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U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 20 2005
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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:
[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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

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 restaurant specializing in Chinese cuisine. 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.

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 24, 2000. The proffered wage as stated on the Form ETA 750 is \$13.50 per hour, which amounts to \$28,080 annually. On the Form ETA 750B, signed by the beneficiary on April 15, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition, submitted on March 31, 2003,¹ claimed the petitioner was established in 1997, currently had 16 employees, had a gross annual income of \$750,000, and had a net annual income of more than \$75,000.

In support of the petition, the petitioner submitted:

¹ On March 29, 2002, the petitioner had submitted a Form I-140 petition along with the petitioner's Form 1120S returns for 2000 and 2001; a duplicate of the certified Form ETA 750; an unaudited balance sheet for the first five months of 2002 showing \$208.92 in current assets and \$2,382.17 in current liabilities; and a statement of the petitioner's profits and losses for the first five months of 2002 showing a net income of \$3,149.89. On January 30, 2003, the director denied the petition, citing a \$5,686 net income deficit reported in the 2000 return and \$3,702 net income in 2001, "well below the proffered wage." He also rejected the petitioner's assertions its "cost of labor" constituted "readily available funds to pay the proffered wage," as well as the petitioner's submission of "financial statements that were not audited." The petitioner did not appeal the January 30, 2003 decision.

- The original labor certification application;
- Counsel's G-28;
- The petitioner's Form 1120S returns for 2001 and 2002; and,
- Translated copies of the beneficiary's work experience and training in the People's Republic of China.

In a request for evidence (RFE) dated March 8, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and specifically the petitioner's 2000 federal income tax return. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 also specifically requested submissions of "audited financial statements, bank account records and personnel records for 2000–2003.

In response to the RFE, on April 8, 2004, the petitioner submitted:

- The petitioner's Form 1120S tax returns for 2000–2002; and,
- The petitioner's balance sheet and profit-loss statement for the period ending December 31, 2003, on which appeared the words, "TAKEN FROM THE BOOKS AND RECORDS WITHOUT AUDIT."

In a decision dated May 10, 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. The director based the decision upon the petitioner's income tax returns for 2000 and 2001, noting the director's previous review in his January 30, 2003 decision; the 2002 net income of \$17,430, and the financial statements taken "unaudited" from the petitioner's books and records.

On appeal, counsel submits no a brief or additional evidence.

On the I-290B, signed by counsel on May 24, 2004, counsel checked the box indicating that the AAO would receive a brief and/or evidence within 60 days without attaching a separate letter showing "good cause" for such a time extension. To date, the record of proceedings does not indicate any brief or evidence had been received. On October 4, 2005, the AAO faxed counsel with a request for the additional evidence has received nothing further from counsel. Accordingly, this office will review the documents currently in the file as the complete record of proceedings.

Counsel states on appeal that the petitioner does have sufficient funds to pay the proffered wage because the petitioner can demonstrate its ability to pay because the wages it pays "all the employees" appear in its tax returns under "Cost of Labor."

At the outset, this office notes that it is not persuaded by counsel's assertion that cost of labor necessarily demonstrates the petitioner's ability to pay the proffered wage. Generally, "cost of labor" represents funds already paid that are therefore not available to demonstrate the petitioner's ability to pay the proffered wage. Moreover, the petitioner makes no claim that on the priority date it was paying more than the proffered wage of \$28,080 annually to a contractor or an employee to perform the same job described on the labor certification. The petitioner has not documented the position, duty and termination of a worker(s) who had been performing the duties of the proffered position.

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. Here, the beneficiary did not claim to have worked for the petitioner, nor does the record contain copies of Form W-2 Wage and Tax statements of the beneficiary.

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 (9th 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 (7th 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.

The evidence indicates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

The petitioner's tax returns show the amounts for taxable income on line 21 as shown in the table below.

Tax Year	Net Income	Wage Increase Needed* To Pay Proffered Wage	Surplus or Deficit
2000	-\$5,686	\$28,080	-\$33,766
2001	\$3,702	\$28,080	-\$24,378
2002	\$17,430	\$28,080	-\$10,650

* The full proffered wage, since no wage payments were made to the beneficiary in these years.

Since each of those figures is negative or less than the proffered wage, leaving a deficit, they fail to demonstrate the ability of the petitioner to pay the proffered wage.

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 corporate 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 corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation'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 those the petitioner may expect to convert 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 To Pay The Proffered Wage*	Wage increase needed
2000	-\$1,298	\$28,080
2001	-\$2,048	\$28,080
2002	\$3,969	\$28,080

* The full proffered wage, since no wage payments were made to the beneficiary in these years.

Since each of those figures is negative or at least less than the proffered wage, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of unaudited financial statements. Unaudited financial statements 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 of its 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.

After a review of the federal tax returns, it is concluded that the petitioner has not established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.