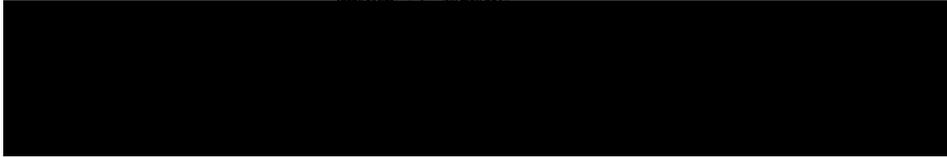




U.S. Citizenship
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FILE: LIN-04-032-50939 Office: NEBRASKA SERVICE CENTER Date: OCT 20 2005

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:

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

The petitioner is a Thai 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, the petitioner 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 May 3, 2001. The proffered wage as stated on the Form ETA 750 is \$11.82 per hour, which amounts to \$24,585.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of 1995.

On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of \$360,000, and to currently employ seven workers. In support of the petition, the petitioner submitted the first pages of its 2001 and 2002 corporate tax return on Form 1120 and unaudited profit and loss statements for January through June 2003 and January through December 2002.

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 April 7, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested evidence pertaining to 2001, including the petitioner's 2001 corporate tax return, and noted that evidence could include audited profit /loss statements, bank account records, and/or personnel records.

In response, the petitioner submitted the first two pages of its Form 1120 Corporate tax return for 2001, an unaudited profit and loss statement for January through December 2003, and statements from a savings and checking account.

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 May 17, 2004, denied the petition, noting that the petitioner has multiple immigrant visa petitions pending and its reported net income did not show its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner submitted additional unaudited profit and loss statements and the first page of its 2003 corporate tax return. The petitioner's president submitted a brief statement stating that a loss in 2003 was the result of the petitioner purchasing a second restaurant called Samui Thai Cuisine in April 2003, but the two restaurants together show a profit in the beginning of 2004. Additionally, the petitioner's president states that the petitioner needs two experienced Thai cooks that will help improve the restaurants' menus, bring more customers, and generate more income for the petitioner. With respect to its multiple petitions, the petitioner stated that the beneficiary for whom one petition was approved, LIN0403252232, passed away and she submitted a death certificate to establish that.

The unaudited financial statements that the petitioner continues to submit into the record of proceeding 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 will not be considered for any purpose.

The director's request for and the petitioner's submission of its bank account balances are 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 would have been considered below in determining the petitioner's net current assets if the petitioner had submitted complete tax returns¹.

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>	<u>2003</u>
Net income ²	\$44,634	\$25,814	-\$13,217
Current Assets	\$N/A	\$N/A	\$N/A
Current Liabilities	\$N/A	\$N/A	\$N/A

¹ It is noted that the petitioner failed to submit the Schedule L to its corporate tax return so the AAO cannot verify its net current assets.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Net current assets	\$N/A	\$N/A	\$N/A
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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. 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.

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.³ 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 has not demonstrated that it paid any wages to the beneficiary during 2001, 2002, or 2003. In 2001, the petitioner shows a net income of \$44,634, which is greater than the proffered wage. However, the petitioner must show its ability to pay the proffered wage for all pending immigrant petitions. An internal CIS

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.

database reflects that the petitioner had no other petitions pending in 2001⁴. The petitioner did not provide evidence of its net current assets or other funds available to pay the proffered wage in that year. Because the petitioner was only responsible for one wage in 2001, it has established its ability to pay the proffered wage out of its net income in 2001.

In 2002, the petitioner shows a net income of \$25,814, which is greater than the proffered wage. However, the petitioner must show its ability to pay the proffered wage for all pending immigrant petitions. An internal CIS database reflects that the petitioner had no other petitions pending in 2002. The petitioner did not provide evidence of its net current assets or other funds available to pay the proffered wage in that year. Because the petitioner was only responsible for one wage in 2002, it has established its ability to pay the proffered wage out of its net income in 2002.

In 2003, the petitioner reports a loss and therefore cannot demonstrate its ability to support one proffered wage or multiple petitions from its net income⁵. The petitioner did not provide evidence of its 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. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2003.

The petitioner claims that the acquisition of a second restaurant caused it to show a loss in 2003 on its tax returns. This is an apparent reference to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which 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.

The petitioner has not provided evidence that it acquired a second restaurant in 2003. Its incomplete tax returns do not reflect the acquisition and no other evidence contained in the record of proceeding reflect that. 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)).

⁴ A petition was filed and approved in 1998, which precedes the instant petition's timeframe.

⁵ The petitioner filed two other immigrant visa petitions in November 2003, LIN-04-032-52260 and LIN-04-032-52232. One was approved in February 2004 and the other is with the AAO on appeal. The petitioner is obligated to pay the proffered wages in those cases that the AAO will presume is approximately equivalent to the proffered wage in the instant petition. Although the beneficiary of LIN-04-032-52232 passed away, the petitioner undertook an obligation to pay the proffered wage in that case, from the date of the petition's priority date until that beneficiary's death.

The petitioner 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 will replace less productive workers, or has a reputation that would increase the number of customers. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cook will significantly increase profits for the petitioner, especially if the beneficiary is already working for the petitioner as she indicated on the ETA 750B when the petitioner reported a loss in the most recent year. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Although the petitioner established its ability to pay the proffered wage in 2001 and 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2003. Therefore, the petitioner has not established that it had the *continuing* ability to pay the proffered wage beginning on the priority date.

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.