

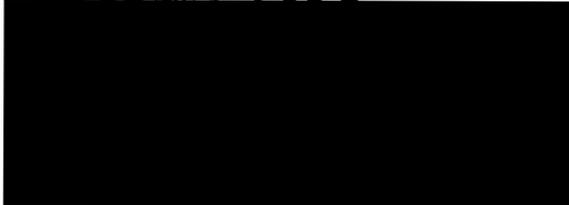


U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **APR 04 2006**  
SRC-04-155-51155

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 February 2, 2004. The proffered wage as stated on the Form ETA 750 is \$310.00 per week, which amounts to \$16,120.00 annually. On the Form ETA 750B, signed by the beneficiary on January 20, 2004, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on March 25, 2004.

The I-140 petition was submitted on May 11, 2004. On the petition, the petitioner claimed to have been established on November 1, 1988, to currently have 5 full time and 3 part time employees, and to have a gross annual income of \$352,661.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated November 17, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states that the service center should have requested additional financial information and the petitioner's financial documentation submitted on appeal clearly establishes the petitioner's ability to pay the proffered wage. Evidence submitted on appeal includes the

petitioner's bank statements from January 2003 to October 2004, unaudited financial statements accompanied by letters from an accountant, and the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the first three quarters in 2004.<sup>1</sup>

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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, signed by the beneficiary on January 20, 2004, 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.

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<sup>1</sup> On the Form ETA 750 and the I-140 petition, the petitioner's name is "[REDACTED]". On the evidence submitted along with the I-140 petition and on appeal, the petitioner's name is "[REDACTED]" or "[REDACTED] Inc." Bank statements submitted by the petitioner are addressed to "[REDACTED] RESTAURANT." Thus, "[REDACTED]" or "[REDACTED]" is doing business under the name "[REDACTED] Restaurant.

The evidence indicates that the petitioner is an S corporation. The record contains a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003. The record before the director closed on May 11, 2004 with the receipt by the director of the petitioner's I-140 petition and supporting evidence. As of that date the petitioner's federal tax return for 2004 was not yet due. Since the tax return for 2004, which covers the period of time from the priority date to the date the record closed before the director, was not available at the time the I-140 petition was submitted or at the time additional evidence was submitted on appeal, CIS will look at previous years' tax returns to determine the petitioner's ability to pay the proffered wage. The petitioner's tax return for 2003 is the most recent tax return available and the only tax return that appears in the record.

For an S corporation, 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 petitioner's tax return shows the amount for ordinary income on line 21 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2003	\$3,318.00	\$16,120.00*	-\$12,802.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 expected to be converted 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 attached to the petitioner's tax return yield the following amount for net current assets.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2003	\$1,306.00	\$16,120.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage.

Counsel states that “the Service Center denied the petition summarily without giving the petitioner an opportunity to respond and submit more documentation,” and “[t]he Service should have sent a request to the petitioner for additional financial information.” The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal. Counsel in this case did in fact file an appeal and submit additional evidence on appeal.

Counsel also states that the petitioner’s “financial documentation, (submitted herewith) including [bank] statement[s], monthly/quarterly financial statements by CPA, [and] quarterly payroll tax [returns,] clearly establish[es] that the petitioner had the ability and still has the ability to pay the proffered wage.”

Evidence in support of counsel’s assertion includes the petitioner’s bank statements from January 2003 to October 2004. 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. The regulations provide for the submission of annual reports, federal tax returns, or audited financial statements. While it is understandable that the petitioner’s tax return for 2004 was unavailable at the time of the filing of the I-140 petition and at the time of the appeal, there is no explanation in the record for why the petitioner’s tax return for 2003 should not be considered or why the petitioner was unable to submit another type of required evidence. 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 which would be sufficient to pay the proffered wage.

In support of his assertion, counsel also submits the petitioner’s income statement ending on October 30, 2004, its income statement ending on August 31, 2004 and accompanied by a letter from an accountant, and its income statement ending on March 31, 2004 and accompanied by a letter from the same accountant. Both letters state that the accountant “[has] not audited or reviewed the accompanying financial statement” and nothing in the record shows that the income statement ending on October 30, 2004 is an audited financial statement. **Thus, the three income statements are 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, and both letters from the accountant state that the compiled income statements “[are] limited to presenting in the form of financial statements information that is the representation of management.” The unsupported representations of management are not persuasive evidence of a petitioner’s ability to pay the proffered wage.

Counsel likewise submits the petitioner’s Form 941 Employer’s Quarterly Federal Tax Returns for the first three quarters in 2004. CIS, as stated above, relies on net income in determining the petitioner’s ability to pay the proffered wage, and net income considers income after expenses were paid. The Form 941 shows the amount the petitioner paid for wages and also the petitioner’s federal tax liability. It does not, however, demonstrate any additional funds available to pay the beneficiary.

Counsel states that the Form 941s “firmly establishes the petitioner’s ability to pay wages to its employees.” The Form 941s do show the amount the petitioner paid for wages, and the petitioner paid \$91,402.84 for the first nine months in 2004.<sup>2</sup> The fact that the petitioner had the ability to pay the wages of its staff is irrelevant to whether it has the ability to pay the beneficiary’s proffered wage at the priority date of the petition; the petitioner must demonstrate that it has additional funds, aside from money used to pay its staff, to pay the wages of an additional staff. If the petitioner has established that the beneficiary will be replacing another staff performing the duties of the proffered position, the wages already paid to that staff may be shown to be available to prove the ability to pay the proffered wage to the beneficiary. No evidence in the record shows that the beneficiary is replacing another staff member. In fact, according to the I-140 petition, the proffered position is a new position. In addition, based on the amount of wages paid for the first nine months in 2004, three-fourth of the proffered wage, \$12,090.00, would be a 13% increase. This is a significant percentage increase.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director erred in combining the ordinary income and the net current assets. Nevertheless, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.

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<sup>2</sup> Counsel states that “the petitioner’s quarterly [payroll] tax return shows an average \$30,000 payroll, which translates into a yearly [payroll] of \$120,000.” CIS refuses to speculate how much the petitioner paid for wages during the last three months in 2004.