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U.S. Citizenship  
and Immigration  
Services

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File:

[Redacted]  
SRC-04-251-51474

Office: TEXAS SERVICE CENTER Date: JAN 04 2007

In re:

Petitioner:  
Beneficiary:



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, Texas 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 an auto body repair shop that seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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 May 16, 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.<sup>1</sup>

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).

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 (“DOL”). *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.

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<sup>1</sup> 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 30, 2001. The proffered wage as stated on Form ETA 750 is \$628 per week based on 40 hours per week, which is equivalent to \$32,656 per year. The labor certification was approved on June 23, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on September 27, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: August 9, 1999; gross annual income: \$86,564.00; net annual income: \$56,453; current number of employees: 2.

On April 11, 2005, the director issued Notice of Intent to Deny ("NOID") requesting additional documentation regarding the petitioner's ability to pay for the years 2001, 2002 and 2003. Counsel responded, but the director determined that the response was insufficient, and denied the petition on May 16, 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. Regarding the petitioner's ability to pay, first, 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. On Form ETA 750B, signed by the beneficiary on November 10, 2002, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not submit any evidence that it employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wages paid to the beneficiary.

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 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.

We note that the petitioner listed on the Form ETA 750 is [REDACTED] with an address of [REDACTED]. The petitioner listed on the I-140 Petition is: [REDACTED] d/b/a [REDACTED] with an address of [REDACTED]. The petitioner has submitted tax returns for [REDACTED]. While the tax returns do list the same address and tax identification number as listed on the I-140 for the petitioner, the petitioner has not forwarded information to demonstrate that [REDACTED] and [REDACTED] operate on a "d/b/a" basis, or that the two businesses have a successor-in-interest relationship. A corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Alternatively, the petitioner would need to show that the new entity is a successor in interest to the original business, which filed the labor certification. The petitioner must show that it has assumed all the rights,

duties, and obligations of that business. Present counsel has provided no evidence. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

We will examine the tax returns submitted with the caveat that the petitioner has not demonstrated the relationship between [REDACTED] and [REDACTED]. 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 of the tax returns demonstrates the following concerning the petitioner's ability to pay the proffered wage of \$32,656 per year:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$740
2002	-\$933
2001	-\$4,887

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage, even if the wages paid to the beneficiary were added to the petitioner's net income.

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.<sup>2</sup> 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, 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	\$1,387
2002	\$607
2001	\$363

The petitioner also lacked sufficient net current assets to pay the beneficiary the proffered wage.

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<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

On appeal, the petitioner resubmitted its 2001, 2002, and 2003 federal tax returns.<sup>3</sup> Counsel contends that the petitioner's tax returns exhibit that its total net income exceeds the proffered wage and demonstrates its ability to pay the proffered wage: in 2003 the petitioner's total income was: \$56,453; in 2002: \$73,361; and in 2001: \$74,980. As noted above, 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 total income, or the "total net income," which counsel references. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Accordingly, the petitioner's net income has been considered above.

Further, counsel contends that the petitioner's business has growth potential because auto repair is an essential business in the today's economy. While we do not contest the necessity of an auto repair business, despite the industry's growth potential, we note that the petitioner's business itself has experienced declining gross receipts from 2001 to 2003, rather than the opposite.

Counsel also contends that the beneficiary's employment will generate additional income. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner cannot project its ability to pay the proffered wage based on the beneficiary's unproven potential to generate income.

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the proposition that "a petitioner may prove its ability to pay wages offered by proving it has a reasonable expectation of increased business and profits." Further, counsel notes that the petitioner in *Sonogawa* demonstrated her reasonable expectation through her outstanding reputation exhibited partially by newspaper and magazine articles. Here, the petitioner has provided no evidence to lend credibility to a reasonable expectation of increased profits. For purposes of meeting the burden of proof in these proceedings, it is insufficient to go on record without supporting documentary evidence. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). An analysis under *Matter of Sonogawa*, or viewing the petitioner's business based on the totality of the circumstances, would not lead us to conclude that the petitioner can pay the beneficiary the proffered wage where the petitioner's net income is consistently negative, its net current assets are extremely low, and the petitioner's gross receipts have consistently declined over a three year time period.

