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U.S. Citizenship  
and Immigration  
Services

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OCT 16 2007

FILE:

Office: VERMONT SERVICE CENTER

Date:

[REDACTED]  
LRC 09 210 92274

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a front desk manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original March 27, 2006 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) 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$17.18 per hour or \$35,734.40 annually.

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 pertinent

evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes a letter, dated April 20, 2006, [REDACTED] a letter, dated April 20, 2006, from Mercantile County Bank, a letter, dated April 20, 2006, from Widener University, and a letter, dated April 20, 2006, from [REDACTED] Accountant, of Accurate Accounting Services, Inc. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1065, U.S. Returns of Partnership Income, and copies of the 2001 through 2003 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1065 reflect ordinary incomes or net incomes [REDACTED] (from Schedule K), \$ [REDACTED] (from Schedule K), and -\$ [REDACTED] (from Schedule K). The petitioner's 2001 through 2003 Forms 1065 also reflect net current assets of -\$87,608, \$62,126, and -\$52,506, respectively.

The 2001 through 2003 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$20,925, \$21,450, and \$18,511.60, respectively.

The letter, dated April 20, 2006, from [REDACTED]

[The beneficiary] has been working and staying at the Knights Inn since January 19, 2000 as a Front Desk Manager. He gets to stay in the fully furnished and all bills paid manager's quarter at no cost. This type of apartment's market rent value comes to about twelve to fifteen thousand dollars per year.

The officer of USCIS Vermont Service Center has raised concern about "The ability of the company – Darpan, LLC, to pay the proffered wage of \$35,374.00 to [the beneficiary] as of April 25, 2001, the date of filing and continuing to the present date." In support of this concern or issue, we submit the certificates from our Banker, Mercantile County Bank, and from our payroll company, Accurate Accounting Service, Inc. We also want to submit the last five years of Financial Data Comparison prepared by our company's accountant, [REDACTED]. The company started the renovation process in the year 2001, which is reflected by substantial repairs and contract labor. The company still had substantially healthy cash flow in the year 2001 as the depreciation expenses normally kept in the reserve and did not require immediate cash outflow for that particular year 2001.

Based on these facts and the company's strong and healthy financial condition, we respectfully submit that the Petitioner, Darpan, LLC had and continues to have the ability to pay the proffered wage at the date of filing – April 25, 2001 of the labor condition application for the beneficiary.

The letter, dated April 20, 2006, from Mercantile County Bank states:

Darpan, LLC has been an account holder with Mercantile County Bank since January 2000 and has maintained excellent accounts.

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<sup>1</sup> 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).



Darpan, LLC was organized in Elkton, Maryland, January 2000. They established all their account[s] with Mercantile County Bank.

The following information is a list of accounts that Darpan, LLC has with Mercantile County Bank.

Deposit Accounts

Checking Account # [redacted] Average balance [redacted]  
Checking Account # [redacted] Average balance [redacted]  
Money Market Saving #350109156 Average balance \$12,000.00  
Certificate of Deposit Average balance \$293,838.78

Loan Accounts

Mortgage: Opened 1/12/00 \$ [redacted]  
240 months @ \$ [redacted]  
Current balance \$ [redacted]  
Paid as agreed. [redacted]

Real Estate/Construction Loan

Opened [redacted]  
60 mths @ [redacted]  
Current balance [redacted]  
Paid as agreed.

The letter, dated April 20, 2006, from Widener University states:

The following table provides financial position of Darpan, Inc. for the last five years. It is in excellent financial health. The funds from operation are increasing and the earnings are growing. **The company has paid all of its obligations on time. The company has made tremendous progress in the last five years.**

Darpan, Inc.  
Five Years Financial Review

	2001	2002	2003	2004	2005
Revenues	[redacted]				
Wages & Salaries					
Interest Expenses					
Other 2 Operating Expenses					
Depreciation & Amortization					
Total					

Expenses					
Profit <Loss>					
Funds from 1 Operation					

- 1) Net Profit <loss> plus depreciation and amortization.
- 2) Includes repair, supplies, utilities, taxes, franchise fees and other expenses.

I am affiliated with this company from its inception. I prepare monthly financial statements and year end tax returns. In 2001, the company had a tax loss, but positive cash flow. During last three years, the company has improved its profitability and cash flows. It has turned around the company and hard work made it very profitable with the help of [the beneficiary]. The company has promoted [the beneficiary] as a Resident Manager in charge of front desk, housekeeping and maintenance. [The beneficiary] has done an excellent job and receives a superb pay package which includes a free furnished apartment with cable, phone service and internet connection. According to my estimate, this pay package is worth more than \$38,000.

The letter, dated April 20, 2006, from Accurate Accounting Services, Inc., states:

I am writing to confirm the steady employment of [the beneficiary] by Darpan, LLC (trade name: [redacted]). We have been providing payroll services to Darpan, LLC since 2000, and [the beneficiary] has been employed since that time as a front desk manager. He has and will continue to receive paychecks weekly. As of this date, Darpan, LLC and [the beneficiary] have timely filed all federal and state required reports and the corporation is in good standing.

On appeal, the petitioner states that it is a healthy, growing business which is getting stronger financially every year. It further contends that it had and continues to have the ability to pay the proffered wage of \$35,734.40 at the filing date of April 25, 2001 and continuing to the present date.

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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 12, 2001, the beneficiary claims to have been employed by the petitioner from January 2000 to the present. In addition, the petitioner has

provided the 2001 through 2003 Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, to show that it employed the beneficiary in the pertinent years, 2001 through 2003.

