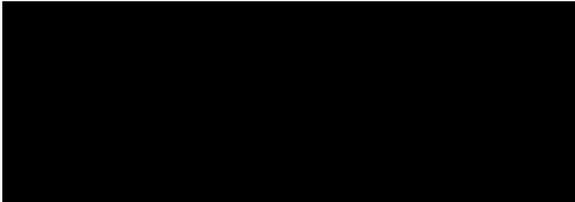




U.S. Citizenship
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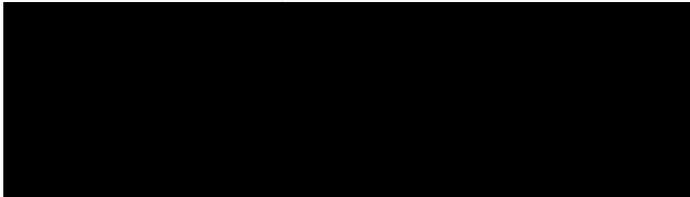
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FILE: LIN 04 150 51665 Office: NEBRASKA SERVICE CENTER Date: OCT 19 2005

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Asian specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook (banquet). 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 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, 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 9, 2002. The proffered wage as stated on the Form ETA 750 is \$2000.00 per month (\$24,000.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; and, a copy of United States federal Form 1120S tax return for 2003 as well as other documents.

The director denied the petition on June 9, 2004, 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.

On appeal, counsel asserts that the evidence supporting the I-140 petition had proven the ability to pay the proffered wage from the priority date.

Counsel submits a brief and the following additional copies of documents: a memorandum dated September 1, 2004; a declaration of the petitioner's accountant; two federal U.S. Form 1120S tax returns for 2002 and 2003; a bank statement of the petitioner's business checking account with a summary statement of average monthly balances; a profit and loss statement for the petitioner for the period January 2004 through June 30, 2004; and, a declaration of the petitioner's vice president.

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. The beneficiary is not in the United States, and according to the certified ETA 750 Part B in the record of proceeding is working as a cook in China for another restaurant.

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 the INS, now CIS, should have considered income before expenses were paid rather than net income.

The tax returns submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,000.00 from the priority date, January 9, 2002:

- In 2002, the Form 1120S stated a taxable income¹ of \$1,278.00.
- In 2003, the Form 1120S stated a taxable income loss of <\$4,281.00>².

Therefore, the petitioner was unable to pay the proffered wage of \$24,000.00 per year from taxable income from the priority date.

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

¹ IRS Form 1120S, Line 21.

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.

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 as in the subject case, as set forth above.

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.³ 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 1120 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 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, the petitioner's Form 1120S return stated current assets of \$26,642.00 and \$41,621.00 in current liabilities. Therefore, the petitioner had <\$14,979.00> in net current assets for 2002. Since the proffered wage was \$24,000.00 per year, this sum is less than the proffered wage.
- In 2003, the petitioner's Form 1120 return stated current assets of \$8,013.00 and \$32,318.00 in current liabilities. Therefore, the petitioner had <\$24,305.00> in net current assets for 2003. Since the proffered wage was \$24,000.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2002 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 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 is not only asserting positions in his representative capacity but he offers his own professional opinions as to matters at issue in the case based upon his practice experience. So in these instances, he is not only the petitioner's legal representative, he also offers himself as an expert providing his own opinions as evidence. Counsel has not qualified himself as an expert in any capacity in the record of proceeding. If counsel wishes to qualify himself as an expert witness in the restaurant business, he must provide documentary evidence in this regard.

Also, without documentary evidence to support these assertions, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Ohaigbena*, 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). 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)).

³ 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.

Counsel has introduced the petitioner's accountant who is a certified public accountant retained by the petitioner. According to that accountant's statement, it is his opinion that the business has at all times had the ability to pay the wage offered. This is the ultimate issue to be decided in this case by CIS. The accountant, although qualified to discuss and give his opinion in matters related to the business based upon his professional qualifications, is not competent to opine on whether or not the petitioner had the ability to pay the proffered wage on the priority date.

The petitioner's counsel, and the above-mentioned accountant who submitted his letter opinion in this matter, advocate the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiency. Since depreciation is a deduction in the calculation of taxable income on tax Forms 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel, and the above-mentioned accountant, advocates the use of the average cash balance of the business checking account to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank checking account 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 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.

The petitioner has introduced a Profit and Loss statement for the period January 2004 through June 30, 2004. There is no indication that it is an audited statement. 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. Since the source of the document has not been disclosed, and, it has not been introduced as an audited statement, it has little probative value in this case. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner requires the beneficiary's services in the business. By the evidence submitted, the petitioner already operates a banquet style restaurant. Reasonably, the petitioner already has cooks providing service to the business. The record of proceedings does not name the employee to be replaced, state his or her compensation, verify his or her employment, and, provide evidence of the efficacy of the petitioner's intent to replace them with the beneficiary. Therefore, insufficient evidence has been presented to show the prospective savings that the petitioner would earn by employing the beneficiary in the occupation of Chinese specialty cook (banquet). In the accountant's declaration mentioned above, the accountant gives an opinion that the hiring of the beneficiary as a Chinese specialty cook (banquet) will significantly increase the petitioner's profits. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment will generate additional income. By necessity, the beneficiary's employment will be in the future, and, it does not aid the petitioner to demonstrate that it has the ability to pay the proffered wage from the priority date.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2002 and 2003. For the years 2001 through 2003, the taxable income for the petitioner decreased from \$1,278.00 in 2002 to a taxable income loss of <\$4,281.00> in 2003. Also, the net current asset value for those years is negative. There is no explanation for this loss in the record of proceeding, but a comment made by the petitioner's accountant in the declaration mentioned above that \$30,000.00 is deducted annually as lease payments to the shareholders of the corporation from net income would serve to decrease the business' income.

There is no evidence submitted by either the accountant or the vice president of the corporation in support of the petition, to the Director or to the AAO, that there were unusual or novel expenses, losses or costs that would have depressed the taxable income of the petitioner in 2002 or 2003. The vice president did say that a Chinese restaurant had been in the same location, under the same name since 1950, and, that the present owner purchased the business in November 2000. He stated that the new owner wished to expand the business by expanding its banquet service. He indicated that the petitioner would be willing to place at least \$30,000 in trust to guaranty the proffered wage, but a review of the record of proceeding does not indicate this was ever done.

Through tax returns submitted, the petitioner has not demonstrated increased earnings. No detail or documentation has been provided to explain how the beneficiary's employment as a Chinese specialty cook (banquet) will significantly increase the petitioner's profits.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that 2002 and 2003 was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner, while a going concern has not proved its ability to pay the proffered wage.

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.