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U.S. Citizenship
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Services

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: JAN 22 2007

WAC 03 132 53514

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition due to abandonment. The director dismissed a subsequent motion to reopen. A second motion to reopen was granted and the director denied the petition. The matter 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 cook. 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 January 31, 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. The director also found unexplained inconsistencies in the record and 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 May 20, 1997. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024.00 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.

On appeal, counsel submits a letter and additional evidence, including signed federal tax returns for ██████████ Pizza¹ for 1997 and 1998, and for ██████████ Pizza for 2003. Counsel also submits copies of previously submitted evidence, including signed federal tax returns for ██████████ Pizza from 1997 through 2002, and for ██████████ Pizza for 2002; copies of the petitioner's California DE 6 Quarterly Wage and Withholding Report for 1997, 1998, 1999, 2000, 2001, 2002, and 2003; and copies of the beneficiary's IRS Form W-2 Wage and Tax Statement issued by the petitioner for 1997, 1998, 1999, 2000, 2001, 2002, and 2003.

On October 27, 2004, the director sent a request for evidence to the petitioner through counsel requesting, in part, signed or IRS-certified federal tax returns with all pages, forms, schedules, and statements for ██████████ Pizza for 1997 and 1998.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, however, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the petitioner has not overcome this portion of the director objections.

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 the reported number of employees was a clerical error does not qualify as independent and objective evidence. Although the evidence of record includes copies of the beneficiary's IRS Form W-2 Wage and Tax Statement issued by the petitioner for 1997, 1998, 1999, 2000, 2001, 2002, and 2003, the petitioner's former counsel stated in his 09/23/03 letter: "[T]he alien was paid cash from 1993 through 1999. Therefore, no W-2's or Check Stubs are available for any of those years." Further, although the evidence of record also includes a federal income tax return for ██████████ Pizza for 1997, the petitioner's former counsel stated in this same letter, in part: "Please note the employer lost his 1997 Income Tax Return for ██████████ Restaurant." The director also pointed out in his denial the following: the beneficiary's IRS w-2 forms issued by the petitioner for 1998, 1999, 2000, 2001, 2002, and 2003 that were submitted at the time of filing contain different financial information than those W-2 forms submitted in response to his request for evidence; the record contains two different California DE 6, Quarterly Wage and Withholding Report, forms for the second quarter of 2003,

¹ The name of the employer on the Form ETA 750 was originally ██████████ Pizza. In letters dated January 21, 1998 and March 30, 1998, the petitioner's former counsel notified the Alien Labor Certification Office of the Employment Development Department in Sacramento, California, that the beneficiary had transferred to ██████████ Pizza, whose ownership is the same as ██████████ Pizza. On August 3, 2001, the Department of Labor's Regional Office approved the correction on the Form ETA 750 to reflect ██████████ Pizza.

which contain contradictory wage information; and the petitioner's federal income tax returns are incomplete as they contain no information on Schedules L, M-1, or M-2. Neither the petitioner nor counsel, however, addresses these inconsistencies on appeal.

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 December 27, 1996, the beneficiary claimed to have worked for the petitioner beginning in December 1993 and continuing through the date of the ETA 750B.

The record contains two sets of Form W-2 Wage and Tax Statements of the beneficiary, which contain contradictory wage information. The beneficiary's Form W-2s for 1998 through 2003, which were submitted by counsel in response to the director's second request for evidence, 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	\$2,065.25	\$24,024.00	\$21,958.75
1999	\$11,040.00	\$24,024.00	\$12,984.00
2000	\$11,075.00	\$24,024.00	\$12,949.00
2001	\$11,040.00	\$24,024.00	\$12,984.00
2002	\$11,040.00	\$24,024.00	\$12,984.00
2003	\$11,040.00	\$24,024.00	\$12,984.00

In contrast to the above amounts, the beneficiary's Form W-2s for 1997 through 2003, which were submitted by the petitioner's former counsel at the time of filing, 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.
1997	\$20,904.00	\$24,024.00	\$3,120.00
1998	\$21,034.65	\$24,024.00	\$2,989.35

1999	\$21,086.91	\$24,024.00	\$2,937.09
2000	\$21,139.30	\$24,024.00	\$2,884.70
2001	\$21,165.56	\$24,024.00	\$2,858.44
2002	\$21,191.82	\$24,024.00	\$2,832.18

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. Further, the record contains no explanation as to why there are two sets of W-2 forms for the beneficiary issued by the petitioner which contain contradictory wage information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 (9th 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 (7th 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 a partnership. The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 1997 through 2003. The record before the director closed on January 21, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. 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 a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065.

In the instant petition, the petitioner's tax returns show amounts for income on Form 1065, line 22, as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
1997	-\$7,147.00	*	*
1998	\$3,450.00	*	*
1999	\$2,712.00	*	*

2000	-\$1,921.00	*	*
2001	\$2,357.00	*	*
2002	-\$5,507.00	*	*
2003	\$2,291.00	*	*

* The record contains insufficient information to calculate these amounts. As discussed above, the record contains two sets of Form W-2 Wage and Tax Statements which contain contradictory wage information. It is not known which set, if either, is correct.

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 partnership 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 partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership'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. As noted by the director in his denial, none of the Schedule Ls in the petitioner's federal income tax returns from 1997 through 2003 contains any information. The record contains no explanation for these deficiencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of the foregoing, 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.

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.

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.