



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
SRC-04-205-52198

Office: TEXAS SERVICE CENTER Date: **APR 04 2006**

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$13.37 per hour, which amounts to \$27,809.60 annually. On the Form ETA 750B, signed by the beneficiary on January 4, 2000, the beneficiary claimed to have worked for the petitioner beginning in April 1998 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on May 10, 2004.

The I-140 petition was submitted on July 22, 2004. On the petition, the petitioner claimed to have been established on October 19, 1997, to currently have 9 employees, and to have a gross annual income of \$337,862.00. With the petition, the petitioner submitted supporting evidence.

In a Notice of Intent to Deny dated September 9, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a copy of the petitioner's tax return for 2003 and copies of the beneficiary's W-2 forms from 1998 to 2004.

In response to the Notice of Intent to Deny, the petitioner submitted additional evidence. The petitioner's submissions in response to the Notice of Intent to Deny were received by the director on October 8, 2004.

In a decision dated October 20, 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 denied the petition.

Counsel states on appeal that the petitioner's other assets indicate that it has the ability to pay the proffered wage. Counsel submits a letter from an accountant with an attached worksheet and a letter showing the petitioner's line of credit.

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 4, 2000, the beneficiary claimed to have worked for the petitioner beginning in April 1998 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary's Form W-2's from 1998 to 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
1998	\$11,517.84	\$27,809.60	\$16,291.76
1999	\$18,000.03	\$27,809.60	\$9,809.57
2000	\$18,720.00	\$27,809.60	\$9,089.60
2001	\$18,720.00	\$27,809.60	\$9,089.60
2002	\$20,080.00	\$27,809.60	\$7,729.60
2003	\$22,007.29	\$27,809.60	\$5,802.31

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years from 1998 to 2003.

In addition to the beneficiary's Form W-2 Wage and Tax Statements from 1998 to 2003, the record includes copies of the petitioner's Employer's Quarterly Reports for all four quarters in 2003 and the first two quarters in 2004. The wages paid to the beneficiary as stated on the petitioner's Employer's Quarterly Reports for 2003 add up to \$22,007.29, which is the same as the amount shown on the beneficiary's W-2 Wage and Tax Statement for 2003. As shown above, this is less than the proffered wage and thus is insufficient to establish the petitioner's ability to pay the proffered wage in 2003. When the record closed on October 8, 2004 with the receipt by the director of the petitioner's submissions in response to the Notice of Intent to Deny, the beneficiary's Form W-2 Wage and Tax Statement for 2004 was not yet available even though it was requested by the director. Thus, the petitioner is not expected to provide the beneficiary's Form W-2 for 2004. However, since the Employer's Quarterly Reports for 2004 are part of the record, the AAO will examine them to determine the wages paid to the beneficiary in 2004. The reports for 2004 show that in the first six months, the beneficiary was paid \$11,361.79. This is not enough to show that the beneficiary was paid the proffered wage in 2004 because nothing in the record indicates that the beneficiary was paid or how much he was paid for the latter part of 2004. In addition, half of the proffered wage is \$13,904.80, and \$11,361.79 is less than \$13,904.80.

The record also includes the petitioner's "Payroll Item Detail" for the beneficiary from January to September 2004. This evidence is an unaudited financial statement, and 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, this evidence shows that from January to September 2004, the beneficiary was paid \$18,910.45. As stated above, this is not enough to show that the beneficiary was paid the proffered wage in 2004 because nothing in the record indicates that the beneficiary was paid or how much he was paid for the last three months in 2004. In addition, three-fourth of the proffered wage is \$20,857.20, and \$18,910.45 is less than \$20,857.20.

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 an S corporation.<sup>1</sup> The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002, and 2003. As stated above, the record before the director closed on December 8, 2004. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available.

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. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

In addition to the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, 2002, and 2003, the record also includes the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1998 and its Form 1120-A U.S. Corporation Short Form Tax Return for 1999. CIS considers net income to be the figure shown on line 28 of the Form 1120 U.S. Corporation Income Tax Return, or line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

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

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$335.00	\$16,291.76*	-\$15,956.76
1999	-\$2,613.19	\$9,809.57*	-\$12,422.76
2000	\$3,252.00	\$9,089.60*	-\$5,837.60
2001	-\$793.00	\$9,089.60*	-\$9,882.60
2002	\$6,854.00	\$7,729.60*	-\$875.60
2003	-\$61,093.00	\$5,802.31*	-\$66,895.31

\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years from 1998 to 2003.

