U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

B6

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 09 2007

EAC-03-176-51721

IN RE: Petitioner:
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:

[redacted]

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 preference visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). In connection with the beneficiary's Form I-130, Petition for Alien Relative, the director served the petitioner with notice of intent to deny the petition (NOID). The director found that the Form I-130 was filed on September 26, 1995 by [redacted] for the beneficiary and the petition was denied on December 27, 1996 because the marriage certificate submitted for [redacted] and the beneficiary was verified as being fraudulent. 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 December 12, 2005 decision, the single issue in this case is whether or not the beneficiary entered into a fraudulent marriage for the purpose of obtaining United States immigration benefits and to evade United States immigration law.

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]. On appeal counsel submits a brief and resubmits the affidavit of the beneficiary previously submitted in response to the NOID. The relevant evidence in the record includes an affidavit of the beneficiary. The record does not contain any other evidence relevant to the beneficiary's previous marriage to [redacted]

On appeal, counsel asserts that section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), does not apply to the beneficiary because he did not have the intent to defraud and knowledge of the fraud since he did not sign any of the prepared forms for the I-130 petition and has never met or been married to [redacted] and he was unaware that the documents filed on his behalf were based on a claim of marriage.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states in pertinent part:

> No immigrant petition shall be approved if (1) the beneficiary has been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a United States citizen or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading immigration laws.

The regulation at 8 C.F.R. § 204.2(c)(ii) states:

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[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).

> *Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for an immigrant visa classification filed on behalf of an alien for whom there is substantial and probative evidence of such an attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The denial of the instant I-140 petition is in connection with the Form I-130 and concurrent Form I-485 filed on behalf of the beneficiary. The record shows that a United States citizen named [redacted] filed a Form I-130 on behalf of the beneficiary as a United States citizen's spouse with Immigration and Naturalization Service (now CIS) New York District Office on September 26, 1995. The I-130 petition includes a Certificate of Marriage for [redacted] and the beneficiary issued by [redacted], City Clerk of the City of New York in 1994. The district director clearly indicated in his denial dated December 27, 1996 that the marriage certificate submitted in connection with the beneficiary's marriage-based petition was fraudulent and that the petition was based on a fraudulent marriage.

Counsel argues on appeal that the beneficiary has never knowingly submitted fraudulent documents in support of an I-130/I-485 application on his behalf in connection with [redacted] that he was never aware that the person representing him submitted an I-130/I-485 application based upon a marriage to a United States citizen; that he did not sign any immigration documents with the knowledge that he had entered into a fraudulent marriage, and that he did not know that the actions taken by the person representing him were for the purpose of evading United States immigration laws. However, counsel did not submit any documents or evidence to support these arguments. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Further, the AAO finds counsel's argument inconsistent with the facts.

The record shows that on the same day [redacted] filed the Form I-130 with the CIS New York District Office, the beneficiary also concurrently filed his Form I-485 adjustment of status application with the same CIS office. The application filed by the beneficiary included Form I-485, Form G-325 and fingerprint cards. All the three items contain the beneficiary's signatures. Counsel claims that the signatures were forged. However, counsel does not submit an expert opinion or any other documents to prove that the signatures on the Forms I-485 and G-325A, and the fingerprint cards were forged.

Moreover, the record indicates that the beneficiary filed his employment authorization document (EAD) application with the CIS New York District Office based on the concurrently filed application for adjustment of status with the family-based immigrant petition. He was issued the EAD and based on the EAD, the beneficiary also applied for his social security number.

In response to the director's NOID, counsel submitted an affidavit of the beneficiary dated July 15, 2004. In this affidavit, the beneficiary asserted that:

> In 1995 I was approached by an individual in Danbury, Connecticut named [redacted] who told me that she could make me legal;
>
> I was told by the individual assisting me that she had the authority to sign documents for me and would assist me in obtaining legal status within the United states;
>
> … …
>
> In 1993 I met a woman named [redacted] on in Danbury, CT. She informed me that she could legally assist me in obtaining legal immigrant status within the United States. I paid her $100.00 and gave her my contact information. I later received a notice in the mail to go and pick up my employment card from the Immigration Office in Hartford. I then applied for a Social Security Number through the mail and was sent my number. I had no knowledge that the documents filed on my behalf were fraudulent. I have not had any contact with this woman since and could be unable to locate her again. I never signed any documents prepared by her, but she told me that she was authorized to obtain legal status for me. I had no idea that she was involved in a fraudulent scheme.