Counsel additionally cites to *In Re: X*, EAC-92-096-51031 (AAU Dec. 19, 1992), and contends that the "AAU held that despite having no net profit in which the priority date was set, petitioner established a reasonable expectation of increase in profits sufficient to pay the wage offered by showing it had established itself in the marketplace with a product that received strong reviews." First, counsel does not provide a

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<sup>3</sup> The petitioner additionally resubmitted a letter on the beneficiary's behalf to document the beneficiary's prior work experience, and provides that "Mr. [REDACTED] does have the necessary three (3) years work experience as stipulated in the USDOL Form ETA 750 . . . Mr. [REDACTED] has the total four (4) years and eight (8) months." First, we note that the ETA 750 requires four years of experience, not three as the petitioner indicates. Second, the petition was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage, not as a result of its failure to document the beneficiary's prior work experience. The denial generally cited the regulation that the petitioner is required to document two years of prior experience for the skilled worker category. The letter to document the beneficiary's experience does demonstrate that the beneficiary had over four years of experience in the required position, so that only the petitioner's ability to pay is in question.

published citation for *In Re: X*. 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). Second, we note the same point as above that the petitioner has provided no documentation to demonstrate a “reasonable expectation” of an increase in profits, but merely surmises that the auto repair business is necessary, and the beneficiary’s employment will generate additional revenue. Mere statements are insufficient. See *Matter of Soffici*, 22 I&N Dec. at 165.

Next, counsel contends that the petitioner’s depreciation should be considered and cites to *In the Matter of [name not provided]*, WAC-98-071-53033 (AAU June 30, 1999). We note again that the matter cited is not binding precedent. Further, 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, which even if accepted, would not demonstrate the petitioner’s ability to pay the proffered wage.

Counsel additionally quotes the regulation 8 C.F.R. § 204.5(g)(2) that the petitioner may provide evidence of its ability to pay in the form of federal tax returns, audited financial statements, or annual reports. The petitioner has submitted its federal tax returns, which based on the regulation CIS will accept to determine the petitioner’s ability to pay. Submission of the requested document alone, however, is insufficient to document the petitioner’s ability to pay. As noted above, both the petitioner’s net income and net current assets are insufficient to demonstrate the petitioner’s ability to pay from the time of the priority date until the beneficiary obtains permanent residence. The petitioner did not submit any alternate, or additional documentation to demonstrate its ability to pay the proffered wage.

Counsel then examines the tax returns and contends that by adding a number of items together, the petitioner can demonstrate its ability to pay the proffered wage. For 2003, he adds the officer's compensation in the amount of \$24,000, to depreciation \$1,555, and to "other deductions" \$16,915, to reach a total of \$42,470 in 2003, and conclude that this demonstrates the petitioner's ability to pay the proffered wage. For 2002, counsel adds officer's compensation \$27,775, to depreciation \$2,177, to other deductions \$24,719, to reach \$54,671. And for 2001, counsel adds officer's compensation \$31,700, to depreciation \$3,048, to other deductions \$19,331, to reach \$54,790.

We have addressed depreciation. Regarding officer's compensation, the sole shareholder of a corporation has the authority to allocate the corporation's expenses for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The petitioner had not provided any documentation to show that the petitioner's president is the sole shareholder, or the percentage of company stock he owns. The petitioner's tax return does not name any officers on IRS Form 1120 Schedule E (Compensation of Officers). The petitioner did not submit any W-2 Forms to verify any compensation. Further, the petitioner did not provide any statement related to this issue. Therefore, adding depreciation to officer compensation to other deductions is insufficient to document the petitioner's ability to pay the proffered wage. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.