

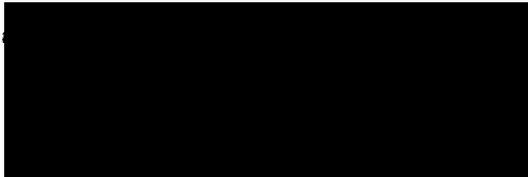


U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 15 2005**  
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IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:



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 dry cleaning and laundry services firm. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 17, 2001. The proffered wage as stated on the Form ETA 750 is \$12.98 per hour, which amounts to \$26,998 annually. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 4, 2003. On the petition, the petitioner claimed to have been established on July 1, 1999, to currently have two employees, to have a gross annual income of \$179,645, and to have a net annual income of \$7,270.

In support of the petition, the petitioner submitted:

- An original Form ETA 750;
- A Form G-28 for counsel;
- The petitioner's letter in support of the petition;
- The petitioner's CPA's April 28, 2003 letter; and,
- The petitioner's unaudited financial statements for 2001 and 2002.

In a request for evidence (RFE) dated September 16, 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 specifically requested:

- The petitioner's Form 1120 return for the fiscal year commencing July 1, 2002;
- The petitioner's bank statements for the "past several months;"
- An explanation of the accountant's claim that the petitioner spent more than \$70,000 in cash over two years on discretionary items that could as easily gone toward payment of the proffered wage;
- An explanation of how the petitioner established the \$160,000 value of its business goodwill and the \$50,000 value of its covenant not to compete;

In response to the RFE, the petitioner submitted:

- The petitioner's Form 1120 return for the 2002-2003 fiscal year, commencing July 1;
- A bill of sale specifying the value of the company's goodwill and of a related covenant not to compete;
- Company bank statements for April 2003–October 2003;
- The accountant's December 4, 2003 letter calculating the goodwill of Y H Kim, Inc.; and,
- A sworn statement of how the petitioner spent company savings for fiscal years 2001–2003.

In a decision dated May 5, 2004, the director determined that the evidence did not establish the petitioner's claimed ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and accordingly, he denied the petition.

On appeal, counsel submits a brief and additional evidence. The evidence consists of:

- Counsel's brief;
- A notarized affidavit executed May 21, 2004 by the petitioner's owner's son "regarding the moneys that I have borrowed from my mother," regarding wired funds and cash he received during the company's fiscal years 2001–2003, adding that "it has been my understanding that the moneys were all savings of the company."
- An opinion letter of the accountant assessing the petitioner's ability to pay, with financial statement attachments for 2001–2003; and,
- A promissory note payable to the petitioner by May 20, 2007, for \$85,000 in recognition of a college loan the petitioner<sup>1</sup> made to the petitioner's owner's son.

Counsel states on appeal that the promissory note and estimated value of goodwill from a previous sale of company assets represent assets available for paying the proffered wage. Further, the company accountant asserts depreciation, goodwill amortization and "outside service payments" should all be considered as assets available to pay the proffered wage.

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, 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.

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<sup>1</sup> While the son's affidavit credits his mother for lending him about \$85,000 for college, the mother's December 4, 2003 affidavit stated that the company rather than the mother lent the son the money.

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. In the instant case, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

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.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28:

<u>Tax Year</u> <sup>2</sup>	<u>Net Income</u>	<u>Surplus or (Deficit)</u>
2000	\$7,044	(\$18,106.40)
2001	\$7,270	(\$19,728.40)
2002	\$3,770	(\$23,228.40)

Accordingly, the petitioner has not established its ability to pay the proffered wage from its net income for any of the foregoing years.

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

<sup>2</sup> The petitioner's tax year for fiscal 2000 ends June 30, 2001, and includes the April 30, 2001 priority date.

assets. The net current assets the petitioner expects 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, demonstrates the petitioner's ability to pay.<sup>3</sup>

Calculations based on the Schedule L's attached to the petitioner's tax returns yield negative net current assets of minus \$7,798 for its 2000 fiscal tax year; a minus \$15,072 for its fiscal 2001 tax year; and a minus \$18,412 for fiscal 2002 tax year.

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

The record also contains copies of unaudited financial statements for calendar years 2001–2003. 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.

Moreover, the CPA's April 28, 2003 letter bases its support of the petitioner having the ability to pay the proffered wage primarily upon being able to recast amortization and depreciation deductions for fiscal 2001 and 2002 into available cash, which the CPA considered those items the same as. 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. The court in *Chi-Feng Chang* further 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.

The record also contains copies of bank statements for parts of 2003. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported

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<sup>3</sup> Counsel points out that the value of the petitioner's goodwill ranged from \$120,000 to \$160,000. Goodwill is, however, not a current asset in that a company is typically not likely to convert its goodwill into cash during the year.

on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, no bank statements for 2001 or 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

In the affidavit notarized December 4, 2003, by ██████████ sole shareholder of the petitioner, the petitioner was attempting to respond to an RFE request to account for the disposition of some \$60,000 of company cash. She states that the company had lent her son, on her behalf, some \$60,000 for his college expenses in 2001 and 2002. Previously, the CPA's April 28, 2003 letter had asserted the petitioner had unspent depreciation and amortization set asides, amounting to of more than \$36,000 in available cash derived from company operations in 2001, and more than \$34,000 in cash from 2002. The petitioner was accounting for its disposition of the available cash by stating the company had lent out most of the \$70,000 to the son of its sole shareholder for college. Prior to the instant appeal, the petitioner, however, does not document this transaction other than through affidavits. 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)).

This office notes that the son's promissory note, submitted on appeal, is unsecured and unavailable to the petitioner as an asset until the note's due date in 2007. As such, the proceeds are not available as an asset on the priority date of the petition, which is the time when the director must determine ability to pay. In any event, the student loans, spread over the three years when made, do not average out to be greater than the annual amount of the proffered wage.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered 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.