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

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*BK*

FILE: [REDACTED]  
SRC-03-195-51596

Office: TEXAS SERVICE CENTER Date:

NOV 03 2005

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook for Middle Eastern Food, Foul and Falafel. 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$7.50 per hour for a 35-hour work week, which amounts to \$13,650.00 annually.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [redacted] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

The I-140 petition was submitted on June 27, 2003. On the petition, the petitioner claimed to have been established in August 1999, to currently have five employees and to have a gross annual income of \$126,517.00. The item on the petition for net annual income was left blank by the petitioner. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary did not claim to have worked for the petitioner. With the petition, the petitioner also submitted supporting evidence.

In a request for evidence (RFE) dated October 24, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence that the beneficiary had complied with the National Security Entry-Exit Registration System (NSEERS).

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 January 16, 2004.

In a decision dated March 5, 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, counsel submits a brief and additional evidence. Counsel states on appeal that the evidence in the record establishes the petitioner's ability to pay the proffered wage during the relevant period. Counsel states that the evidence includes a recent paycheck from the petitioner to the beneficiary and a letter from the petitioner's accountant and that both of those documents are evidence of the petitioner's ability to pay the proffered wage.

The additional evidence submitted on appeal consists of a copy of a pay statement of the beneficiary dated March 29, 2004. 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). The record in the instant case provides no reason to preclude consideration of the document newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Although the petitioner was represented by counsel when the instant appeal was filed, counsel submitted a note by facsimile transmission to the AAO on October 9, 2005 stating that counsel was no longer representing the petitioner. Since no new counsel has entered an appearance in this matter, the petitioner is now self-represented.

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. On the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary did not claim to have worked for the petitioner. Counsel states that the evidence includes a recent paycheck from the petitioner to the beneficiary. The record contains no copy of a paycheck of the beneficiary, but the record does contain a copy of pay statement of

the beneficiary dated March 29, 2004, which is submitted for the first time on appeal. The pay statement contains no information identifying the employer. Counsel states that the employer for that pay statement was the petitioner. However, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Even assuming that the pay statement in the record shows payments by the petitioner to the beneficiary, the information on that pay statement is insufficient to establish the petitioner's ability to pay the proffered wage for any year at issue in the instant petition. The statement shows gross income for the current pay period of \$263.00. The length of the pay period is not specified. If the pay period is one week, that amount would be slightly more than the weekly proffered wage, which is \$263.50. The pay statement shows gross income for the year to date to be \$2,454.16. That amount is equal to a little more than two months pay at the proffered wage, though as of March 29, 2004 nearly three months of the year had been completed. The pay statement therefore fails to establish the petitioner's ability to pay the proffered wage in the year 2004. Moreover, no evidence of payments by the petitioner to the beneficiary in any prior years was submitted for the record. The evidence concerning the beneficiary's employment by the petitioner therefore fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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.

On the I-140 petition the petitioner stated an IRS tax number which ends in the final three digits "950." The record contains copies of Form 1065 Returns of Partnership Income for a partnership named [REDACTED] with an employer identification number ending in the three digits "250." The record also contains copies of Form W-3 Transmittal of Wage and Tax Statements with the employer identification number ending in "250." On the Form W-3's the employer's state ID number is the number ending in "950" which appears on the I-140 petition. The petitioner therefore erroneously placed its state ID number on the I-140 petition, rather than its federal IRS employer identification number. On the Form W-3's, the name of the petitioner appears in the address block under the name Sandan, LLC, indicating that the petitioner's name is a trade name. The foregoing information is sufficient to establish that Sandan, LLC, is the petitioner's legal name.

The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for the years 2001 and 2002. The record before the director closed on January 16, 2004 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 due. Therefore the petitioner's tax return for 2002 was the most recent return available when the record before the director closed.

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 tax returns show no income on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1 other than that stated as ordinary income on line 22. Therefore the petitioner's figures for ordinary income will be considered to be the petitioner's net income.

The petitioner's tax returns state amounts for ordinary income on line 22 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$6,259.00	\$13,650.00*	-\$7,391.00
2002	-\$22,123.00	\$13,650.00*	-\$35,773.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the years at issue in the instant petition.

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	\$13,706.00	\$19,005.00	\$13,650.00*
2002	\$19,005.00	\$9,033.00	\$13,650.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information shows that at the beginning of each of the two years at issue the petitioner had net current assets which were greater than the proffered wage. Those figures are sufficient to establish the petitioner's ability to pay the proffered wage during each of those years.

The record also contains copies of Form W-3 Transmittals of Wage and Tax Statements of the petitioner for 2001 and 2002, with copies of Form W-2 Wage and Tax Statements for the petitioner's employees during those years. The record also includes copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the four quarters of 2001. The information on the Form W-3's, Form W-2's and Form 941's appears to be consistent with the information on the petitioner's Form 1065 tax returns discussed above.

The evidence in the record therefore is sufficient 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.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002. The director calculated the petitioner's year-end net current assets for each of those years. In making those calculations, the director failed to include trade notes in the calculation of current assets. The petitioner's Schedule L's show figures for trade notes of \$1,252.00 at year end for 2001 and 2002. Therefore the director's figures for net current assets at year end should have been higher by \$1,252.00 for each of those years. Nonetheless, even with those additions, the year-end figures for net current assets are not greater than the proffered wage. However, the director failed to consider the petitioner's net current assets at the beginning of each year. As shown above, the beginning of the year net current assets figures for 2001 and 2002 are greater than the proffered wage.

The figures for the petitioner's net current assets at the beginning of each year, as shown above, reflect the assets available to the petitioner at the beginning of its tax year. Those assets could be drawn upon by the petitioner, if necessary, to pay the proffered wage to the beneficiary. The figures for the petitioner's net current assets at the end of each year, also shown above, reflect the assets available to the petitioner at the end of its tax year as a result of the petitioner's activities during the tax year. Those assets could be drawn upon by the petitioner during the year as they are accumulated if needed to pay the proffered wage to the beneficiary. Therefore in evaluating the petitioner's ability to pay the proffered wage it is appropriate to base the analysis either on the petitioner's net current assets for the beginning of each tax year or its net current assets for the end of each tax year.

In the instant petition, since the director failed to consider the petitioner's net current assets for the beginning of each tax year, the director's decision to deny the petition was incorrect. For the reasons discussed above, the assertions of counsel on appeal are sufficient 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.