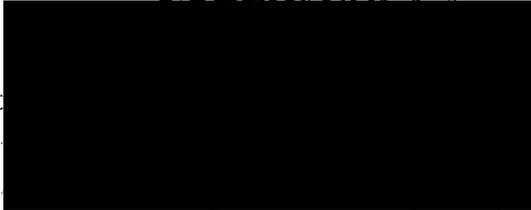




U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 10 2005
EAC 03 253 50251

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:
[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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the counsel submits 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$32,000.00 per year. The Form ETA 750 states that the position requires two years experience.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested additional evidence to establish that the employer had the ability to pay the proffered wage. The Director requested W-2 Wage and Tax Statements for 2001 and 2002, bank account records, personnel records, or annual reports for 2001 and 2002 with audited or reviewed financial statements among other requests.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a letter from petitioner's accountant; a compiled balance sheet statement for 2003; and, copies of salary checks paid to the beneficiary.

The director denied the petition finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Petitioner received the Director's decision on April 30, 2004, according to the record of proceeding.

On appeal, counsel asserts, although the company suffered start-up losses, it is receiving "on-going investment capital;" that the cancelled checks placed into evidence were the net amounts of the beneficiary's salary "not the gross amounts;" and, that the beneficiary's skilled labor as a chef is necessary for the success of the restaurant business. Counsel submits petitioner's federal tax return for 2003, and, an internally generated profit and loss statement for the first quarter of 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary since November 2000.

Checks submitted demonstrated wages of \$22,046.95 were paid in 2002, and, \$20,155.28 in 2003. Since the proffered wage was \$32,000.00 per year the evidence submitted does not show that the petitioner paid the proffered wage. Petitioner stated on appeal that actually the paychecks were "net" payments and that the beneficiary "started at \$32,000 and approximately a year ago [about May 2003] increased to \$37,000." While there is evidence of payroll expenses in the compiled Statement of Income, there are no W-2, Form 1099-Misc or payroll statements confirming counsel's assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, 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, (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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,000.00 per year from the priority date of April 25, 2001:

- In 2001, the Form 1065 stated a taxable income loss¹ of <\$10,160.00>.²
- In 2002, the Form 1065 stated a taxable income loss³ of <\$29,216.00>.
- In 2003, the Form 1065 stated taxable income of \$92,383.00.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have any taxable income to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1065 federal tax return. The petitioner's 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.

Examining the Form 1065 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1065 return stated current assets of <\$30,754.00>- and \$143,890.00 in current liabilities. Therefore, the petitioner had <\$174,644.00> in net current assets. Since the proffered wage was \$32,000.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1065 return stated current assets of \$60,864.00 and \$198,186.00 in current liabilities. Therefore, the petitioner had <\$137,322.00> in net current assets. Since the proffered wage was \$32,000.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1065 return stated current assets of \$91,877.00 and \$178,479.00 in current liabilities. Therefore, the petitioner had <\$86,602.00> in net current assets. Since the proffered wage was \$32,000.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel cites no legal precedent for the contention,

¹ IRS Form 1065, Line 22.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

³ IRS Form 1065, Line 22.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

and, according to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel and petitioner's accountants both assert that the business is a "start-up" restaurant that requires several years of capital investment. These funds are received from the personal assets of the "main investment/owner. The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.⁶ As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds. The petitioner provided no evidence of its own ability to pay the proffered wage.

Counsel asserts that the beneficiary's skill as a chef is proven by his work experience in the present restaurant and other similar businesses, and, that the beneficiary's labor is necessary for the success of the business. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a chef will significantly increase petitioner's profits that for the years 2001 and 2002 were depressed. The gross income for the business has been essentially the same since 2001 averaging between \$1.6 million to \$1.7 million. The record does not contain evidence of the beneficiary's contribution to petitioner's taxable income for tax years 2001 through 2003. Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary's reputation would increase the number of customers. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel submits compiled financial statements. A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. It is the lowest level of financial statements. The unaudited Profit and Loss statements that SCA

⁵ 8 C.F.R. § 204.5(g)(2).

⁶ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

submitted 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. Thus, the unaudited Profit and Loss statements whether produced by an accounting service or internally generated are of little evidentiary value in this matter.

Also, the accounting service that prepared the above mentioned documents severely qualified the financial statement:

Management has elected to omit substantially all of the disclosures and statements of members' capital and cash flows required by generally accepted accounting principles. If the omitted disclosures and statements of members' capital and cash flows were included in these financial statements, they might influence the user's conclusions about the Limited Liability Company's financial position, results of operations and cash flows.⁷ Accordingly, these financial statements are not designated for those who are not informed about such matters.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

⁷ In a generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, presents an analysis of the financial health of a business.