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U.S. Citizenship
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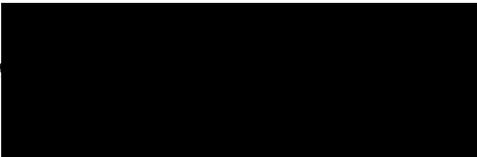
AG

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2005
WAC-03-050-54029

IN RE: Petitioner: [REDACTED]
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:



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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 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.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of June 1999.

On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$335,242, and to currently employ five workers. In support of the petition, the petitioner submitted its Forms 1120S, U.S. Income Tax Returns for an S Corporation, for the years 1999 through 2001¹. The tax return for 2001 reflects the following information:

	<u>2001</u>
Net income ²	-\$34,464
Current Assets	-\$1,014
Current Liabilities	\$3,115
Net current assets	-\$4,129

¹ Any evidence pertaining to the petitioner's financial situation prior to the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 20, 2003, the director issued a notice of intent to deny. The director noted the petitioner's net income in 2001, as reflected on its corporate tax return, was negative and determined that indicated the petitioner could not demonstrate its continuing ability to pay the proffered wage.

In response, the petitioner's counsel asserted that the tragedy of September 11, 2001 negatively impacted the petitioner's business, that the petitioner intended to expand its business, and that the beneficiary's employment will result in future increased profits. A letter from the petitioner's representative reiterates counsel's assertions and states that in addition to restaurant income, the restaurant maintains savings and checking accounts with balances sufficient to support the proffered wage. The letter from the petitioner's representative also states that the beneficiary only worked on a part-time basis and thus no Form W-2 was issued to prove wages actually paid to the beneficiary. The petitioner submitted copies of its checking account statements for the first few months in 2003 and the petitioner's quarterly federal tax returns for all four quarters in 2002 and the first quarter in 2003. The quarterly federal tax returns do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 July 10, 2003, denied the petition.

On appeal, counsel asserts that the director erred in failing to consider wages actually paid and the employment capacity of the petitioner's employees; failing to consider "\$140,000.00 personal funds to invest in the restaurant in order to increase the future business and the future income as the result of hiring the beneficiary;" and failing to consider depreciation and fixed assets. The petitioner submits previously submitted evidence and new evidence such as bank statements, unaudited balance sheets, the petitioner's 2002 and 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, unemployment tax returns, a business license, and pictures of the petitioner's facility.

The petitioner's tax returns submitted on appeal reflect the following information:

	<u>2002</u>	<u>2003</u>
Net income ³	-\$71,767	-\$74,904
Current Assets	-\$305	-\$3,009
Current Liabilities	\$2,640	\$2,003
Net current assets	-\$2,945	-\$5,012

The unaudited financial statements that counsel submits on appeal 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.

Counsel's reliance on the balances in the petitioner's bank accounts 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

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

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. 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002, or 2003.

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 contrary to counsel's assertions. 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). Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner's net income was negative in 2001, 2002, and 2003, and thus cannot demonstrate the petitioner's continuing ability to pay the proffered wage out of its net income in those years.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, counsel's argument that the petitioner's total, or fixed, assets should have been considered in the determination of the ability to pay the proffered wage. 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 a corporation's end-of-year 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 petitioner's net current assets during the years in question, 2001, 2002, and 2003, however, were negative. As such, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets in those years.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, 2002, or 2003. In each year, the petitioner shows a negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel asserts that \$140,000.00 has been invested in the petitioner's business, but fails to submit corroborating evidence that indicates how that money will be utilized to increase the petitioner's revenues and financial standing or where that additional investment reflects positively on the petitioner's audited financial statements, annual reports, or tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, the petitioner's attempt to attribute its 2001 ordinary losses on its tax returns to the tragedy of September 11, 2001 fails since no evidence shows that 2001 was worse financially than other years and a clear and convincing nexus between that event and the restaurant industry.

Additionally, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits for the petitioner. No information was provided concerning the beneficiary's outstanding reputation or impact upon Chinese cuisine in the petitioner's market that would increase the petitioner's revenues. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 190. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns and it too speculative for these proceedings. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001, 2002, or 2003.

Since the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 2003, therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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.