

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

FILE:

SRC 06 225 50765

Office: TEXAS SERVICE CENTER

Date: JAN 22 2009

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.

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a chef.<sup>1</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 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 January 30, 2007 denial, the primary 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [U.S. Citizenship and Immigration Services (USCIS)].

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 U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the

---

<sup>1</sup> The director in her denial of the petition erroneously described the proffered position as maintenance, household repairer.

beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$25 an hour or \$52,000 per year. The Form ETA 750 states that the position requires three years and ten months of work 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<sup>2</sup>. On appeal, counsel submits a brief as well as a letter dated March 22, 2007 written by [REDACTED], Tax, Accounting & Management Consulting Services, Detroit, Michigan.

In his letter [REDACTED] states that he has reviewed the petitioner's corporate income tax returns for the petitioner for tax years 2002 to 2004. [REDACTED] also states that in the period examined the petitioner had a cumulative loss of \$10,633, including a \$5,118 profit in 2003. [REDACTED] stated that if depreciation in those tax years were added back, the petitioner would have a \$13,431 profit. [REDACTED] also states that since the petitioner is a C corporation, it is very doubtful that the petitioner will ever show a profit since that would trigger the double taxation issues, and that any profits would be wiped out by additional salaries to the owner or members of the family. Mr. [REDACTED] concludes his letter by stating that in his opinion the petitioner is a viable business and despite its minimal losses, it will be able to continue operations.

The record also contains copies of the petitioner Sales Tax license issued by the state of Michigan Department of Treasury; the petitioner's undated Articles of Corporation; the petitioner's menu, a copy of the petitioner's statement from its Insurance company dated May 2006; a bank statement from BANK1ONE for January 31, 2006 that indicates a ending balance of \$7,367.22, and a copy of the petitioner's business insurance policy from the American Economy Insurance Company, dated October 17, 2005. The record also contains copies of the petitioner's Federal tax returns for tax year 2000, apparently submitted with a previously submitted I-140 petition. In response to the director's RFE dated August 23 2006, counsel submitted the petitioner's Forms 1120 for tax years 2001, 2002, 2003, and 2004. Counsel also submitted copies of the various pay stubs for tax years 1992 to 2000, as well as the beneficiary's W-2 Wage and Tax Statement for tax years 1992, 1997, 2000, and 2001. These documents indicated the petitioner paid the beneficiary the following wages in the years

---

<sup>2</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).

relevant to this proceeding: \$17,450 in tax year 2001.<sup>3</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-290B form, counsel states that the USCIS did not use the correct accounting basis when it examined the petitioner's ability to pay the proffered wage. In her brief, counsel states that the regulation at 8 C.F.R. § 204.5(g)(2) allows employers with less than 100 employees to submit as statement form a financial officer indicating the petitioner's ability to pay the proffered wage. Counsel then refers to [REDACTED] letter and his reference to the use of depreciation to change the petitioner's financial position from a negative to positive. Counsel states that a review of existing statutes, regulations and case law indicates that there is no precedent that would prohibit the calculation of the petitioner's financial resources to include depreciation. Counsel concludes by stating that the petitioner has provided evidence from financial officer that demonstrate the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on May 1, 1999, to have gross annual income of \$369,000, and to currently employ six workers.<sup>4</sup> On the Form ETA 750B, signed by the beneficiary on July 25, 2005, the beneficiary claimed to have worked for the petitioner since March 1992.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

---

<sup>3</sup> Since the priority date for the visa petition is April 16, 2001, the information with regard to wages paid to the beneficiary prior to 2001 is not dispositive in this proceeding. The relevant years with regard to this proceeding are 2001 priority year and tax years 2002 to 2005.

<sup>4</sup> The record contains conflicting information with regard to the establishment of the petitioner. An earlier I-140 petition submitted for the beneficiary that was subsequently considered abandoned because the petitioner did not respond to a request for evidence indicates the petitioner was established in 1978. The petitioner's tax returns indicate an incorporation date of July 25, 1983. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The petitioner needs to clarify its date of establishment.

On appeal, counsel misstates part of the regulation at 8 C.F.R. § 204.5(g)(2) with regard to when a petitioner can submit a letter from a financial officer. Counsel states that if an employer has less than 100 hundred workers, it may submit a statement from a financial officer indicating the petitioner's ability to pay the proffered wage. However, the regulation in question states that an employer with *more* than 100 workers may submit a statement from a financial officer with regard to the petitioner's ability to pay the proffered wage. The petitioner claims to have six employees. Therefore it must submit one of the three kinds of evidence to the record indicated at 8 C.F.R. 204.5(g)(2) to establish its ability to pay the proffered wage, namely federal tax returns, audited financial statements or annual reports. The AAO further notes that [REDACTED] does not appear to be a financial officer of the petitioner.

The record contains one of the petitioner's BANK1ONE checking account statement representing funds that the petitioner had in one month for the time period ending January 31, 2006. However, the petitioner's reliance on one balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage from 2001 to the present. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Further on appeal, counsel states that the petitioner can add back its depreciation deductions to its net income in examining the petitioner's ability to pay the proffered wage. Counsel states that no precedent case law exists that would contradict the use of such depreciation expenses. However, as the AAO will illustrate further in this proceeding, the AAO does not consider depreciation when it evaluates the petitioner's net income and significant case law does exist that clearly disallows the use of depreciation to calculate a petitioner's net income.

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. In the instant case, the petitioner has established that it employed and paid the beneficiary prior to the 2001 priority date and paid the beneficiary \$17,450 during the priority year. The petitioner did not submit any additional W-2 Forms for the tax years material to this proceeding, namely tax years 2002, 2003, 2004, and 2005. The petitioner therefore cannot establish that it paid the beneficiary the proffered wage as of the 2001 priority date to the present time. Thus the petitioner has to establish its ability to pay the difference between the

beneficiary's actual wages and the proffered wage of \$52,000 during tax year 2001, and has to establish its ability to pay the entire proffered wage in tax years 2002 to 2005.<sup>5</sup>

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, contrary to counsel's assertion, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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.

---

<sup>5</sup> It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated October 27, 2006. At this time, the petitioner's 2005 income tax return would have been available. Although the director requested the petitioner's 2005 tax return in his RFE, the petitioner did not provide it and has not provided any explanation for its absence in the record. The petition can be denied based solely on this omission. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return for 2005. The tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). For purposes of this proceeding, the AAO will examine whether the petitioner had sufficient net income or net current assets in tax years 2001 to 2004 to either pay the difference between the beneficiary's actual 2001 wages and the proffered wage, or pay the entire wage in tax years 2002 to 2004.

Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719, F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,000 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>6</sup> of -\$12,727.
- In 2002, the Form 1120 stated a net income of -\$5,627.
- In 2003, the Form 1120 stated a net income of \$5,118.
- In 2004, the Form 1120 stated a net income of -\$6,529.

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net income to pay difference between the beneficiary's actual wages in 2001 and the proffered wage, or to pay the entire proffered wage in tax years 2002 to 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</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 petitioner's net current assets during 2001 were \$7,416.
- The petitioner's net current assets during 2002 were \$7,780.

---

<sup>6</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>7</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.

- The petitioner's net current assets during 2003 were \$10,006.
- The petitioner's net current assets during 2004 were \$6,485.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's 2001 actual wages and the proffered wage. Further, in tax years 2002 to 2004, the petitioner did not have sufficient net current assets to pay the entire proffered wage of \$52,000.

Accordingly, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the petitioner's tax returns that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. 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.