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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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**DEC 20 2006**

FILE:

[REDACTED]  
EAC 04 125 52622

Office: VERMONT SERVICE CENTER

Date:

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner appears to have previously retained a different attorney to represent its interests in this matter. That attorney filed an executed G-28 Notice of Entry of Appearance on February 10, 2004. The petitioner's current attorney filed his appearance on March 13, 2006, indicating that he replaced previous counsel. All representations will be considered, but today's decision will be furnished only to the petitioner and its counsel of record.

The petitioner is a grocery store and butcher shop. It seeks to employ the beneficiary permanently in the United States as a butcher/meat cutter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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.

On appeal counsel submitted a letter and additional evidence. The petitioner's previous counsel submitted a brief.

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 granting 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 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 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, the day 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). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, which equals \$26,145.60 per year.

On the petition, the petitioner stated that it was established during November 1998 and that it employs one worker. The petition states that the petitioner's gross annual income is \$177,658 and that its net annual income is \$63,492. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to

have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Revere, Massachusetts.

In support of the petition,<sup>1</sup> the petitioner submitted (1) two real estate assessments, (2) a real estate tax bill, (3) copies of monthly statements pertinent to the petitioner's bank accounts during 2004, (4) the Form 1040 joint U.S. Individual Income Tax Return of the petitioner's owner and the owner's spouse for 2001, 2002, and 2003, (5) copies of two non-precedent decisions of this office, and (6) a letter dated February 28, 2004.

One real estate assessment shows that the petitioner's owner also owned an improved property in Revere, Massachusetts. That property had a 2003 total assessed value of \$277,600. The other assessment is for property the petitioner's owner owns in Malden, Massachusetts. The 2003 total assessed value of this additional property is \$690,300. The real estate tax bill provided pertains to the second property. None of those documents indicate whether, or to what extent, either of those properties may be encumbered.

The tax returns submitted show that the petitioner is held as a sole proprietorship and that the sole proprietor and his spouse had three dependents during each of the salient years. During 2001, 2002, and 2003 the petitioner returned net profit of \$25,391, \$43,349, and \$47,378, respectively. The petitioner's owner or sole proprietor declared adjusted gross income, including the petitioner's profit, of \$25,669, \$43,301, and \$59,334 during 2001, 2002, and 2003, respectively.

In his February 28, 2004 letter the petitioner's previous counsel noted that the petitioner is a sole proprietorship and cited the non-precedent decisions for the proposition that the owner's personal income and assets, therefore, should be considered in determining the petitioner's ability to pay the proffered wage.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on November 1, 2004, denied the petition.<sup>2</sup>

On appeal, the petitioner's current attorney of record submitted the petitioner's owner's 2004 and 2005 Form 1040 U.S. Individual Income Tax Returns and a letter dated April 7, 2006. The 2004 and 2005 tax returns show that the petitioner returned profit of \$44,703 and \$45,241 during those years, respectively. The 2004 return shows that the sole proprietor declared adjusted gross income, including the petitioner's profit, of \$69,945. The petitioner's 2005 tax return shows adjusted gross income, including the petitioner's profit, of \$80,896.

In his letter counsel stated that the petitioner's owner's 2003, 2004, and 2005 income, gross profit, and depreciation deductions are factors to be considered in determining the petitioner's continuing ability to pay

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<sup>1</sup> The petitioner previously submitted another Form I-140 petition for the same beneficiary. That previous petition was denied on December 31, 2003 and not appealed. The instant Form I-140 petition, which was filed on March 19, 2004, utilizes the same Form ETA 750 labor certification as the previous Form I-140 petition.

<sup>2</sup> The record indicates that, on June 24, 2003, the service center issued a request for evidence pertinent to the first petition, but that no request for evidence was issued pertinent to the instant petition.

the proffered wage beginning on the priority date. Counsel did not address the sole proprietor's 2001 and 2002 returns.

The petitioner's previous counsel submitted a brief in which he argued that the amount of the proffered wage due during 2001 should be prorated to reflect that the priority date was April 30, 2001. Previous counsel also argued that the petitioner's depreciation deduction should be added to the petitioner's income to show ability to pay the proffered wage, citing a non-precedent decision in support of that position. In addition counsel cited the total value of the petitioner's owner's rental real estate as an index of the petitioner's ability to pay the proffered wage.

The real estate tax assessments show that at some point during 2003 the petitioner's owner owned real property in Revere and Malden, Massachusetts. Those assessments do not, in themselves, show whether the petitioner's owner owned the property on the priority date or whether he continues to own it. Further, those tax bills show the assessed value of those properties, which is not necessarily the same as market value.<sup>3</sup> Further still, even if the petitioner's owner owned those properties during the entire salient period and its market value were established, the evidence is insufficient to show the petitioner's owner's equity in those properties because no evidence in the record indicates to what extent that property may be mortgaged or otherwise encumbered.<sup>4</sup>

Not only are the ownership of the property and its value poorly supported, and the amount by which it is encumbered not in evidence, but even if the information were in the record and demonstrated to be correct, that would be insufficient, in itself, to render the petition approvable.

The petitioner's owner's equity in real estate is not a net current asset. Current assets, or short-term assets, are those assets of a business that are expected to be converted to cash or cash equivalent within a short period, generally one year. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on a Schedule L, lines 1(d) through 5(d), appended to its Form 1120, U.S. Corporation Income Tax Return. Its year-end current liabilities are shown on lines 15(d) through 17(d). 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. That statistic is generally inapplicable to sole proprietorships.<sup>5</sup>

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<sup>3</sup> Market value of a property is typically determined by an appraisal, rather than an assessment.

