

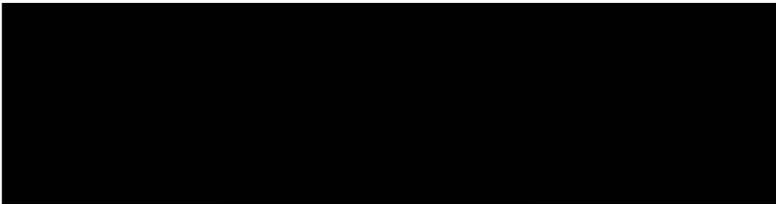


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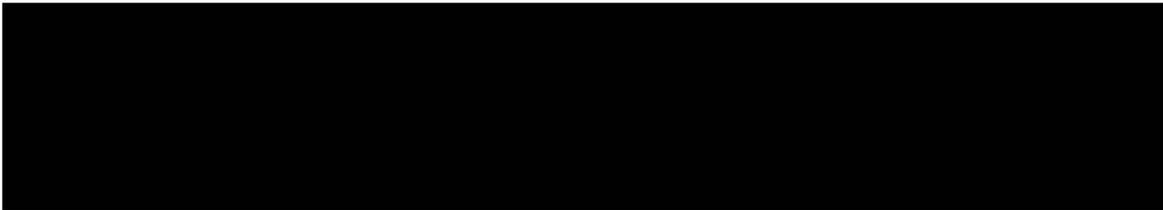
Office: VERMONT SERVICE CENTER

Date: APR 26 2007

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

The petitioner is a Turkish restaurant, and seeks to employ the beneficiary permanently in the United States as a Cook, Turkish (“Turkish Specialty Cook”). 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 September 22, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it can pay the beneficiary the proffered wage.

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. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$17 per hour. The regular hourly wage would be equivalent to \$30,940 per year, based on a schedule of 35 hours per week. The labor certification was approved on December 16, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on March 24, 2005. The petitioner's representative listed the following information on the I-140 Petition related to the petitioning entity: date established: 1988; gross annual income: \$692,802; net annual income: \$331,457; and current number of employees: 18.

On April 27, 2005, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay from April 30, 2001 to the present, including the petitioner's 2001, 2002, 2003, and 2004 federal tax returns, as well as the beneficiary's Forms W-2 if the petitioner employed the beneficiary. The petitioner responded to the RFE. Following review, the director denied the petition on September 22, 2005. Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not submit any W-2 statements, or provide that it had employed the beneficiary. Therefore, the petitioner is unable to demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 Citizenship and Immigration Services ("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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not submitted ²

² The petitioner provided a letter from its accountant, which provided that the petitioner files its tax returns based on a fiscal year rather than a calendar year. The petitioner's fiscal year runs from October 1 to September 30, so that the petitioner's 2004 tax return would be based on the time period October 1, 2004 to September 30, 2005, and the tax return would be due by December 15, 2005. Accordingly, the petitioner's

2003	\$2,033
2002	\$586
2001	\$0
2000	\$0 ³

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

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.⁴ 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, or, if filed on Form 1120-A, on Part III. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$17,106
2002	\$20,643
2001	\$12,584
2000	\$12,141

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets either.

The petitioner also submitted its bank statements for the time period ending April 31, 2001 to February 28, 2005. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120 Schedule L and included in net current assets analysis above. The petitioner did not provide evidence to show

2004 tax return would not have been available at the time of filing the I-140 petition, or at the time of the petitioner's response to the RFE, or on appeal.

³ Based on the priority date of April 30, 2001, and the petitioner's tax year filing, the petitioner's 2000 federal tax return would encompass the time period from October 1, 2000 to September 30, 2001. Therefore, the petitioner's 2000 federal tax return would be relevant to determining the petitioner's ability to pay in the year of the priority date. Present counsel, who took over representation of the petitioner on appeal, submitted the petitioner's 2000 federal tax return on appeal.

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

that the funds listed in the bank statements represent funds beyond those listed on the petitioner's Forms 1120 federal tax returns.

If we were to examine the bank statements, the statements reflect a low balance of \$9,949.86 as of September 30, 2001, and a high balance of \$44,911 as of November 30, 2004, with significant variance in the other months, and days in between. The director notes in her decision that had the petitioner paid the beneficiary wages on a monthly basis from its account, the petitioner's account would have been overdrawn by September 2001, and would have been significantly overdrawn by \$90,000 by February 2005. Further, as noted above, the petitioner did not provide any evidence to show that the amounts listed on the bank statements represent funds not accounted for on Schedule L of the petitioner's Forms 1120 tax returns.⁵

On appeal, counsel contends that the director failed to consider prior AAO cases where the AAO has examined bank statements to find the petitioner's ability to pay. Prior counsel has cited to a number of non-precedent cases. 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). Further, the petitioner's bank statements have been considered above. However, the petitioner has failed to demonstrate that the funds held in its bank account represent funds beyond those listed on Schedule L, and not already considered in the net current assets analysis above.

