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

**identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 17 2008

SRC 06 241 52842

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 proffered wage from the priority date. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 28, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of April 3, 2001.

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 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 C.F.R. § 204.5(d). The priority date in the instant petition is April 3, 2001. The proffered wage as stated on the Form ETA 750 is $17.36 per hour or $36,108.80 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[1]. Relevant evidence submitted on appeal includes counsel's brief, a copy of the beneficiary's 2006 Form 1040, U.S. Individual Income Tax Return, a copy of the 2006 Form W-2, Wage and Tax Statement, issued by the petitioner on behalf of the beneficiary, a copy of the beneficiary's social security statement, dated December 21, 2006, and a letter, dated November 2, 2006, from [redacted], Executive Chef, for the petitioner. Other relevant evidence includes copies of the petitioner's 2001 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years July 1 through June 30 each year, copies of the 1999 through 2006 Forms W-2 issued by the petitioner on behalf of the beneficiary, and copies of the beneficiary's 2000 and 2005 Forms 1040. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of $7,495, -$62,112, -$152,728, -$62,985, and -$119,620, respectively. The petitioner's 2001 through 2005 Forms 1120 also reflect net current assets of -$106,957, -$320,057, -$71,648, -$122,447, and -$230,141, respectively.

The 1999 through 2006 Forms 1040, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary by the petitioner of $7,752.53, $19,166.89, $12,214.82, $11,952, $12,870, $12,720, $12,960, and $16,170.85, respectively.[2]

The beneficiary's 2000, 2005, and 2006 Forms 1040 reflect adjusted gross incomes of $19,167, $16,643, and $17,189, respectively.

The beneficiary's social security statement indicates that he has been paying into social security since 1996.

The letter, dated November 2, 2006, from Executive Chef, for the petitioner states:

> I am in charge of all of the operations of the restaurant and hereby, on behalf of petitioner, confirm the job offer made to the beneficiary, [xxx], as well as his continued employment.
>
> Petitioner's offer to the beneficiary includes compensation at the rate of $17.36 an hour for a 40 hour week.
>
> I wish to state that prior to 2001, Il Cortile Restaurant filed five previous labor certifications all of which were approved and all of which contained a requirement of at least two years of experience as a cook. Petitioner because of its size employs approximately 62 employees of which 33 are kitchen employees and includes seven full time line cooks due to the volume of our business.

On appeal, counsel asserts:

---

[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).

[2] It is noted that the 1999 and 2000 Forms W-2, issued by the petitioner on behalf of the beneficiary, are for the two years prior to the priority date of April 3, 2001, and, therefore, have little evidentiary value when determining the petitioner's ability to pay the proffered wage of $36,108.80 from the priority date. Therefore, the AAO will not consider the 1999 and 2000 Forms W-2 when determining the petitioner's ability to pay the proffered wage from the priority date except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

> The Texas Service Center completely ignored the fact that salaries and wages were set forth on each tax return in varying amounts from $1,293,380 in 2001 and up to $1,351,933 in 2004 and $1,347,818 in 2005. In addition, a Profit and Loss Statement from June 2005 through July 2006, on an accrual basis, further reflected gross annual total income of $5,359,997.
>
> It would be readily apparent that the petitioner's gross income during the years from 2001 to present from $3.5 million to $5.4 million per annum would clearly enable petitioner to pay its employees.
>
> A review of the tax returns indicates numerous and varied deductions such as depreciation reducing the net income in some cases to a loss. However, the U.S. Corporation Income Tax Return has always included payment of the salaries of petitioner's employees, which has been and which will continue to be paid.
>
> * * *
>
> The USCIS must consider normal accounting practices of the company, such as a corporation that routinely and legally minimizes taxable income. *See Matter of VSC, EAC 01-018-50413* (AAO Jan.31, 2003) (net profit on return should not control). Reported in 8 No. 18 Bender's Immigration.

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 Sonegawa*, 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 750, signed by the beneficiary on March 15, 2001, the beneficiary claims to have been employed by the petitioner from February 1999 to the present (March 15, 2001). In addition, counsel has submitted the 1999 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, in support of the beneficiary's contention. Therefore, the petitioner has established that it employed the beneficiary in the years 1999 through 2006.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of $36,108.80 and the actual wages paid to the beneficiary of $12,214.82 in 2001, $11,952 in 2002, $12,870 in 2003, $12,720 in 2004, $12,960 in 2005, and $16,170.85 in 2006. Those differences are $23,893.98, $24,156.80, $23,238.80, $23,388.80, $23,148.80, and $19,937.95, respectively.

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 federal case law. *See 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. 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 (7th 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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 Chang,* 719 F. Supp. at 537.

In 2001 through 2005,[3] the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2005 were $7,495, -$62,112, -$152,728, -$62,985, and -$119,620, respectively. The petitioner could not have paid the differences of $23,893.98, $24,256.80, $23,238.80, $23,388.80, and $23,148.80, respectively in 2001 through 2005 between the proffered wage of $36,108.80 and the actual wages paid to the beneficiary of $12,214.82, $11,952, $12,870, $12,720, and $12,960, respectively in 2001 through 2005 from its net incomes in 2001 through 2005. In addition, since the petitioner did not submit its 2006 tax returns, the AAO is unable to determine if the petitioner had sufficient funds in 2006 to pay the difference of $19,937.95 between the proffered wage of $36,108.80 and the actual wages paid to the beneficiary of $16,170.85 from its net income in 2006.

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

[3] The petitioner's 2006 federal tax return was not submitted. Therefore, the AAO is unable to determine if the petitioner was organized as a "C" corporation in 2006, or if it was organized differently.

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.[4] 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 a corporation'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 2005 were -$106,957, -$320,057, -$71,648, -$122,447, and -$230,141, respectively. The petitioner could not have paid the differences of $23,893.98, $24,256.80, $23,238.80, $23,388.80, and $23,148.80, respectively in 2001 through 2005 between the proffered wage of $36,108.80 and the actual wages paid to the beneficiary of $12,214.82, $11,952, $12,870, $12,720, and $12,960, respectively in 2001 through 2005 from its net current assets in 2001 through 2005. In addition, since the petitioner did not submit its 2006 tax returns, the AAO is unable to determine if the petitioner had sufficient funds in 2006 to pay the difference of $19,937.95 between the proffered wage of $36,108.80 and the actual wages paid to the beneficiary of $16,170.85 from its net current assets in 2006.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage based on it gross income, large salaries, numerous and varied deductions such as depreciation, and its longevity.

Counsel's 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. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 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.

With regard to the petitioner's other "numerous and varied deductions," counsel does not state what those deductions consist of and does not explain how the deductions may be used to pay the proffered wage to the beneficiary from the priority date and continuing until the beneficiary obtains lawful permanent residence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

[4] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

*Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, counsel 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).

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 incorporated in 1977. The petitioner has provided tax returns for the years 2001 through 2005. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of $36,108.80. In addition, the petitioner has not provided enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation throughout the industry. The petitioner has also not shown that the years 2001 through 2005 were exceptionally difficult years. Furthermore, while CIS will consider the petitioner's gross income, wages paid to its employees, and longevity where the petitioner has demonstrated by its tax returns that it had the ability to pay the proffered wage in some of the years as represented by those tax returns, in this case, the petitioner has not demonstrated that it had the ability to pay the proffered wage in any of the pertinent years (2001 through 2005).[5] 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 do not overcome the decision of the director.

[5] The AAO notes that in 2006, according to the payroll records in the record of proceeding, the beneficiary was paid at a rate below the minimum wage for the state of New York ($6.00 versus $6.75 minimum wage).

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.