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U.S. Citizenship
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Services

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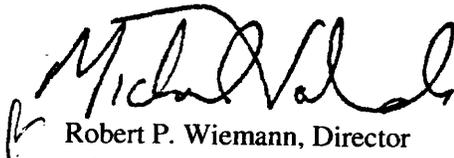
IN RE: Petitioner:
Beneficiary:

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a deli/pizzeria. It seeks to employ the beneficiary permanently in the United States as a cook with a specialization in Italian food. 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 states that Citizenship and Immigration Services (CIS) erred in its decision by analyzing the petitioner's federal income tax too narrowly. Counsel submits further documentation.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 2, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$18.89, or an annual salary of \$39,321. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 1996. On the petition, the petitioner did not indicate the date it was established, the number of its employees, or its gross or annual net income.

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 January 3, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide the original completed Form ETA-Form 750, as well as evidence that the beneficiary had three years of

experience as a cook prior to April 2, 2001, the priority date. The director also requested further evidence with regard to the petitioner's ability to pay the proffered wage. In particular, the director requested that the petitioner submit any of the following documents: the petitioner's 2001 federal income tax returns with all schedules and attachments, a copy of the beneficiary's 2001 Form W-2 wages and tax statements, or annual reports for 2001 accompanied by audited financial statements.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001, and a balance sheet and statement of income prepared by [REDACTED] Valley Cottage, New York. The balance sheet and statement of income are not audited. In addition, counsel submitted a copy of the beneficiary's W-2 form that indicated the petitioner paid the beneficiary \$13,000 in 2001. The petitioner also submitted a letter from [REDACTED] Restaurant [REDACTED] Quito, Ecuador, that stated the beneficiary had worked at this business as a cook from January 1985 to December 20, 1989.

On April 1, 2003, the director denied the petition. The director stated that the beneficiary had been paid \$13,000 in 2001, which was \$26,291 less than the proffered wage. In addition, the director stated that the petitioner's 2001 federal income tax return showed a net income of \$7,156 and current assets of \$4,302. Based on these figures, the director stated that the petitioner did not have sufficient funds available to pay the beneficiary the balance of the proffered salary.

On appeal, counsel states that the decision is based on substantial error in the director's review of the petitioner's financial statements and 2001 federal income tax return. Counsel asserts that the director analyzed these documents narrowly, only referring to the net income of the petitioner, rather than a broader financial analysis of the employer's gross revenues, gross profit, salaries and wages paid, among other issues. Counsel further states that the director did not examine the economic projections for the petitioner's business or future capabilities, which tainted the decision and thus violated the petitioner's due process to conduct its business in a free enterprise society. Counsel resubmits the petitioner's IRS Form 1120S, as well as the document from [REDACTED] and Company. In addition, counsel submits a letter from [REDACTED] C.P.A., P.C., Bayonne, New Jersey. In this letter, [REDACTED] states that upon review of the petitioner's 2001 income tax return and its 2001 financial statement, his company believes that the petitioner has good economic projections and prospective business capacities, and that they had the ability as of April 2, 2001 to pay the beneficiary the proffered salary.

With regard to counsel's assertions as to the director's analysis of the petitioner's financial assets, counsel refers to no relevant legislative or case law to substantiate his assertions. The letter from Mr. [REDACTED] also provides no further rationale or documentation for why his company finds that the petitioner has the ability to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988).

In addition, the response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted in response to the director's request for further evidence 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.

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. The petitioner submitted a W-2 salary statement for the beneficiary for the year 2001, which established that the petitioner paid the beneficiary \$13,000, which is \$26,321 less than the proffered annual wage of \$39,321. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage as of the priority date and onward.

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 on appeal, the director's reliance on the petitioner's federal income tax return 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 shows the following amount of ordinary income: \$7,156. This net income figure fails to establish the ability of the petitioner to pay the proffered wage as of the priority date and onward.

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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 submitted the following information from its federal income tax return for 2001:

	2001
Ordinary Income	\$ 7,156
Current Assets	\$ 26,142
Current Liabilities	\$ 21,822
Net current assets	\$ 4,320

The petitioner's net current assets during the year 2001 were \$4,320. If the remaining salary of \$26,321 were taken from this figure, \$22,001 would still be lacking from the petitioner's net current assets to pay the proffered wage of \$39,321.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of \$7,156 and net current assets of only \$4,320, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. The petitioner also has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and onward.

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.

¹ 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.