



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6

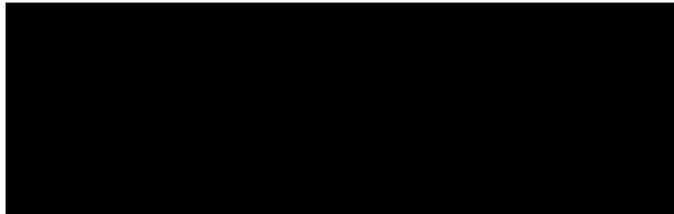


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 30 2008
EAC-04-067-51476
EAC-03-156-51308

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting 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.¹ The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a Specialty Cook, Indian Food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

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.

As set forth in the director's October 10, 2006 denial, the single issue in this case is whether or not the petitioner has the 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 nature, for which qualified workers are not available in the United States.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

¹ The petitioner has filed two preference visa petitions on behalf of the same beneficiary. One was filed on January 9, 2004 (EAC-04-967-51476) and one was filed on April 28, 2003 (EAC-03-156-51308). Both petitions are based on the same Form ETA 750, Application for Alien Employment Certification. Both petitions were denied by the director of October 10, 2006. Counsel has not specified which denial is being appealed. All relevant evidence in the record has been reviewed and is addressed in this decision.

qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$18.90 per hour (\$39,312.00 per year).² The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³ Counsel has submitted a brief in support of this appeal. Relevant evidence in the record includes petitioner's corporate tax returns for 1998, 1999, 2000, 2001 and 2002; W-2 Wage and Tax Statements issued to the beneficiary by the petitioner for 1998, 1999, 2000, 2001 and 2002; W-2 Wage and Tax Statements issued by the petitioner to other employees in 2002; and the petitioner's W-3 Transmittal of Wage and Tax Statements for 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 1998 and 1999, and as an S in 2000, 2001 and 2002. On the petition, the petitioner claimed to have been established in 1993 and to currently employ eight workers. According to the most recent tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

² The rate of pay is alternatively listed on the Form ETA 750 \$720.00 per week. However, the hourly rate (\$18.90 per hour) multiplied by 40 hours (the total hours per week listed on the ETA Form 750) equates to \$756.00 per week. AAO will use the higher rate of pay which, as noted above, equates to \$39,312.00 per year. However, it is noted that even if the lower rate were used, the petitioner would still be unable to establish its ability to pay the proffered wage, and thus our decision would be the same.

³ 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).

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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. As noted above, the petitioner submitted copies of W-2 Wage and Tax Statements issued to the beneficiary for 1998, 1999, 2000, 2001 and 2002. The amounts that the petitioner paid the beneficiary during the years 1998 through 2001 are listed in the table below.

<u>Year</u>	<u>Wages Paid</u>
1998	\$9,500.00
1999	\$15,300.00
2000	\$15,600.00
2001	\$16,200.00
2002	\$16,200.00

The W-2 statement exhibits partial payment of the proffered wage to the beneficiary for the years 1998 through 2002. Since the proffered wage is \$39,312.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, as listed in the table below.

<u>Year</u>	<u>Difference Between Wages Paid and Proffered Wage</u>
1998	\$29,812.00
1999	\$24,012.00
2000	\$23,712.00
2001	\$23,112.00
2002	\$23,112.00

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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. [USCIS] 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 Chang* at 537.

As noted above, the petitioner was structured as a C corporation in 1998 and 1999. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 1998 and 1999, as shown in the table below.

- In 1998, the Form 1120 stated net income of \$37,734.00.⁴
- In 1999, the Form 1120 stated net income of -\$43,804.00.

The petitioner was structured as an S corporation in 2000, 2001 and 2002. The petitioner's tax returns demonstrate its net income for 2000, 2001 and 2002 as shown in the table below:

- In 2000, the Form 1120S stated net income of \$15,949.00.⁵

⁴ This is the amount shown on the income tax return submitted by the petitioner in support of the petition filed on January 9, 2004 (EAC-04-067-51476). The 1998 tax return submitted in support of the petition filed on April 28, 2003 (EAC-03-156-51308) listed the petitioner's net income as \$39,054.00. On appeal, counsel indicated that the petitioner had received "tax audit documents" which "resulted in a recalculation of petitioner's tax returns." Counsel stated that copies of the tax audit documents were being submitted with the appeal, but no such documents are found in the record. Because the petitioner has failed to adequately explain the discrepancy between the two tax returns, we will use the lower of the two net income figures.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found line 23 of Schedule K (for tax years 1997 through 2003). See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 23, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income credits, deductions or other adjustments shown on its Schedule K for 2000, the petitioner's net income is found on Schedule K of its tax return for 2000.

- In 2001, the Form 1120S stated net income of \$10,101.00.⁶
- In 2002, the Form 1120S stated net income of \$5,642.00.⁷

Therefore, the petitioner had the ability to pay the difference between the wages paid to the beneficiary and the proffered wage in 1998. The petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1999, 2000, 2001 or 2002.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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 petitioner's tax returns demonstrate its end-of-year net current assets for 1999, 2000, 2001 and 2002 as shown in the table below.

- In 1999, the Form 1120 stated net current assets of \$8,943.00.⁹
- In 2000, the Form 1120S stated net current assets of \$8,868.00.
- In 2001, the Form 1120S stated net current assets of \$10,553.00.
- In 2002, the Form 1120S stated net current assets of \$9,167.00

The petitioner did not have sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage in 1999, 2000, 2001 or 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

⁶ Ordinary income as listed on line 21 of the petitioner's IRS Form 1120S. See footnote 5 above.

⁷ Ordinary income as listed on line 21 of the petitioner's IRS Form 1120S. See footnote 5 above.

⁸ According 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.

⁹ Schedule L was not included with the copy of the 1999 tax return submitted by the petitioner. This amount was calculated using the "Beginning of tax year" figures from Schedule L of the petitioner's 2000 tax return.

As noted above, the record contains copies of the petitioner's W-3 Transmittal of Wage and Tax Statements for 2002 and copies of W-2 Wage and Tax Statements issued by the petitioner to other employees in 2002. Although these documents show that the petitioner paid wages to individuals other than the beneficiary, they do not establish that the petitioner had the ability to pay the proffered wage. The record also contains copies of the beneficiary's individual tax returns for the years 1998 to 2002. Although these documents reflect the amounts paid to the beneficiary by the petitioner as shown on the W-2 Wage and Tax Statements, they do not establish that the petitioner had the ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.