability to pay the proffered wage.

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).

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.³ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The AAO views the petitioner's change of items on the petitioner's Schedule L and the subsequent amended tax return as questionable, specifically with regard to the significant increases in the petitioner's net current assets based on the increased cash on hand and restatement of other assets. 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). These factors raise questions as to the veracity of the petitioner's amended tax return. Thus, the AAO gives no weight to the amended 2001 tax return, and CIS will examine the version of the petitioner's 2001 tax return that was initially submitted to the record. Thus, the petitioner has not submitted sufficient documentation to establish that it has sufficient net income or net current assets to pay the proffered wage.

It is further noted that the petitioner's accountant's assertion that the officer's salary, the net income and depreciation expenses can be utilized to establish the petitioner's total actual net profit is not persuasive. The AAO will address the use of depreciation expenses in the examination of a petitioner's ability to pay the proffered wage more fully further in these proceedings. With regard to the officer's salary being available to establish the petitioner's ability to pay the proffered wage in tax year 2001, the AAO notes that the original 2001 tax return indicates compensation to officers of \$5,500, a sum that would be insufficient to pay the proffered wage of \$33,600 in the 2001 priority year.

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 2001 priority date or subsequently.

³ 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)).

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 and the petitioner's accountant's assertions, 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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$33,600 per year from the priority date:

- In 2001 the Form 1120 stated net income⁴ of -\$19,624.

Therefore, for the year 2001, 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, including real property. 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.

⁴The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 -\$39,223.

For the year 2001, 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, except for years 2002 and 2003.

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, namely through the use of depreciation expenses and through the use of compensation paid to one of the petitioner's officers. As stated previously, the AAO does not consider depreciation expenses when examining the petitioner's ability to pay the proffered wage through its net income or net current assets. Furthermore, as stated previously, the officer compensation of \$5,500 noted in the petitioner's 2001 tax return is not sufficient to pay the \$33,600 proffered wage. 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.

⁵ 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.