

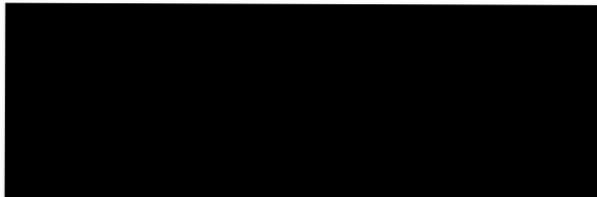
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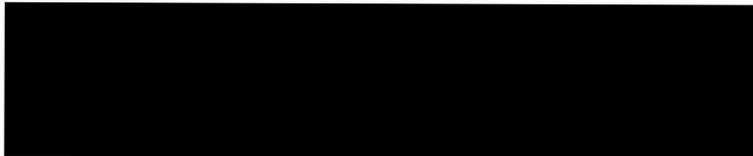
IN RE:

Petitioner:

Beneficiary:

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, 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 an auto service station with garage. It seeks to employ the beneficiary permanently in the United States as a Night Shift Manager – Auto Service Station. 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 and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 30, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's 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), 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 January 20, 1998. The proffered wage as stated on the Form ETA 750 is \$1,232.40 per week, which amounts to \$64,084.80 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a letter dated January 14, 2005 from the petitioner's president and documents describing planned construction work for a major expansion of the petitioner's business. Other relevant evidence in the record includes copies of Form 1120 U.S. Corporation Income Tax Returns of the petitioner for 1997, 1998, 1999 and 2000 and copies of Form W-2 Wage and Tax Statements of the beneficiary for 1999, 2000 and 2001.

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).

On appeal, counsel states that the petitioner was delayed in implementing its business plan to expand its business and that its expansion has now been approved and will commence during the 2005 fiscal year. Counsel states that the expansion will result in greatly increased revenues to the petitioner. Counsel also states that the petitioner has been hampered by the great delay in the adjudication of the instant petition which amounted to more than two years. Counsel states that the petitioner's corporate tax returns covering the period from April 1, 1998 to March 31, 1999 reflected a loss of \$76,139.00 which resulted from a loss carried forward which was a cash item resulting from the cancellation of certain pension plans of the corporation, and that therefore an additional \$76,139.00 was placed back into corporation assets. Counsel states that the foregoing action was an accounting procedure which was misinterpreted by the adjudicator.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 November 1, 2000, the beneficiary claimed to have worked for the petitioner beginning in April 1995 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary's Form W-2's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1998	\$11,440.00	\$64,084.80	\$52,644.80
1999	\$11,440.00	\$64,084.80	\$52,644.80
2000	\$11,440.00	\$64,084.80	\$52,644.80

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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 a corporation. The I-140 petition was submitted on March 25, 2002, and with the petition the petitioner submitted copies of its Form 1120 U.S. Corporation Income Tax Returns for 1997 and 1998. The director issued a request for additional evidence (RFE) on June 16, 2002. The RFE made no specific request for any tax returns more recent than the 1998 tax year. In response to the RFE, the petitioner submitted the copies of the beneficiary's Form W-2 Wage and Tax Statements discussed above and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999 and 2000. The petitioner's submissions in response to the RFE were received by the director on September 11, 2002.

The tax returns in the record show that the petitioner's tax year runs from April 1 until March 31 of the following calendar year. The periods covered by the petitioner's tax returns are as follows:

- 1997: April 1, 1997 to March 31, 1998
- 1998: April 1, 1998 to March 31, 1999
- 1999: April 1, 1998 to March 31, 2000
- 2000: April 1, 2000 to March 31, 2001

As noted above, the I-140 petition was submitted on March 25, 2002. As of that date, the petitioner's 2001 tax year had not yet ended. Therefore the petitioner's tax return for its 2000 tax year was the most recent return available as of the date of the filing of the I-140 petition.