The petitioner is obligated to demonstrate that it had sufficient funds to pay the difference between the proffered wage of \$35,734.40 and the actual wages paid to the beneficiary of \$20,925 in 2001, \$21,450 in 2002, and \$18,511.60 in 2003. Those differences would have been \$14,809.40 in 2001, \$14,284.40 in 2002, and \$17,222.80 in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Return of Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22."

Where a LLC 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 1065 states that a LLC's total income from its various sources are to be shown not on page one of the Form 1065, but on the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1065, 2006*, at <http://www.irs.gov/instructions/i1065/ch02.html>, (accessed May 29, 2007).

In the instant case, the petitioner's 2001 through 2003 net incomes from Schedule K were -\$36,027, -\$15,500, and \$136,514, respectively. The petitioner could not have paid the difference of \$14,809.40 in 2001 or the difference of \$14,284.40 in 2002 between the proffered wage of \$35,734.40 and the actual wages paid to the beneficiary of \$20,925 in 2001 and \$21,450 in 2002 from its net incomes in 2001 and 2002. The petitioner

could have paid the difference of \$17,222.80 between the proffered wage of \$35,734.40 and the actual wages paid to the beneficiary of \$18,511.60 from its net income in 2003.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.<sup>2</sup> 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 15 through 17. If a partnership's end-of-year 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. The petitioner's net current assets in 2001 through 2003 were -\$87,609, -\$52,506, and \$62,126, respectively. The petitioner could not have paid the difference of [REDACTED] between the proffered wage of \$35,734.40 and the actual wages paid to the beneficiary of \$18,511.60 in 2001 and [REDACTED] in 2002 from its net current assets in 2001 and 2002. The petitioner could have paid the difference of \$ [REDACTED] between the proffered wage of [REDACTED] and the actual wages paid to the beneficiary of [REDACTED] from its net current assets in 2003. It is noted that the petitioner has already shown that it had sufficient funds to pay the difference of [REDACTED] between the proffered wage of \$35,734.40 and the actual wages paid to the beneficiary of \$18,511.60 from its net income in 2003.

On appeal, the petitioner contends that it is a healthy, growing business which is getting stronger financially every year. It further contends that it had and continues to have the ability to pay the proffered wage of \$35,734.40 at the filing date of April 25, 2001 and continuing to the present date. The petitioner references the letters from its bank, accountant, and payroll-company as proof of its ability to pay the proffered wage.

The letter from the petitioner's bank, Mercantile County Bank, reflects that the petitioner has two checking accounts, a money market savings account, and a certificate of deposit with the bank. However, the letter does not indicate when those accounts were opened with the bank, and the petitioner has not submitted any proof of these accounts. In addition, these accounts appear to represent the LLC's business accounts, and these funds are most likely shown on Schedule L of the tax returns as cash. Business account statements may only be utilized as part of a "totality of circumstances" analysis.

The letter from the petitioner's accountant provides a financial table for the petitioner for the years 2001 through 2005. The accountant, however, does not provide an explanation of the table except to include net profit <loss> plus depreciation and amortization with the other operating expenses and to include repairs,

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

supplies, utilities, taxes, franchise fees and other expenses with the funds from operations. It is unclear what the accountant wishes to show by providing the table. If his intent is to provide an overview of the petitioner's increase in revenues over the five-year period, then the accountant has adequately provided this information. However, if the accountant is suggesting that the depreciation, etc. should be added back to the net incomes in the pertinent years, then the accountant is mistaken. The accountant has not provided any legal authority for his contention, nor has he submitted any precedent decisions in support of his contention. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be **designated and published in bound volumes or as interim decisions.** 8 C.F.R. § 103.9(a). In addition, the argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. [REDACTED], 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

On appeal, the accountant also states that "[the beneficiary] has done an excellent job and receives a superb pay package which includes a free furnished apartment with cable, phone service and internet connection. According to my estimate this pay package is worth more than \$38,000." The AAO will not consider evidence of the beneficiary's non-wage income from the petitioner. The accountant does not provide legal authority for the AAO to consider such evidence. The only evidence that the beneficiary actually enjoys room and board from the petitioner is a letter from the accounting firm. There is no other objective information pertaining to this issue. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, although there is a section to do so, the labor certification application does not indicate that "required" room and board is a condition of the proffered position. If that information had been advertised for potential job applicants during the labor certification process, the outcome could have been different. To alter the terms of the proffered position at this point in the proceeding is unfair and contrary to the spirit of employment-based immigrant visa petitions. If a qualified U.S. citizen or lawful permanent resident were aware that room and board was required of the position, more applications may have been forthcoming. Altering this requirement of the proffered position impugns the validity of the employment offer. Thus, for the multiple reasons cited above, the "non-wage" income will not be considered.

The letter from the payroll services company confirms that the beneficiary is employed by the petitioner, has been receiving checks weekly since 2000 and will continue to do so. The payroll services company indicates that the petitioner and the beneficiary have filed all federal and state reports and that “the corporation is in good standing.” As there is nothing in the record of proceedings that would make the payroll services company’s statement suspect, it will be accepted as is. However, it should be noted that nothing in the statement establishes the petitioner’s ability to pay the proffered wage.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity’s business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner’s financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, the petitioner’s tax returns indicate it was started in 2000 (approximately 7 years ago). The petitioner has provided tax returns for the years 2001 through 2003. However, while the petitioner’s gross receipts have **steadily increased**, only one tax return establishes the petitioner’s ability to pay the proffered wage of [REDACTED]. **The one tax return that establishes the petitioner’s ability to pay the proffered wage is not enough evidence** to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner’s reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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.