

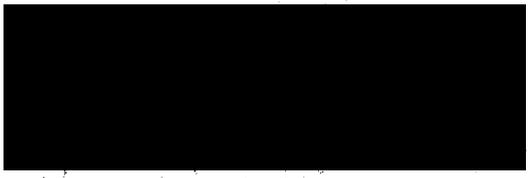
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U.S. Department of Homeland Security
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Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**



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OCT - 4 2004

FILE: [Redacted] **Office:** NEBRASKA SERVICE CENTER **Date:**

IN RE: **Petitioner:** [Redacted]
Beneficiary: [Redacted]

PETITION: 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, Director
Administrative Appeals Office

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and had not established that the beneficiary had the required experience in the offered position. The director therefore denied the petition.

On appeal, counsel states that the petitioner is a corporation, the shares of which are held by a single owner, and that the personal financial resources of the owner should be considered when evaluating the petitioner's ability to pay the proffered wage. Counsel also states that affidavits submitted on appeal provide sufficient corroboration for the beneficiary's claimed prior work experience.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour for 40 hours a week, and \$15.00 per hour for 20 hours of overtime per week, which amounts to \$36,400.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 2000.

On the petition, the petitioner claimed to have been established on March 22, 2000, to have a gross annual income of \$20,000.00, and to currently have over ten employees.

In support of the petition, the petitioner submitted a letter from the petitioner's president dated January 23, 2003, confirming the job offer to the beneficiary; a copy of the articles of incorporation of the petitioner dated

March 22, 2000; a copy of the petitioner's alcoholic beverage license dated January 9, 2001 issued by Ada County, Idaho; copies of the petitioner's U.S. corporation short-form income tax returns, Forms 1120-A, for 2000 and 2001; a copy of the petitioner's Form 41 Idaho Corporation Income Tax Return for 2000; a copy of a letter dated December 9, 2002 from a former employer of the beneficiary in Fuzhou City, China, certifying the beneficiary's employment as a cook from July 1996 to January 1998; a copy of a letter dated January 20, 2003 from a former employer of the beneficiary in Pulaski, Tennessee, certifying the beneficiary's employment as a specialty cook from December 1998 to March 2000; and a letter dated January 23, 2003 from the petitioner certifying the beneficiary's experience as a specialty cook from April 2000 to April 2002.

The director found the evidence insufficient to demonstrate the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and insufficient to establish that the beneficiary had the experience required on the ETA 750. In a request for evidence (RFE) dated March 11, 2003, the director requested evidence on each of those issues. The director specifically requested copies of the beneficiary's Form W-2 wage and tax statements for the years 1998, 1999, 2000, 2001 and 2002, corresponding to the years in which the beneficiary claimed to have worked in the United States.

In response to the RFE, counsel submitted a letter dated May 30, 2003 and the following evidence: a copy of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2002; a copy of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return for China Grand Buffet of Boise, Idaho, for 2002; and a letter from a certified public accountant dated May 28, 2003 explaining the depreciation expenses on the petitioner's tax returns and on those of China Grand Buffet

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and that the evidence did not establish that the beneficiary had two years and three months of experience in the offered position as of the priority date, as required by the ETA 750. The director therefore denied the petition.

On appeal, counsel submits a brief and the following additional evidence: an unaudited financial statement for the petitioner dated August 31, 2003; an unaudited financial statement dated July 31, 2003 for China Grand Buffet, Inc.; an unaudited financial statement dated July 31, 2003 for No.1 China Buffet, Inc.; an unaudited financial statement dated August 31, 2003 for the petitioner's owner; a letter from a certified public accountant dated October 1, 2003; partial copies of statements from U.S. Bank, St. Paul, Minnesota for an account of the petitioner for the months of March 2001 through June 2001; copies of the first page of statements from U.S. Bank for China Grand Buffet for May 2001 and for July 2001 through December 2001; a copy of an undated share statement certificate for the petitioner; a copy of an undated share statement certificate for China Grand Buffet, Inc.; an affidavit dated September 22, 2003 from a former co-worker of the beneficiary attesting to the beneficiary's work in the No. 1 Chinese Restaurant from 1998 to 2000; an affidavit dated September 22, 2003 from another former co-worker of the beneficiary attesting to the beneficiary's work as a cook in the No. 1 Chinese Restaurant from December 1998 to March 2000; and an affidavit dated September 22, 2003 from a third former co-worker of the beneficiary attesting to the beneficiary's experience as a cook with the petitioner from April 2000 to April 2002.

