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U.S. Citizenship
and Immigration
Services

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File: EAC-05-065-51393 Office: VERMONT SERVICE CENTER Date: SEP 28 2006

In re: Petitioner: [Redacted]
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:



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 Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner's business relates to concrete work and seeks to employ the beneficiary permanently in the United States as a cement mason ("concrete finisher"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 10, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, 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).

The regulation 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.

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). 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The proffered wage as stated on Form ETA 750 for the position of a concrete finisher is \$29.22 per hour, 40 hours per week, with allowed overtime as needed at a rate of \$43.83 per hour. The basic rate would be equivalent to \$60,777.60 per year.² The labor certification was approved on September 28, 2004, and the petitioner filed the I-140 on the beneficiary's behalf in January 2005. On the I-140, counsel listed the following information related the petitioning entity: date established: 1994; gross annual income: \$1,426,801.00; net annual income: not listed; and current number of employees: 25.

On March 10, 2005, the case was denied base on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO. We will examine the petitioner's ability to pay based on standards enumerated and then consider the petitioner's additional arguments on appeal.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will examine whether the petitioner employed and paid 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 case at hand, on Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary listed that he has been employed with the petitioner since November 1998. The petitioner submitted a 2001 W-2 Form for a [REDACTED] showing payment in the amount of \$28,147.36. However, as noted in the Service Center denial, no information was submitted to document that the beneficiary [REDACTED] and [REDACTED] are the same individual. All of the forms completed note the beneficiary's name as [REDACTED]. The petitioner did not address this issue on appeal. Therefore, the 2001 W-2 Form submitted showing payment to [REDACTED] cannot be considered as payment to the beneficiary in order to demonstrate the petitioner's ability to pay the proffered wage. Further, even if the petitioner could demonstrate that [REDACTED] and [REDACTED] were the same individual, the amount paid to the beneficiary, and the documentation submitted would be insufficient, standing alone, to demonstrate the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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. 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). 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

² The petitioner initially listed the wage as \$18 per hour on the Form ETA 750. The wage was corrected and increased to \$29.22, and the change approved by the DOL prior to certification of the labor certification.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$60,777.60 per year from the priority date. The record demonstrates that the petitioner is an S corporation. 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. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not submitted ³
2003	not submitted
2002	not submitted
2001	-\$512

The petitioner's net income would not allow for payment of the beneficiary's proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner failed to submit tax returns or other evidence for the years 2002, and 2003.

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 the difference between the petitioner's current assets and 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 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	not submitted
2003	not submitted
2002	not submitted
2001	-\$59,164

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner similarly lacks the ability to pay the proffered wage in any year.

On appeal, counsel contends that the petitioner had an additional \$41,335 in depreciation, which would amount to \$40,823, when the \$512 net loss is subtracted from the amount of depreciation. According to counsel, if the wages allegedly paid to the beneficiary were then added back in to the depreciation figure with the loss subtracted, the available funds to pay the proffered wage would be \$68,970.⁴ Counsel contends that the Service Center was erroneous in placing the burden on the petitioner to show that the "depreciation expense was not an actual expense to the enterprise during the time period covered."

³ The petitioner's 2004 tax return was likely not available at the time of filing the I-140, but may have been available at the time of filing the instant appeal.

⁴ Regarding the wages paid, counsel refers to the 2001 W-2 Form submitted for [REDACTED]." Counsel has failed to provide any documentation to demonstrate that [REDACTED] is the same individual as the beneficiary. Therefore, as noted above we will not accept the wages paid to [REDACTED] as evidence of wages paid to the beneficiary.

Depreciation as a tax concept 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>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the **depreciation expense charged for the year**. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

Counsel provided no further documentation or federal tax returns to demonstrate the petitioner's ability to pay the proffered wage, and did not raise any additional arguments on appeal.

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Accordingly, the petition was properly denied.

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.