Although the beneficiary contended that he never retained an attorney for the purpose of filing documents with CIS in 1995, never signed a representative agreement with an attorney for representation with CIS in 1995, and never signed any immigration documents, it is clear that the beneficiary paid [redacted] $100 to assist him in obtaining permanent residence.

Counsel claimed that the beneficiary did not know what [redacted] had done on his behalf because he was not familiar with the American immigration laws and his English was poor that time. That assertion is not persuasive. The record shows that the beneficiary entered the United States on April 25, 1989 without inspection. The record shows that the beneficiary filed Form I-589, Request for Asylum in the United States on February 6, 1995. It is not persuasive that the beneficiary did not know what [redacted] would do for him because he did not understand English very well and was not familiar with immigration laws after he stayed for 6 years in the United States and filed an asylum application.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage to [redacted] was entered into for the purpose of evading immigration laws. The beneficiary, pursuant to his affidavit, states that he has never met [redacted] and has never been married. The beneficiary received an immigration benefit, an EAD, which temporarily enabled him to live and work in the United States. The marriage to [redacted] was not authentic, and the beneficiary received an immigration benefit from this fake marriage. The beneficiary circumvented immigration laws that would have rendered him subject to removal proceedings. Pursuant to a notice dated December 27, 1996, CIS notified the beneficiary that his application for adjustment of status as a permanent resident was denied and that his employment authorization was terminated. The beneficiary creates a tale about a lady named [redacted] whose name does not appear on any of the paperwork pertaining to the Form I-130. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a US citizen by reason of a marriage determined by CIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent

residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the 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 December 27, 1999. The proffered wage as stated on the Form ETA 750 is $11.79 per hour ($24,523.20 per year). The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner claimed to have been established in 1993, to have a gross annual income of $2,500,000, to have a net annual income of $75,000, and to currently employ 70 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed on December 16, 1999, and the Form G-325A signed on December 3, 2002, the beneficiary claimed to have worked for the petitioner since April 1999.

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, Citizenship and Immigration Services (CIS) 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 submitted the beneficiary's W-2 forms for 2000 and 2001. The record does not

contain any other documentary evidence to show that the petitioner paid the beneficiary in the relevant years. The W-2 forms for 2000 and 2001 indicate that the petitioner paid the beneficiary $19,883.00 in 2000 and $1,972.50 in 2001. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 1999 onwards. The petitioner is still obligated to demonstrate that it could pay the full proffered wage in 1999 and 2002 through the present, and that it could pay the difference of $4,640.20 in 2000 and $22,550.70 in 2001 between wages actually paid to the beneficiary and the proffered wage respectively.

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 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 its gross income and gross profit is misplaced. Showing that the petitioner's total income 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 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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. [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 Chang* at 537.

The petitioner submitted Form 1120S U.S. Income Tax Return for an S Corporation filed by [redacted] for 1999 through 2002 as evidence of the petitioner's ability to pay the proffered wage.[2] The tax returns for 1999 through 2002 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date:

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[2] It is noted that the record of proceeding shows that [redacted] has a different address from the petitioner. However, the AAO will review [redacted] tax returns as the petitioner's since the evidence shows that both [redacted] and the petitioner is owned by [redacted] and identifies themselves with the same federal employer identification number.

- In 1999, the Form 1120S stated a net income[3] of $8,376.
- In 2000, the Form 1120S stated a net income of $3,073.
- In 2001, the Form 1120S stated a net income of $49,806.
- In 2002, the Form 1120S stated a net income of $6,180.

Therefore, in 1999 the petitioner did not have sufficient net income to pay the proffered wage of $24,523.20 that year; in 2000, the petitioner's net income of $3,073 was not sufficient to pay the difference of $4,640.20 between wages actually paid to the beneficiary and the proffered wage; in 2001, the petitioner's net income of $49,806 was sufficient to pay the difference of $22,550.50 between wages actually paid to the beneficiary and the proffered wage; and in 2002, the petitioner had insufficient net income to pay the proffered wage.

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, CIS 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, CIS 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.[4] 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 1999 were $(52,994).
- The petitioner's net current assets during 2000 were $(39,729).
  The petitioner's net current assets during 2002 were $(76,890).

Therefore, for the years 1999, 2000 and 2002, the petitioner had insufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage.

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[3] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." However, where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

[4] 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.

Therefore, 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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 1999, 2000 and 2002 through an examination of wages paid to the beneficiary, its net income or its net current assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.