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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 29 2005  
WAC-03-070-53029

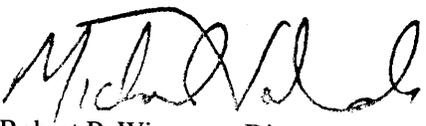
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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

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

The petitioner is a French and Moroccan restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, French-Moroccan style. 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 denied the petition accordingly.

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 [Citizenship and Immigration Services (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 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 March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$10.09 per hour, which amounts to \$20,987.20 annually. On the Form ETA 750B, signed by the beneficiary on February 14, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 1998 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on December 26, 2002. On the petition, the petitioner claimed to have been established in 1996, to currently have 50 employees, and to have a gross annual income of \$3,075,485.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 15, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on May 28, 2003.

In a decision dated January 23, 2004, 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 denied the petition.

On appeal, the petitioner submits a brief and additional evidence.

Counsel states on appeal that the petitioner's gross income in the relevant years was sufficient to establish its ability to pay and that its net income in the 2001 was unusually low. Counsel also states that the beneficiary's actual compensation has been higher than the proffered wage during the relevant period.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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).

In determining the petitioner's ability to pay the proffered wage, 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, on the Form ETA 750B, signed by the beneficiary on February 14, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 1998 and continuing through the date of the ETA 750B. However, the beneficiary does not state that he has been working as a cook, which is the offered position, but rather states that he has been working as a waiter.

The record contains copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1996, 1997, 1999, and 2001, and copies of Form W-2 Wage and Tax Statements of the beneficiary for 1996, 1997, 1999, 2000, 2001 and 2002. The Form W-2 for 1996 shows compensation received from a previous employer, and the Form W-2's for 1997, 1999, 2000, 2001 and 2002 show compensation received from the petitioner. Each of the Form W-2's in the record shows from about 50% to about 80% of the beneficiary's income as tips, reflected in block number 7 as social security tips. On each of the Form 1040's in the record the beneficiary states his occupation as "waiter."

The two years at issue in the instant petition are 2001 and 2002. The beneficiary's Form W-2 for 2001 shows social security wages of \$20,777.45, apparently indicating the wages paid directly by the petitioner, and social security tips of \$20,758.00, apparently indicating the beneficiary's tip income, and total wages, tips and other compensation of \$41,535.45, which is the total of those two figures. The beneficiary's Form W-2 for 2002 shows an even higher percentage of income from tips, stating social security wages of \$8,324.12, social security tips of \$34,234.00, and total wages, tips and other compensation of \$42,558.12.

The foregoing information indicates that the beneficiary's employment with the petitioner has been as a waiter, not in the offered position of specialty cook. For this reason, the evidence of compensation received by the beneficiary from the petitioner is not evidence of the petitioner's ability to pay the beneficiary the proffered wage in the position of cook. The logic being that, had the petitioner instead paid the beneficiary those same wages as cook, another individual would have, presumably, been needed to perform the beneficiary's waiter duties and receive compensation.

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 for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 a partnership. The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2001 and 2002. The record before the director closed on May 28, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet available. The petitioner's tax return for 2002 was apparently also not yet available, and it was not submitted for the record prior to the director's decision. The petitioner's Form 1065 for 2002 has been submitted in evidence on appeal. The date beside the signature of the preparer of the Form 1065 for 2002 is September 23, 2003, thereby indicating that the 2002 return was prepared after the general filing deadline of April 15, 2003. This fact appears to explain the petitioner's failure to submit a copy of its Form 1065 for 2002 with its submissions to the director in response to the RFE.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below."

Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. In the instant case, the petitioner's Form 1065 for 2002 shows a small amount of income from a source other than a trade or business, therefore the figures for net income on the Schedule K's will be taken as the petitioner's net income.

In the instant case, the petitioner's tax returns states the amounts for net income on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1, as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	-\$377,178.00	\$20,987.20*	-\$398,165.20
2002	\$42,274.00	\$20,987.20*	\$21,286.80

\* The full proffered wage, since the only evidence of wage payments made by the petitioner to the beneficiary was for work in a different job than the offered position.

The foregoing figures establish the petitioner's ability to pay the proffered wage in the year 2002, but not in the year 2001, which is the year of the priority date.

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 partnership 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. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership'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 Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	-\$70,470.00	-\$240,725.00	\$20,987.20*
2002	-\$240,725.00	-\$277,917.00	\$20,987.20*

\* The full proffered wage, since the only evidence of wage payments made by the petitioner to the beneficiary was for work in a different job than the offered position.

The above figures fail to establish the petitioner's ability to pay the proffered wage either in 2001 or 2002.

Counsel asserts that the petitioner's net income for 2001 was unusually low as a result of the economic effects of the September 11, 2001 terrorist attacks. The assertions of counsel do not constitute evidence. *Matter of Obaignena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The evidence in the record is insufficient to support counsel's assertions. The petitioner's net income for 2002 was positive and was greater than the proffered wage, a fact which is consistent with counsel's assertion that net income in 2001 was unusually low. However, no tax returns for years prior to 2001 were submitted in evidence, therefore no comparison can be made with the petitioner's net income figures for years prior to 2001.

In addition, the petitioner's location is in Los Angeles, California, which is not near the location of any of the terrorist attacks, and nothing in the record indicates that the petitioner's business is related to any sector of the economy which was heavily affected by the September 11, 2001 attacks, such as the transportation sector. Therefore the evidence fails to establish that the petitioner's low net income in 2001 was the result of any temporary economic difficulties. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his decision, the director correctly found that the petitioner's net income and net current assets for 2001 were insufficient to establish the petitioner's ability to pay the proffered wage that year. As noted above, the record before the director did not include a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2002, which was submitted for the first time on appeal. Accordingly, the director had no evidence on which to base an evaluation of the petitioner's net income and net current assets for 2002.

The director stated that the proffered wage is \$10.99 per hour, but in fact the proffered wage is \$10.09 per hour. The wage rate on the ETA 750 per hour is a hand-written figure which is partly obscured by a stamp of the Department of Labor. However, a job offer letter from the petitioner accompanying the ETA 750 states the offered wage to be \$10.09 per hour, thereby clarifying any ambiguity in the hand-written figure on the ETA 750.

Concerning the compensation actually paid to the beneficiary, the director stated that the Form W-2's in the record indicated that the beneficiary was being paid by the petitioner at a rate of \$6.75 per hour and that most of the beneficiary's income appeared to come from tips, not from payments by the petitioner. For this reason, the director found that the compensation paid to the beneficiary by the petitioner failed to establish the petitioner's ability to pay the beneficiary the proffered wage.

The director failed to note that the wage payments to the beneficiary were for a different position than the offered position. Nonetheless, this error did not significantly affect the director's analysis, since the director found the evidence of the wage payments to the beneficiary insufficient because the evidence showed most of the beneficiary's income to be from tips, rather than from payments by the petitioner. The director's decision to deny the petition was correct, based on the evidence then in the record.

For the reasons stated above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail 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.