U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 1 8 2008
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IN RE: Petitioner: [redacted]

Beneficiary:

PETITION: Immigrant 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, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as the Indian cuisine cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2003 priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's November 21, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Service].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 2, 2003. The proffered wage as stated on the Form ETA 750 is $2,005 a month, or $24,060 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[1] Relevant evidence submitted on appeal includes counsel's brief.

With the initial I-140 petition, the petitioner submitted a Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2003. The petitioner also submitted a copy of its Forms 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2003 through the second quarter of tax year 2004; and state of Colorado Unemployment Insurance Tax Reports for the third quarter of 2003 to the second quarter of 2004.[2]

The record also contains evidence submitted by the petitioner in response to the director's request for further evidence dated June 28, 2006 that includes: the petitioner's Forms 1120S, U.S. Income tax Return for an S Corporation, for tax years 2004 and 2005; the beneficiary's Forms W-2 Wage and Tax Statement for tax year 2005; and copies of the beneficiary's paychecks for the months June to August 2006.[3] The petitioner also submitted a two page income state that listed the petitioner's income and operating expenses for the month of June 2006 and for the six month period ending June 30, 2006; a Form 941 Employer's Quarterly Federal Tax Return or the second quarter of tax year 2006 that indicated the petitioner had nine employees; a state of California Unemployment Insurance Tax Report of Workers Wages for June 2006 that indicated the petitioner had eleven employees.[4]

Finally in response to the director's RFE, the petitioner submitted a list of three individuals for whom it had submitted I-140 petitions. The petitioner indicated one person was presently working for it, another had declined full time employment with the petitioner, and the third person was the beneficiary. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the petitioner offered the beneficiary wages of $2,005 a month, and that the amount due in tax year 2003 was $12,030.[5] Counsel asserts that the petitioner's net income in tax year 2003 was $16,868, which is sufficient to pay the beneficiary's 2003 wages. Counsel also notes that the net current assets of the petitioner in tax year 2003 were identified as $18,519, which is also sufficient to pay the proffered wage for the six months remaining after the July 2, 2003 priority date was established.

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[1] 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).

[2] These documents indicate the petitioner had five employees for all quarterly reports submitted, except for the first quarter of tax year 2004, in which the petitioner reported the wages of six employees.

[3] These paychecks indicated the petitioner paid the beneficiary a monthly salary of $2,100 for these three months.

[4] Based on the quarterly wages report on the form, some of the petitioner's employees do not work fulltime. Further the first sheet of the form indicates the petitioner had nine employees in June 2006.

[5] Counsel calculated this figure by multiplying the petitioner's proffered monthly salary by six months time.

Counsel further asserts that by utilizing a hybrid analysis of the petitioner's tax return for 2003, the combination of the petitioner's net income and its net current assets for tax years was $35,387, a sum sufficient to pay the proffered wage of $24,060.

Counsel refers to an interoffice memorandum from William R. Yates, Former CIS Director for Operations,[6] and notes that the Yates memo does not preclude the application of *Matter of Sonegawa,* 12 I&N Dec. 612(Reg. Comm. 1967) in situations where an employer cannot meet the three possible avenues outlined in the Yates memo to establish the petitioner's ability to pay outlined in the Yates memo.

With regard to considering the overall circumstances of the instant petitioner, counsel notes that the petitioner's federal tax returns, through an examination of the petitioner's gross annual income, net annual income, and net current assets, demonstrate the petitioner's consistent profitability and the petitioner's ability to pay the proffered wage. Counsel also stated that according to the Colorado Unemployment Insurance Tax Report for the second quarter ending June 30, 2006, the petitioner had eleven employees, gross sales of $295,513 and net profits of $57,501 through June 30, 2006. Counsel asserts that by maintaining and consistently increasing its profitability over the past four years, the petitioner has demonstrated a reasonable expectation of increasing its profits in the future. Counsel states that the petitioner meets the criteria set forth in *Sonegawa* and demonstrates its ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in March 2001, to have a gross annual income of $371,042, a net annual income of $16,868, and to currently have five employees. On the Form ETA 750, signed by the beneficiary on June 11, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that in tax year 2003 the petitioner only has to establish its ability to pay the proffered wage as of July 2, 2003 to December 31, 2003, thereby prorating the annual wage to the actual months following the July 2003 priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.[7]