The record before the director closed on September 11, 2002 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's 2001 tax year had already ended. The normal filing deadline would have been two and one half months after the March 31, 2002 end of the tax year, which was June 15, 2002. However, the petitioner would have been eligible for an automatic six-month extension of the filing deadline upon the submission of a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return. The record does not indicate whether the petitioner's Form 1120 for 2001 was in fact available as of September 11, 2002 when the petitioner's submitted its response to the RFE. But in any event, since the RFE made no specific request for any tax returns, the petitioner's 2001 tax year will not be considered to be at issue in the instant petition.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below. In order to simplify the analysis, wages actually paid to the beneficiary as shown on the W-2 forms on a calendar year basis are credited below in the petitioner's tax years which begin on April 1 of each year.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1997	\$15,944.68	\$64,084.80*	\$(48,140.12)
1998	\$(76,139.00)	\$52,644.80**	\$(128,783.80)
1999	\$(27,384.00)	\$52,644.80**	\$(80,028.80)
2000	\$(47,359.00)	\$52,644.80**	\$(100,003.80)

* The full proffered wage.

** Crediting the petitioner with the \$11,440.00 actually paid to the beneficiary each year in calendar years 1998, 1999 and 2000.

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. Even if an attempt were made to precisely apportion the wages paid to the beneficiary to the tax years in which the wages were earned, the evidence would still fail to show sufficient net income to pay the proffered wage in any of the years at issue.

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 year-end net current assets as shown in the following table. Wages actually paid to the beneficiary as shown on the W-2 forms on a calendar year basis are credited below in the petitioner's tax years which begin on April 1 of each year.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1997	\$10,731.66	\$64,084.80*	\$(53,353.14)
1998	\$28,716.00	\$52,644.80**	\$(23,928.80)
1999	\$36,993.00	\$52,644.80**	\$(15,651.80)
2000	\$(10,458.00)	\$52,644.80**	\$(63,102.80)

* The full proffered wage.

** Crediting the petitioner with the \$11,440.00 actually paid to the beneficiary each year in calendar years 1998, 1999 and 2000.

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. Nor would any attempt to precisely apportion the beneficiary's actual wages to the petitioner's tax years produce a different result.

On appeal, counsel states that the petitioner was delayed in implementing its business plan to expand its business and that its expansion has now been approved and will commence during the 2005 fiscal year. Counsel states that the expansion will result in greatly increased revenues to the petitioner.

The record contains a copy of a letter dated January 14, 2005 from the petitioner's president and documents describing planned construction work for a major expansion of the petitioner's business. In his letter, the president states that the business filed the instant petition for a future position that would be needed for a new business that the Exxon corporation planned to construct on the site of the existing gasoline station.

The president states that planning began before the 1998 calendar year and continues through the date of the letter. The president states that construction was originally expected to begin in 2000, but that it was delayed because of the 1999 merger of Exxon Corporation and Mobil Corporation. The president states that all municipal approvals have now been obtained and that construction is expected to begin in August 2005.

The president states that the new business will include a convenience store of more than 4000 square feet, 24-hour full-service diesel fuel and gasoline sales with 18 dispensers. New Jersey lottery, food services and a 24-hour roll-over car wash. The president states that Exxon is investing approximately \$2,000,000.00 in the construction of the facility and that the petitioner is also making a substantial investment.

In his letter, president then states as follows: "While our current facility had not generated income sufficient to meet the proffered wage during the 1998 to 2001 years, the job offered is intended only for this new, larger operation." (Letter from President, January 14, 2005, at 1-2).

The president states that the attached documents describe the scope of the project.

The documents referred to in the president's letter consist of a summary of information about the expansion project focusing on zoning requirements, a franchisee's copy of a receipt for an offering circular from ExxonMobil, and a memorandum on the project dated January 7, 2005 from a franchise specialist with ExxonMobil.

The letter from the petitioner's president and the attached documents indicate a significant expansion of the petitioner's business with substantial financial support from ExxonMobil. Nonetheless, as of the January 14, 2005 date of the president's letter, construction had not yet begun on the expansion. In fact, the president concedes that for the years 1998 through 2001 the petitioner had not generated income sufficient to pay the proffered wage for the offered position. Therefore the letter and that attached documents fail 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.

Counsel states that the petitioner has been hampered by the great delay in the adjudication of the instant petition which amounted to more than two years. 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). Counsel fails to specify how the adjudication of the petition could have had any effect on the expansion of the petitioner's business. Moreover, counsel's assertion is inconsistent with the information in

the January 14, 2005 letter from the petitioner's president, which states that delays in the project were caused by the 1999 merger of Exxon Corporation and Mobil Corporation.

On appeal counsel also states that the petitioner's corporate tax returns covering the period from April 1, 1998 to March 31, 1999 reflected a loss of \$76,139.00 which resulted from a loss carried forward which was a cash item resulting from the cancellation of certain pension plans of the corporation, and that therefore an additional \$76,139.00 was placed back into corporation assets. Counsel states that the foregoing action was an accounting procedure which was misinterpreted by the adjudicator. As noted above, 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).

