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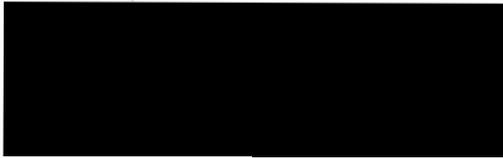
U.S. Department of Homeland Security  
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Washington, DC 20529



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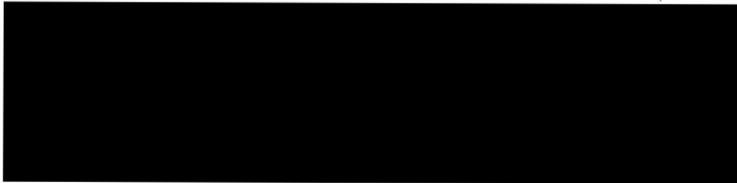


FILE: LIN 05 121 50422 Office: NEBRASKA SERVICE CENTER Date: FEB 20 2007

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 for*

Robert P. Wiemann, Chief  
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 bakery/restaurant. It seeks to employ the beneficiary permanently in the United States as a bakery manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's June 10, 2005 decision denying 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, or that the position requires at least two years of training or experience as reflected on the petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$61,880.00 annually.

The AAO reviews appeals on a *de novo* basis. See *Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a statement.

On the I-290B, signed by counsel on July 8, 2005, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on December 8, 2006 informing counsel that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five days to respond. In response, counsel submits copies of the petitioner's financial statements for 2001 through 2004, listing its "Total profits before non cash items," prepared by the petitioner's secretary/chief financial officer.

On appeal, counsel states that the "skilled worker" box was mistakenly checked on Form I-140, that the "underlying job offer (certified) clearly shows that it was for an 'other worker' position in that the requirements were for less than two years of experience or training," and that the "applicant brought this unintentional typographical error to the attention of the Service." Counsel states further that the petitioner submitted sufficient documentation including income tax returns, payroll materials, and evidence of compensation previously paid to the beneficiary, to demonstrate that its ability to pay the proffered wage. Relevant evidence in the record includes the petitioner's federal income tax returns for 2001, 2002, and 2003.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that checking the "skilled worker" box was a typographical error and that the petitioner brought this error to the attention of the "Service" does not qualify as independent and objective evidence. Further, although counsel asserts that the record contains evidence of compensation previously paid to the beneficiary, the record as it is presently constituted, contains no such evidence. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 11, 2001, 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 Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *see also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, and 2003. The record before the director closed on March 14, 2005 with the receipt by the director of the petition and supporting documentation. 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. 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." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated as an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. *See* Internal Revenue Service, Instructions for Form 4562 (2003), at 1, *available at* <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, *available at* <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

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, for income.

In the instant petition, the petitioner's tax returns indicate income from activities other than from a trade or business or additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income or all of its relevant deductions. For this reason, the petitioner's net income must be considered as the total of its income from various

sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income.

In the instant case, the petitioner's tax returns show the following amounts for income on line 23, Schedule K as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$15,149.00	\$46,731.00*	-\$46,731.00
2002	\$52,257.00	\$9,623.00*	-\$9,623.00
2003	\$54,284.00	\$7,596.00*	-\$7,596.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner 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 at issue in the instant petition.

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 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 year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$23,378.00	\$38,502.00*	-\$38,502.00
2002	\$10,921.00	\$50,959.00*	-\$50,959.00
2003	\$75,969.00	\$0*	\$14,089.00

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements,

the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record 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.

The director found that the petitioner's net income and net current assets failed 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.<sup>1</sup> 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> The discrepancies between the amounts listed by the director and the AAO do not alter the ultimate outcome of this appeal.