<sup>4</sup> The nature and extent of encumbrances would typically be determined by a professional title search.

<sup>5</sup> Although that calculation could be accomplished on a financial statement it is not part of a Schedule C, Profit and Loss from Business.

The value of the petitioner's owner's equity in real estate is not expected to be realized in cash or cash equivalent within the coming year. Equity in real estate is not, ordinarily, a current asset. Further, real estate is not the sort of liquid asset generally available to pay wages. For all of the reasons listed, the petitioner's owner's alleged equity in real estate will not be considered.

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis 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. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>6</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

The petitioner is a sole proprietorship. The petitioner's previous counsel urged, and cited non-precedent decisions to support, that the petitioner's owner's personal income and assets should, therefore, be considered in the determination of the petitioner's ability to pay the proffered wage.

Although previous counsel's citation of non-precedent decisions of this office are of no effect<sup>7</sup> one may argue that the reasoning of a non-precedent decision is persuasive and should be extended to the instant case.<sup>8</sup> In the instant case this office agrees that, because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly

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<sup>6</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

<sup>7</sup> Although the regulation at 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act it makes no such allowance for non-precedent decisions.

<sup>8</sup> As previous counsel did not, in fact, address the reasoning of those non-precedent decisions this office gathers that he was citing them as binding precedent.

combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that \_she could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

This office is not persuaded by previous counsel's assertion, however, that the amount of the proffered wage during 2001 should be prorated to reflect that four months of that year were over on the priority date. This office will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will 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), the petitioner has not submitted such evidence.

Showing that the petitioner's gross receipts or gross profits<sup>9</sup> exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D.

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<sup>9</sup> Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself on his remaining adjusted gross income and assets.

The proffered wage is \$26,145.60 per year. The priority date is April 30, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$25,669, including all of the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner is unable to demonstrate the ability to pay the proffered wage with its profits of its owner's adjusted gross income during that year.

During 2002 the petitioner's owner declared adjusted gross income of \$43,301. That amount is sufficient to pay the proffered wage, but would leave the petitioner's owner a balance of only \$17,155.40 with which to support his household during that year. No evidence pertinent to the petitioner's owner's family's monthly or annual expenses was requested or provided. This office finds, however, that to expect the petitioner to support a family of five on that amount is unreasonable. The petitioner is unable to demonstrate the ability to pay the proffered wage with its profits or its owner's adjusted gross income during that year.

During 2003 the petitioner's owner declared adjusted gross income of \$59,334. That amount is sufficient to pay the proffered wage and would leave the petitioner's owner a balance of \$33,188.40 with which to support his household during that year. Although the record contains no evidence pertinent to the petitioner's owner's family's monthly or annual expenses, this office finds that the petitioner's owner might reasonably be expected to support his family for one year on that amount.

During 2004 the petitioner's owner declared adjusted gross income of \$69,945. That amount is sufficient to pay the proffered wage and would leave the petitioner's owner a balance of \$43,779.40 with which to support his household during that year. This office finds that the petitioner's owner might reasonably be expected to support his family for one year on that amount.

During 2005 the petitioner's owner declared adjusted gross income of \$80,896. That amount is sufficient to pay the proffered wage and would leave the petitioner's owner a balance of \$57,750.40 with which to support his household during that year. This office finds that the petitioner's owner might reasonably be expected to support his family for one year on that amount.

The petitioner has demonstrated that it was able to pay the proffered wage during 2003, 2004, and 2005. The petitioner has not demonstrated, however, that its income or its owner's adjusted gross income was sufficient during 2001 and 2002 to pay the proffered wage.

However, this office also notes various favorable factors in the record. The record contains five years of the petitioner's owner's tax returns. During each of those years the petitioner's owner's adjusted gross income has risen. Schedule E Supplemental Income and Loss forms<sup>10</sup> attached to each of the returns shows that this

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<sup>10</sup> The Schedule E appears to show only one property, whereas the petitioner's submitted assessments pertinent to two properties in two different towns. Based on a comparison of the tax amount shown on the tax

increase is due, in large part, to an increase in the rents the petitioner's owner has been able to charge for the rental real estate he owns. The petitioner's owner has also enjoyed a decrease in the expenses associated with those properties, especially the amount of mortgage interest<sup>11</sup> paid during each year. This increase in gross rents and decrease in expenses has resulted in the petitioner being able to pay the proffered wage during the three most recent years for which evidence was provided.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) indicates that if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. This office finds, based on the evidence pertinent to the increase in the petitioner's owner's rental income and adjusted gross income, that based upon the totality of factors in the record the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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bill submitted and the tax amount shown on the Schedule E this office suspects that the Malden Property is the petitioner's owner's rental property. This office would assume that the other property, that in Revere, is the petitioner's owner's family's residence. The petitioner's 2001, 2002, and 2003 tax returns, however, show, a home address in Malden and its 2004 and 2005 returns show a home address in Saugus, Massachusetts. Although the significance of this discrepancy is unknown to this office it does not appear to be relevant to any material fact at issue.

<sup>11</sup> The mortgage interest on the petitioner's owner's rental property decreased from \$41,592 during 2001 to \$27,625 during 2005. This office notes that this is convincing evidence that the rental property was, in fact, encumbered and the petitioner's owner's equity cannot, as was stated above, be readily determined.