The petitioner's Form 1120 for its 1998 tax year lacks sufficient information to support counsel's assertions about the reason for the petitioner's loss that year. The return shows a loss of -\$76,139.00 on line 28, for taxable income before net operating loss deduction and special deductions. Nothing in the return identifies any item pertaining to the cancellation of certain pension plans of the corporation, nor any corresponding addition to the corporation's assets in the amount of \$76,139.00. Therefore, nothing in the return indicates additional financial resources available to pay the proffered wage during the petitioner's 1998 tax year.

On the I-290B, filed on January 18, 2005, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. No additional documentation was received by the AAO within 30 days of January 18, 2005. While the appeal was pending, in response to an inquiry by the AAO on whether additional documentation had been submitted within the 30-day period after the appeal counsel submitted a letter dated July 12, 2006 to which was attached a letter dated July 12, 2006 from the petitioner's president. Those documents are not timely and therefore are not properly before the AAO. However, the content of those documents has no information which would significantly change the foregoing analysis.

In his July 12, 2006 letter, the petitioner's president reports that the construction of the petitioner's new facility was completed in February 2005 and that sales and revenue have increased significantly. Although the information in that letter would be some evidence of the petitioner's ability to pay the proffered wage beginning in February 2005, the letter provides no information to help establish that ability for the period prior to February 2005.

In counsel's July 12, 2006 letter, counsel states that evidence pertaining to the beneficiary's employment by the petitioner helps to establish the petitioner's ability to pay the proffered wage. Counsel also repeats his assertions pertaining to a pension plan loss carried forward. Matters pertaining to the beneficiary's employment by the petitioner and pertaining to the pension plan loss are discussed above.

Counsel also states that evidence regarding other items establishes the petitioner's ability to pay the proffered wage, such as depreciation expenses, other cash and non-cash deductions or expenses and retained earnings

Concerning depreciation deductions and other deductions or expenses, 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 and amortization of the cost of good will, though counsel does not specify any relevant non-cash deductions other than depreciation. In any event, such

non-cash 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>.

Concerning cash expenses, counsel offers no reason why actual cash expenses should not be considered in evaluating the petitioner's ability to pay the proffered wage.

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.

Counsel also recommends the use of retained earnings to pay the proffered wage. Retained earnings are shown on a corporate tax return on Schedule L. Unlike the current assets shown elsewhere on the Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that have been financed from profitable operations rather than from selling stock to investors or from borrowing from external sources. In other words, retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. In simplest terms, the current year's retained earnings are the previous year's retained earnings plus the current year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. For the foregoing reasons, in evaluating the petitioner's ability to pay the proffered wage, CIS considers each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

To the extent that retained earnings represent the equity value of shares in the corporation, any such value would pertain to the assets of shareholders, not of the corporation. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

For the foregoing reasons, the July 12, 2006 letter from the petitioner's president and the July 12, 2006 letter from counsel contain no information which would significantly change the above analysis of the petitioner's ability to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record 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.

As noted above, the issue of the petitioner's ability to pay the proffered wage is part of a more general analysis of whether the petitioner's job offer to the beneficiary was a realistic one as of the priority date and continuing thereafter until the beneficiary obtains lawful permanent residence. The evidence in the record of the instant petition indicates that the petitioner's job offer to the beneficiary pertained to the petitioner's planned expansion of its business. In his letter dated January 14, 2005, the petitioner's president states, "While our current facility had not generated income sufficient to meet the proffered wage during the 1998 to 2001 years, the job offered is intended only for this new, larger operation." (Letter from President, January 14, 2005, at 1-2). The expansion of the petitioner's business had not even begun as of the priority date, and the evidence in the record indicates that the expansion was not completed until February 2005, more than seven years after the January 20, 1998 priority date. The position offered to the beneficiary therefore did not exist at the time the ETA 750 labor certification application was filed, nor did it exist as of the March 25, 2002 date on which the I-140 petition was

filed. The evidence in the record therefore fails to establish that the petitioner's job offer to the beneficiary was a realistic one as of the priority date or at any other time prior to February 2005. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In her decision, the director correctly stated the petitioner's net income in its 1997, 1998, 1999 and 2000 tax years, 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 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.