Counsel also asserts that in tax year 2003, the petitioner's net income and net current assets can be combined to determine the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets do not produce a meaningful number. Net income and net current assets are two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Given that net

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[6] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

[7] Since the petitioner did not provide any evidentiary documentation, such as W-2 Forms or pay stubs to the record with regard to any wages paid to the beneficiary from July 2003 to December 2003, the petitioner cannot meet this test.

income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. Thus, the petitioner cannot combine its net income and net current assets in tax 2003 to establish its ability to pay the proffered wage.

In response to the director's RFE, counsel also submitted the petitioner's income statement as of June 30, 2006. However, the AAO notes that this income statement is not audited. 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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form 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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although, as counsel correctly points out, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. at 612.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted the beneficiary's Form W-2 for tax year 2005 that established the petitioner paid the beneficiary $23,966.27. The petitioner also submitted pay stubs for the beneficiary for tax year 2006 indicating that for the months of May, June and July 2006, the beneficiary earned a salary of $2,100 a month and had wages of $15,800 as of July 31, 2006. Thus the petitioner appears to have established that the beneficiary was earning more than the stipulated monthly wages during these three months.[8] Thus the record contains some documentation that the petitioner paid the beneficiary a wage either equal to or greater than the proffered wage in tax year 2006. The AAO in these proceedings, will accept that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in 2006.

With regard to its ability to pay the entire proffered wage in tax year 2005, the petitioner has to establish its ability to pay the difference between the beneficiary's wages of $23,966.27 and the proffered wage of $24,060, namely $93.73. In earlier tax years, the petitioner did not submit any further evidentiary documentation as to any wages paid to the beneficiary. Further the state of Colorado Unemployment Insurance Report of Workers Wages for tax years 2003 and 2004 do not reflect any wages paid to the

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[8] The state Unemployment Insurance Report of Workers Wages, for the second quarter of tax year 2006 also reflects that the beneficiary earned $6,300 during these three months.

beneficiary during these years. While the Forms 941 submitted to the record indicates the combined wages paid to employees, and that the petitioner had employees, it does not identify individual employees. Thus, the petitioner has to establish its ability to pay the entire proffered wage of $24,060 during tax years 2003 and 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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 supported by federal case law. *See 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. Texas 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng,* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $24,060 per year from the priority date:

- In 2003, the Form 1120 stated a net income[9] of $16,593.

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[9]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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions as shown on its Schedule K for tax years 2003, 2004 and 2005, the petitioner's net income is found on Schedule K of its tax return. .

- In 2004, the Form 1120 stated a net income of $43,989.
- In 2005, the Form 1120 stated a net income of 47,972.

Therefore, while the petitioner had sufficient net income to pay the proffered wage in 2004, and the difference between the beneficiary's actual wages and the proffered wage in tax year 2005, it did not have sufficient net income to pay the proffered wage in tax year 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax return for tax year 2003 indicates net current assets of $18,519. Thus, the petitioner did not have sufficient net current assets to pay the proffered wage of $24,060.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner identified on the instant I-140 petition had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. As stated previously, the AAO does not combine the petitioner's net income and net current assets when determining the petitioner's ability to pay the proffered wage.

On appeal, counsel cites *Matter of Sonegawa,* 12 I&N Dec. at 612, a decision that relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large

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[10]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 was an uncharacteristically unprofitable year for the petitioner. On appeal, counsel states that the petitioner's increasing profitability is evidence of the petitioner's ability to pay the proffered wage, but provides no further evidentiary documentation to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506.(BIA 1980).

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2003 priority date.

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.