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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC-03-215-51845

Office: VERMONT SERVICE CENTER

Date: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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.

Robert P. Wiemann, Director
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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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.

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:

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 petition's 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$40,664.00 per year. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary claimed to have worked for the petitioner beginning in May 2000 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on June 27, 2003. On the petition, the petitioner claimed to currently have 20 employees. The items on the petition for the date on which the petitioner was established, its gross annual income and its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated November 3, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on January 28, 2004.

In a decision dated April 19, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits no brief and submits additional evidence.

Counsel states on appeal that the petitioner's net income and assets are sufficient to establish the petitioner's ability to pay the proffered wage in the years 2001 and 2002. Counsel also states that as of the May 21, 2004 date on which the I-290B was signed, the petitioner had not filed its tax returns. Counsel also states that the beneficiary was paid in cash for his employment with the petitioner.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 10, 2001, the beneficiary claimed to have worked for the petitioner beginning in May 2000 and continuing through the date of the ETA 750B. However, the record contains no Form W-2 Wage and Tax Statements of the beneficiary, nor any other evidence corroborating the claim by the beneficiary to have been employed by the petitioner.

On the Form I-290B notice of appeal, counsel states that the beneficiary was paid in cash. However, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, counsel makes no assertions concerning the amount of any compensation paid to the beneficiary.

As another 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 for a given year, 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. 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. The record before the director closed on January 8, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 was the most recent return available when the record closed before the director.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income.

The petitioner's tax returns state amounts for ordinary income on line 21 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$38,382.00	\$40,664.00*	-\$2,282.00
2002	\$13,158.00	\$40,664.00*	-\$27,506.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

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 a corporate taxpayer's current assets less its current liabilities. 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. 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$752.00	\$753.00	\$40,664.00*
2002	\$753.00	\$1,401.00	\$40,664.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in the years 2001 or 2002.

The record also contains a letter from a certified public accountant dated April 28, 2004. In the letter, the accountant states that if the petitioner's expenses for depreciation and amortization are added to the petitioner's net income for 2001 and 2002, the result establishes the petitioner's ability to pay the proffered wage in each of those years.

While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation 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>.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. See *Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, 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 his letter the accountant also states that in the year 2002, loans from shareholders were reduced by \$34,040.00, which the accountant states is evidence of the petitioner's ability to provide additional financing. The tax returns in the record do identify any of the petitioner's shareholders or the number of its shareholders. Therefore the evidence does not establish that the loans from shareholders were from persons who held a controlling interest in the petitioner. Moreover, nothing in the record indicates that the repayment of any shareholder loans was discretionary on the part of the petitioner. Finally, even if the repayment of loans in 2002 were consider as additional financial resources for the petitioner for that year, no similar claim is made for the year 2001, which is the year of the priority date.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in either of those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.