Counsel states on appeal that the personal financial resources of the petitioner's owner should be considered in evaluating the petitioner's ability to pay the proffered wage, and that the reason for absence of W-2 forms to corroborate the beneficiary's work experience in the United States is that the beneficiary was paid in cash for that work. Counsel states that the affidavits submitted on appeal provide sufficient corroboration of the beneficiary's claimed work experience.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary claims to have worked for the petitioner, the evidence fails to show the amounts paid to the beneficiary for his claimed work with the petitioner. Therefore the evidence concerning the beneficiary's experience with the petitioner fails to establish the petitioner's ability to pay the proffered wage during the relevant time period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as a corporation. For a corporation which submits a short-form tax return, CIS considers net income to be the figure shown on line 24, taxable income before net operating loss deduction and special deductions, of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 24: \$20,705.00 for 2000; \$860.00 for 2001; and \$6,718.00 for 2002. Since each of those figures is less than the proffered wage of \$36,400.00, those figures fail to establish the ability of the petitioner to pay the proffered wage.

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 a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. On the U.S. Corporation Short-Form Income Tax Return, Form 1120-A, a corporation's current year-end current assets are shown on Part III, lines 1(b) through 6(b). Its year-end current liabilities are shown on lines 13(b) and 14(b). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Part III balance sheets attached to the petitioner's tax returns yield the following amounts for net current assets: \$27,455.00 for the end of 2000; \$31,709.00 for the end of 2001; and \$44,799.00 for the end of 2002. The petitioner's net current assets for the end of 2000 were less than the

proffered wage of \$36,400.00, and its net current assets for the end of 2001 were also less than the proffered wage of \$36,400.00. Therefore those figures fail to establish the petitioner's ability to pay the proffered wage as of the April 25, 2001 priority date. For 2002 the petitioner's year-end net current assets were greater than the proffered wage, by an amount of \$8,399.00. Therefore if 2002 were the only year at issue, the petitioner's net current assets would be sufficient to establish its ability to pay the proffered wage that year. However, since the priority date was in 2001, if the petitioner had paid the proffered wage to the beneficiary that year, its net current assets would have been reduced by the amount of the proffered wage, or, more precisely, by the proportionate share for the 250 days of the year beginning on the April 25, 2001 priority date, which would be \$24,931.51. Therefore the net current assets at the end of the year 2002 would have been -\$16,532.51. It may be noted that the record before the director contained no evidence on which to base a conclusion that paying the beneficiary the proffered wage beginning on April 25, 2001 would have increased the petitioner's income or its net current assets, either in the year 2001 or in 2002.

For the foregoing reasons, the figures for the petitioner net current assets also fail to establish the petitioner's ability to pay the proffered wage during the relevant time period.

The record also contains a Form 1120-A tax return for the China Grand Buffet restaurant, which has the same owner as the petitioner. However, as noted above, the petitioner is a corporation. Because 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."

In his decision, the director incorrectly added the petitioner's depreciation deductions to the petitioner's taxable income in evaluating the petitioner's ability to pay the proffered wage based on its net income. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. Moreover, the director failed to consider the petitioner's net current assets as part of his analysis of the petitioner's ability to pay the proffered wage. Despite those errors in analysis, the director's conclusion on the issue of the petitioner's ability to pay the proffered wage was correct, since, as shown above, the evidence in the record before the director failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As a second ground for denying the petition, the director found that the evidence failed to establish that the beneficiary had the experience in the offered position as required on the ETA 750.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d).

On the ETA 750, block 14 requires two years and three months experience in the offered position. Block 14 also lists alternative experience in a related occupation, but the alternative experience requirement is a duplicate of the experience requirement in the offered position, including a duplicate of the name of the offered position.