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

<sup>1</sup> The record includes the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation from 2000 to 2003, its Form 1120-A U.S. Corporation Short Form Tax Return for 1999, and its Form 1120 U.S. Corporation Income Tax Return for 1998. Since the petitioner's more recent tax returns indicate that it is an S Corporation, the AAO will treat it as such.

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'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 End of year	Wage increase needed to pay the proffered wage
1998	\$14,892.00	\$16,291.76*
1999	\$890.58 <sup>2</sup>	\$9,809.57*
2000	\$919.00	\$9,089.60*
2001	-\$6,677.00	\$9,089.60*
2002	\$2,733.00	\$7,729.60*
2003	-\$11,813.00	\$5,802.31*

\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years from 1998 to 2003.

Counsel states that “[t]here are secondary sources of assets when included in the financial picture of Texas Pastabilities Inc. indicate that [it] has the ability to pay the proffered wage.” Evidence in support of this assertion includes a letter from an accountant stating that “it appears to me that the additional assets in the form of property, credit line, and receivables would sustain this business and would allow it to have the ability to afford the additional 0.04% needed to accommodate the proffered wage,” a worksheet provided by the accountant, and a letter showing the petitioner's line of credit.

The worksheet accompanying the accountant's letter is essentially an unaudited financial statement. As stated earlier, 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.

The worksheet is also not an accurate presentation of the petitioner's assets because in calculating the amount of money needed to meet the proffered wage, the accountant combines the petitioner's net current assets for 2003 with its line of credit for 2004, its personal property for 2004, and its receivables for 2004. Then, the accountant uses the combined amount to show that the wage increase needed to pay the proffered wage in 2003 is 0.04% of the combined assets available to the petitioner. First, the accountant's calculation is incorrect. Based on her calculation, the wage increase needed to pay the proffered wage is 4%, not 0.04%, of

<sup>2</sup> For the Form 1120-A U.S. Corporation Short Form Tax Return, current assets are shown on Part III, lines 1 through 6, and current liabilities are shown on lines 13 and 14.

the combined assets available to the petitioner. Second, the accountant cannot combine the petitioner's other assets for 2004 with the petitioner's net current assets for 2003 in determining whether the petitioner had the necessary amount of assets in 2003 to pay the proffered wage. These other assets for 2004, including the petitioner's property, line of credit, and receivables, may not have been available in 2003.

Furthermore, even though the worksheet lists the petitioner's net incomes and net current assets from 1998 to 2003, the petitioner's other assets for 2004, and the beneficiary's Form W-2s from 1998 to 2003, it focuses on whether the petitioner had available assets to pay the proffered wage in 2003 based on the accountant's inaccurate calculation. A showing that the petitioner had the ability to pay the proffered wage in one of the years in question is insufficient because the petitioner must show the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

The letter from the accountant mentions the petitioner's property and the worksheet includes the petitioner's personal property for 2004 as part of the calculation. However, there is no evidence in the record showing that the petitioner had \$35,000.00 worth of personal property in 2004, and counsel's adoption of the accountant's finding 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)). As stated above, the worksheet is an unaudited financial statement and therefore is not persuasive evidence.

The letter from the accountant mentions the petitioner's line of credit and the worksheet includes the petitioner's line of credit for 2004 as part of the calculation. The record also includes a letter dated July 22, 2004 showing the petitioner's line of credit. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The letter from the accountant mentions the petitioner's receivables and the worksheet includes the petitioner's receivables in 2004 as part of the calculation. CIS takes receivables into consideration in calculating the net current assets. However, there is no evidence in the record showing that the petitioner had two receivables in 2004 because the petitioner's tax return for 2004 is not part of the record, and counsel's

adoption of the accountant's finding 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)). As stated above, the worksheet is an unaudited financial statement and therefore is not persuasive evidence.

The letter from the accountant also states that “[a]lthough the tax returns (1120S) show a minimal gain or slight loss over the past 5 years the business is still thriving and this is not an uncommon event for small businesses.” The letter further notes that “[d]uring the current economic times many small businesses are suffering somewhat.” Assertions made by the accountant regarding the fact the petitioner is still thriving and the current economic situation are not supported by documentary evidence and are thus 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)).

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. 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.