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U.S. Citizenship
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Services

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FILE:

[REDACTED]
SRC 03 143 50845

Office: TEXAS SERVICE CENTER

Date: **DEC 19 2005**

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, Director
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 convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 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, 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). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$39,000 annually. On the Form ETA 750B, signed by the beneficiary on an unspecified date, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$1,592,221, a net income of \$9,795 and two employees. In support of the petition, the petitioner submitted its unaudited financial statements for 2002 and Form 1065 U.S. Return of Partnership Income for 2001. These documents reflect the following information:

	2001	2002
Net income	\$9,795	\$20,565.63
Salaries and wages	\$33,585	\$32,562
Cost of Labor	\$0	\$0

Current Assets	\$14,352	\$14,992.44
Current Liabilities	\$1,855	\$0
Net current assets	\$12,497	\$14,992.44

We note that the petitioner indicated negative cash in both years.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 23, 2004, denied the petition. While the director did not have evidence of the beneficiary's wages individually, he noted that the total wages paid by the petitioner were less than the proffered wage. The director further concluded that the petitioner's net income and net current assets were insufficient to demonstrate an ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has paid the beneficiary in excess of the proffered wage since 2001. The petitioner submits the beneficiary's purported Forms W-2 Wage and Tax Statements for 2001 and 2002 and the petitioner's income tax returns for 2002 and 2003. The petitioner also resubmitted previously submitted evidence. The Forms W-2 reflect wages paid to an individual named Bharti Mehta of \$42,000 in 2001 and \$43,200 in 2002. The 2002 and 2003 tax returns reflect the following information:

	2002	2003
Net income	\$22,584	\$29,275
Salaries and wages	\$43,200	\$36,000
Cost of Labor	\$0	\$0
Current Assets	\$14,992	(\$50,337)
Current Liabilities	\$0	\$0
Net current assets	\$14,992	(\$50,337)

The net income and salaries and wages listed on the petitioner's tax returns for 2002 do not match the numbers listed on the compiled financial statements. We further note that, as with the above documents, the petitioner indicated negative cash values.

The unaudited financial statements that counsel submitted with the petition are 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. When such statements contradict the federal tax returns, however, the petitioner must resolve those inconsistencies with competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 purported Forms W-2 submitted by the petitioner suggest that it employed and paid [REDACTED] wages in 2001 and 2002. The record of proceedings demonstrates that [REDACTED] is the spouse of the beneficiary (and obviously, therefore, not the beneficiary as represented by counsel). As such, these wages cannot show the petitioner's ability to pay the proffered wage. Moreover, these Forms W-2 are inconsistent with the

petitioner's 2001 tax return and 2002 profit and loss statement, both of which reflect total wages paid by the company of less than the amounts listed on the Forms W-2 and no additional cost of labor costs.

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). Thus, we are justified in evaluating whether the Forms W-2 are consistent with the petitioner's tax returns.

Moreover, as stated above, the Form I-140 petition signed by a representative of the petitioner indicated that the petitioner employed two workers on the date the petition was signed, March 6, 2003. If the petitioner employed two workers in 2001 and 2002 as well, the amounts listed as total wages and salaries would need to include wages and salaries for two employees. In 2003, the year the petitioner indicated it had two employees, the total wages listed on the petitioner's 2003 tax return are only \$36,000, \$3,000 less than the proffered wage. While the petitioner's net income of \$29,275 could cover the difference in 2003, the record lacks evidence of how much of the \$36,000, if any, was paid to the beneficiary.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner has not shown that it has employed and paid the beneficiary the proffered wage. Nor has the petitioner resolved the inconsistencies between the evidence submitted on appeal and the evidence submitted initially. As such, we cannot conclude that it has established that it paid the beneficiary more than the proffered wage in 2001 and 2002 as claimed. Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Thus, the tax returns have diminished evidentiary value.

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.