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U.S. Citizenship  
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File: [REDACTED]  
SRC-05-064-52375

Office: TEXAS SERVICE CENTER Date: JAN 23 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 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 operates a business, which sells women’s fashions, and seeks to employ the beneficiary permanently in the United States as manager, retail store. 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 27, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification 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.<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. 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.

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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 May 30, 2001. The proffered wage as stated on Form ETA 750 for the position of a manager, retail store is \$39,624.00 per year. The labor certification was approved on August 10, 2004, and the petitioner filed the I-140 Petition on the beneficiary's behalf on December 29, 2004. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: December 6, 1994; gross annual income: see attached; net annual income: see attached; and current number of employees: 4.

On March 2, 2005, the director issued a Request for Evidence ("RFE"). The director requested that the petitioner submit: evidence related to the petitioner's ability to pay the proffered wage in the form of the annual reports or audited financial statements for 2001, 2002, and 2003; copies of all W-3 statements for the petitioner's employees; a copy of the petitioner's business license; and the beneficiary's 2001, 2002, 2003, and 2004 federal tax returns along with corresponding W-2 Forms.

On May 23, 2005, the petitioner responded and resubmitted its 2001, 2002, and 2003 federal tax returns as the petitioner did not have an audited financial statement or annual report; documentation from Florida Department of State regarding the petitioner's owner; and counsel provided that "the Beneficiary has never filed federal income tax returns in the United States, and the Beneficiary is not currently working for the Petitioner and therefore does not have W-2s from the Petitioner." Following review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition on May 27, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised 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. On Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary listed that he has been employed with the petitioner since October 1999 (to the present, the date of signing April 25, 2001). The petitioner has not submitted any W-2 Forms to document wages paid. Further, counsel has stated that the beneficiary is not currently working for the petitioner and "therefore does not have W-2s from the petitioner."<sup>2,3</sup> Since the petitioner has not provided any documentation regarding wages paid to the beneficiary, the petitioner, therefore, cannot establish its ability to pay the beneficiary based on prior wage payment to 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 that period, CIS will next examine the net income figure reflected on the petitioner's

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<sup>2</sup> We note that the beneficiary's Form G-325A filed with his I-485 Adjustment of Status application provides that he has been employed with the petitioner from October 1999 to "present," and the beneficiary signed the document on November 8, 2004. It would appear that the beneficiary was employed, but no W-2 statements were submitted.

<sup>3</sup> The petitioner did submit W-3 wages paid to all employees for the year 2004, which exhibited wages paid in the amount of \$40,600.00, including \$26,200 to the company's president, and three other employees in the amounts of \$1,500, \$12,300, and \$600, but no wages paid to the beneficiary.

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.

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The petitioner's tax returns reflect that it is structured as 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. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	\$8,625 <sup>4</sup>
2002	\$2,186
2001	\$1,481

From the above net income, the petitioner did not have sufficient net income in any year to demonstrate its ability to pay.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The net current were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2003	\$7,816

<sup>4</sup> We note that the petitioner's 2004 tax return would not have been available at the time of filing the I-140 Petition, but should have been available at the time of filing the appeal.

<sup>5</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.

2002	\$15,711
2001	\$4,520

As demonstrated above, the petitioner did not have sufficient net current assets to pay the proffered wage in any year either.

On appeal, counsel submitted a letter on the petitioner's behalf from an accounting firm regarding the petitioner's ability to pay, as well as bank statements for the petitioner. The letter, signed generally on behalf of a certified public accounting and consulting firm, provided that the petitioner "has cash flow which was taken out by the officer of the company to avoid paying double tax." The letter continues, "in 2003, the shareholder took a salary of \$32,250 to reduce the income of the corporation. If the salary of the officer was not taken, then the income would have been \$40,875, plus add back . . . the depreciation expense of \$5,003, then the net cash flow would have been \$45,878." Similarly, the accounting firm provides that in 2002, the shareholder's salary was \$33,750, and depreciation was \$7,004, which would result in \$42,940, and in 2001, the shareholder's salary was \$28,500, and depreciation \$7004, resulting in \$36,985.

The sole shareholder of a corporation has the authority to allocate corporation 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 officer compensation may be considered as the petitioner's additional financial resources, in addition to its figures for ordinary income.

The documentation presented here, however, does not indicate who holds what percentage of company stock, and what services that individual performs. One individual is referenced as the company agent, and officer on corporate documents, and has signed the tax returns as president. No documentation was submitted to demonstrate that this is the sole shareholder. Even if we accept that this is the sole shareholder, if all officer compensation were waived, the tax returns would not reflect the petitioner's ability to pay the proffered wage on this basis alone. According to the petitioner's 2003 federal tax return, the first page of the tax return reflects \$32,250 in officer compensation; page 1 of the 2002 federal tax return does not reflect any officer compensation, and the same is true for 2001. The W-3 statement submitted for the petitioner's president for 2004 reflects \$26,200 in wages paid to the president. All of the foregoing amounts would be deficient to show the petitioner's ability to pay the proffered wage. Further, the president has not provided any statement that he would be willing to waive future compensation in order to pay the beneficiary's wage.

Further, regarding depreciation, as a tax concept 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>. 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 next contends that the petitioner's bank statements exhibit the company's ability to pay. 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, if we were to examine the bank statements submitted, nothing contained therein leads us to conclude that the petitioner can demonstrate its ability to pay the proffered wage. The petitioner submitted bank statements for various time periods, with several gaps in the months submitted: April 2001 to July 2001; November 2001; March and April 2002; July 2002; September 2002; April and May 2003; August 2003; October 2003; April 2004; June 2004; July 2004; January 2005; February 2005; and March 2005.

The statements reflect a high balance of \$27,852 as of April 30, 2004, and a low balance of \$6,519.64 as of February 28, 2005. Given the significant gaps in the statement months provided, we would not conclude that the documentation exhibits the petitioner's ability to pay from the priority date until the beneficiary obtains permanent residence. The petitioner did not provide any explanation for the selected months submitted, or why statements for the entire time period were not submitted. Additionally, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Schedule L and included in net current assets analysis above.

Based on the foregoing the petitioner is unable to demonstrate its continued ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. 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.