

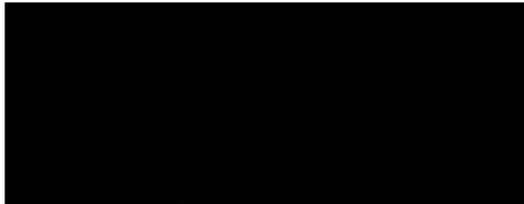


U.S. Citizenship  
and Immigration  
Services

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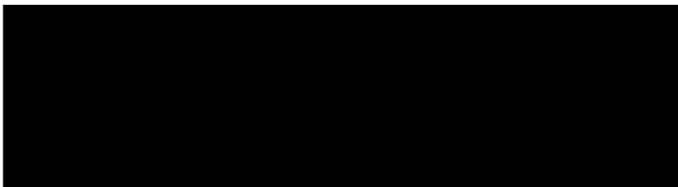


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAR 21 2006**  
SRC-04-025-52812

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker 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 kitchen helper. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$7.50 per hour, which amounts to \$15,600.00 annually. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on July 9, 2003.

The I-140 petition was submitted on October 30, 2003. On the petition, the petitioner claimed to have been established on September 5, 1983, to currently have 86 employees, to have a gross annual income of \$4,700,000.00, and to have a net annual income of \$23,300.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 9, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on February 13, 2004.

In a decision dated March 30, 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.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that the documents submitted in evidence establish the petitioner's ability to pay the proffered wage. Counsel also states that the instant petition is one of four petitions submitted by the petitioner and is the only one denied. Counsel states that the other three petitions were approved and that the same financial evidence was submitted in support of all four petitions.

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 April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 1999 and continuing through the date of the ETA 750B. However, no evidence in the record indicates the amount of any compensation paid by the petitioner to 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 (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.

In the instant petition, the petitioner has submitted no copies of any of its federal tax returns. Therefore no analysis can be made of the petitioner's net income as shown on its federal tax returns. The petitioner also has not submitted any evidence in one of the two other alternative forms of required evidence specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports or copies of audited financial reports.

The record contains a copy of a Form 1120S U.S. Income Tax Return for an S Corporation for 2001 of Superb Foods, Inc. That return is a consolidated return of three corporations, one of which is the petitioner. However, that return is not a tax return of the petitioner. Attached to the Form 1120S is a document titled as [REDACTED] Inc., Consolidation Schedule for the Year Ended December 31, 2001, Form 20S – Alabama.” The consolidation schedule contains entries for various line items of income and deductions for each of the three corporations, including for the petitioner. But the relationship between the figures on that document and those on the petitioner's Form 1120S federal tax return is not clear from the record. Although on many of the line items, the totals for the three corporations on the Alabama Form 20S consolidation schedule correspond to figures on the petitioner's Form 1120S federal return, on some line items the totals do not correspond to figures on the Form 1120S federal return. Therefore, it cannot be assumed that the figures for ordinary income and for Schedule K income of the petitioner on the Alabama Form 20S consolidation schedule show the amounts which would appear on a Form 1120S federal return of the petitioner, if such a return had been prepared separately for the petitioner alone. Moreover, the figures for the petitioner's ordinary income and for its Schedule K income on the Alabama Form 20S consolidation schedule are negative. Therefore, those figures would fail to establish the petitioner's ability to pay the proffered wage in the year 2001.

The record contains copies of unaudited financial statements of the petitioner for the months of January, February, March, and April 2001. 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 record also contains a copy of a letter dated January 23, 2004 on the letterhead of a certified public accounting firm. The letter is signed with an illegible signature, and no name of the individual signing the letter is typed below the signature. Typed below the signature are the words “For the Firm, Fairhope Office,” a reference to the firm's office location in Fairhope, Alabama, as shown on the letterhead. The letter states that the petitioner has annual operating income in the range of \$500,000.00 and above and that the petitioner's operating income is more than sufficient to meet the anticipated wage demands of the company.

Letters from accountants are not among the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2). The regulation provides for a fourth alternative form of evidence for petitioners which have 100 or more workers, namely a statement from a financial officer which establishes the petitioner's ability to pay the proffered wage. In the instant petition, however, the petitioner states on the I-140 petition that it has 86 employees. Therefore, the petitioner is not eligible to rely on a letter from a financial officer. Moreover, the evidence does not establish that the signer of the letter dated January 23, 2004 is a financial officer of the petitioner.

Counsel states that the instant petition is one of four petitions submitted by the petitioner and is the only one denied. Counsel states that the other three petitions were approved and that the same financial evidence was submitted in support of all four petitions. Nonetheless, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The record contains no other evidence relevant to the financial situation of the petitioner. For the reasons discussed above, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner filed two other I-140 petitions in 2003, each of which was approved, and one other I-140 petition in 2004, a petition which was later withdrawn. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wages to the beneficiaries of the other petitions filed by the petitioner which have already been approved while also paying the proffered wage to the beneficiary of the instant petition.

In his decision, the director correctly found that the petitioner had failed to submit evidence in one of the three alternative forms required by the regulation at 8 C.F.R. § 204.5(g)(2), and correctly found that since the petitioner does not employ 100 or more workers it is not eligible to rely on a statement by a financial officer of the petitioner. The director's decision to deny the petition was correct. 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.