The evidence on the beneficiary's experience in the record before the director consisted of a copy of a letter dated December 9, 2002 from a former employer of the beneficiary in Fuzhou City, China, certifying the

beneficiary's employment as a cook from July 1996 to January 1998; a copy of a letter dated January 20, 2003 from a former employer of the beneficiary in Pulaski, Tennessee, certifying the beneficiary's employment as a specialty cook from December 1998 to March 2000; and a letter dated January 23, 2003 from the petitioner certifying the beneficiary's experience as a specialty cook from April 2000 to April 2002. Although the director's RFE had requested copies of W-2 forms for the beneficiary for the years when the petitioner claimed the beneficiary had worked in the United States, no copies of the beneficiary's W-2 forms were submitted for the record. No explanation for the absence of the beneficiary's W-2 forms was submitted prior to the director's decision.

In his decision, the director cited the absence of the beneficiary's W-2 forms as a reason to find that the petitioner had not established that the beneficiary had the experience required by the Form ETA 750. The director was correct in his analysis. The absence of W-2 forms from the record created an inconsistency with the petitioner's claim that the beneficiary had work experience in the United States in the offered position. The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has said, "[i]t 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." In failing to provide any explanation for the absence of W-2 Forms the petitioner failed to meet the requirements of *Matter of Ho*, 19 I&N Dec. 582, 591-592.

For the foregoing reasons, the decision of the director to deny the petition was correct, based on the evidence submitted prior to the director's decision.

On appeal, counsel submits additional evidence. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE's issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

Some of the evidence newly submitted on appeal pertains to the financial resources of the petitioner's owner and the financial resources of other corporations also owned by the same owner. As noted above, the assets of

a corporation's 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.

The evidence newly submitted on appeal pertaining to the petitioner includes an unaudited financial statement dated August 31, 2003 and a letter from a certified public accountant dated October 1, 2003 analyzing that financial statement. An unaudited financial statement is not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The evidence newly submitted on appeal also includes partial copies of bank statements for the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant petition, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Part III of the Form 1040-A returns that is considered above in calculating the petitioner's net current assets for 2000, 2001 and 2002.

The record in the instant case contains no bank statements for the petitioner for any months after June 2001. Moreover, the copies of the statements in evidence are partial ones, omitting several pages of each statement. Among the omissions are the balance figures for March 2001, April 2001 and June 2001. Therefore the bank statements in evidence include only one ending balance for the petitioner, that shown on the May 2001 statement, which gives an ending balance of \$14,266.26. Although that ending balance is greater than one month's proffered wage, which would be \$3,033.33, a single ending balance is insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

With regard to the absence of W-2 forms for the beneficiary for the years when the petitioner claims he worked in the United States, counsel's brief states that the beneficiary was paid in cash, and for that reason has no W-2 forms. That assertion of counsel is not supported by any evidentiary document in the record. 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).

On appeal, counsel also submits affidavits from former co-workers of the beneficiary attesting to his work experience as a cook. The regulation at 8 C.F.R. § 204.5(g)(1) states in relevant part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Although the affidavits from former co-workers of the beneficiary provide partial corroboration to the letters from the beneficiary's purported former employers, previously submitted in evidence, the affidavits lack the details required by 8 C.F.R. § 204.5(g)(1). They fail to state the specific duties performed by the beneficiary, including whether the beneficiary was a full-time employee. Moreover, the affidavits do not address the issue of the absence of any W-2 forms for the beneficiary for the periods when the petitioner claims the beneficiary worked in the United States. Nor has the petitioner submitted any alternative evidence on that point, such as payroll records itemizing wage payments made to the beneficiary. Therefore the petitioner's evidence on appeal fails to resolve the inconsistencies in the evidence, as required by *Matter of Ho*, 19 I&N Dec. 582, 591-592.

For the foregoing reasons, the evidence submitted on appeal would fail to establish the petitioner's ability to pay the proffered wage during the relevant period and would fail to establish that the beneficiary had the required experience in the offered position as of the priority date, even if that evidence were properly before the AAO on appeal. The evidence newly submitted on appeal therefore fails to overcome the decision of the director,

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.