Counsel further contends that the director failed to consider the May 4, 2004, William R. Yates, Associate Director for Operations, Memorandum regarding Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2). The May 4 Yates Memo proves that CIS should make a positive determination regarding a petitioner's ability to pay where the petitioner's net income, net current assets, or employment of the beneficiary demonstrate the ability to pay the proffered wage. Accordingly, we have considered the petitioner's net income, and net current assets above, neither of which demonstrates the petitioner's ability to pay. Further, the petitioner has not documented that it has employed or paid the beneficiary. The May 4, Yates Memo reiterates that in accordance with 8 C.F.R. § 204.5(g)(2), acceptance of additional financial documentation is discretionary. The CIS decision conformed with both 8 C.F.R. § 204.5(g)(2), and the May 4 Yates Memo. Counsel does not provide specifically how CIS has failed to consider the May 4 Memo in its determination.

Additionally, counsel contends that CIS should consider the petitioner's assets, as well as the petitioner's non-cash deductions "as available cash" to pay the proffered wage. Counsel then outlines the petitioner's ability to pay on a year-by-year basis:

- For 2000 to 2001: counsel provides that the petitioner ended the fiscal year with assets of over \$185,000, with depreciation of \$150,000, paid wages of \$98,000, and the owner's salary was \$34,800.
- For 2001 to 2002: the petitioner's fiscal year-end assets were over \$187,000, with depreciation of \$160,000. The petitioner paid wages in the amount of \$80,927, and the owner was paid \$30,000 in salary.

⁵ For example, the petitioner's Forms 1120, Schedule L show the following amounts in cash at year end: 2000: \$10,977; 2001: \$12,963; 2002: \$20,824; and 2003: \$21,934. The petitioner's bank statements in comparison show as of September 30, 2001, that the petitioner had \$9,949.84 in the bank, and as of September 30, 2002, the petitioner had \$20,703 in its bank account. The numbers are close to the figures listed in available Schedule L cash, and have, therefore, most likely been considered already under the net current assets test as set forth above.

- For 2002 to 2003: the petitioner's fiscal year-end assets were over \$187,500, with depreciation of \$169,000. The petitioner paid wages in the amount of \$70,800, and the owner was paid \$27,200 in salary.
- For 2003 to 2004: the petitioner's fiscal year-end assets were over \$187,500, with depreciation of \$97,177. The petitioner paid wages in the amount of \$73,000, and the owner was paid \$26,500 in salary.
- For 2004 to 2005: the petitioner's tax return had not been filed at the time of the appeal, however, counsel provided that the petitioner paid wages in the amount of \$102,000.

First, it is unclear from where counsel has determined the figure for the petitioner's assets. Based on the tax returns filed, the petitioner's tax returns list total assets on page 1 as 2000: \$53,893; 2001: \$46,740; 2002: \$45,745; 2003: \$35,333. Counsel has provided no other documentation to substantiate the assets claimed above, or assets beyond those exhibited by the petitioner's federal tax returns. 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).

We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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 proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Second, 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.

Regarding wages that the petitioner has paid to other workers,⁶ in general, wages paid to others would not prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel has not asserted that the petitioner seeks to replace one of the employed workers with the beneficiary, in which case, with proper documentation, wages paid to another might be used to demonstrate the petitioner's ability to pay.⁷ Here, that is not the case. Further, regarding the owner's wages, the petitioner has not asserted that the owner will use, could use, or has allocated any of his wages to pay the beneficiary. Therefore, the owner's wages are not relevant.

Counsel further contends that the director's decision misstates the holding in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), and fails to consider *Matter of Great Wall*, but fails to elaborate on how CIS misstates the holdings. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factors, which previously impacted its ability to pay the prevailing wage. Additionally, by reviewing the petitioner's net income, as well as the petitioner's net current assets, the petitioner's financial status has been fairly considered. In reviewing the totality of the circumstances, reversal of the director's decision is not warranted. The petitioner has failed to demonstrate its ability to pay in any of the years since the priority date, has minimal net income and minimal net current assets, and has not demonstrated any one-time incident impacting its ability to pay.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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.

⁶ We note that the petitioner provided 2004 W-2 Forms for the petitioner's employees, however, this did not include any wages paid to the beneficiary. The petitioner paid wages of \$102,000 in 2004, but counsel notes that the employer is "taxable for \$146,000 since the service staff receives part of their compensation from tips . . . with the same salaries paid to employees for tax purposes should be raised 40% in each of the preceding years although that money came from tips rather than from paychecks." We note that most of the W-2 Forms show wages paid in low amounts, and might exhibit part-time employment.

⁷ Further, we note that Form I-140, Part 6, Question 8 indicates that the proffered position is a new position.