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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 02 2004

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 The director's decision will be affirmed in part and withdrawn in part.

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. 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; that the beneficiary was not qualified for the proffered position; that the petitioner filed the visa petition under the wrong category; and that the proffered position does not require two years of experience, and denied the petition accordingly.

On appeal, counsel submits a brief and re-submits previously submitted evidence.

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 first issue to be discussed in this case is whether or not the petitioner established its ability to pay the proffered wage. The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour, which amounts to $20,800 annually.

With the petition, the petitioner submitted a letter, a copy of its most recent quarterly tax return, unaudited financial statements, and its 2001 corporate tax return.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 17, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the years 2000, 2001, and 2002. The tax returns reflect the following information for the following years:[1]

	2001	2002
Net income[2]	$17,179	-$3,354
Current Assets	$5,369	$4,598
Current Liabilities	$9,179	$1,990
Net current assets	-$3,810	$2,608

In addition, counsel submitted copies of the petitioner's checking account statements for the period from 2000 through 2002 and the petitioner's quarterly wage report for the quarter ended September 30, 2002. The quarterly wage reports previously submitted and submitted in response to the director's request for evidence do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Additionally, the petitioner re-submitted unaudited financial statements as well as a letter from " that states the following:

> I am the treasurer of ., which conducts business as [the petitioner]. Bachour Enterprises achieves gross annual revenues of approximately $243,000.00. These revenues provide us with more than sufficient funds to pay the salary of at least $19,200.00 per year offered to [the beneficiary] in the application for alien employment certification, which was approved on his behalf.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 30, 2003, denied the petition. The director noted that the petitioner proved its ability to pay the proffered wage at the date of the priority date in 2001, but failed to show a continuing ability through its net loss in 2002.

On appeal, counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), applies to the facts of the instant visa petition and the petitioner's loss in 2002 does not indicates its inability to pay the proffered wage. The petitioner re-submits evidence that was previously submitted.

The unaudited financial statements that counsel submitted with the petition 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 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to

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[1] The petitioner's tax return for 2000 is irrelevant as the priority date was established in 2001.

[2] Taxable income before net operating loss deduction and special deductions on Line 28.

pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Finally, the letter provided by the petitioner's treasurer is of little evidentiary weight. The regulations permit the petitioner to provide a letter affirming its financial solvency in lieu of the regulatory documentary requirements if the petitioner employs more than one hundred (100) employees. *See* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner indicates that it employs six (6) employees. Thus, the letter merely reiterates its gross revenues reflected on its tax returns, which will be analyzed next.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

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 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. 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). Counsel's 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The director incorrectly determined that the petitioner demonstrated its ability to pay the proffered wage in 2001. The director pro-rated the proffered wage from the priority date so that only the number of months during that year was considered as the amount of the wage needed to be paid to the beneficiary. The director determined that the petitioner's total net income was sufficient to cover the pro-rated proffered wage. The problem with pro-rating in this manner is the failure to pro-rate the net income too.[3] Thus, the petitioner has not illustrated its ability to pay the proffered wage out of its net income in 2001. Additionally, the petitioner reports a loss in 2002,

[3] For example, the proffered wage broken down into monthly installments is $1733.33 and the net income broken down into monthly installments is $1431.58. Thus, multiplying each figure by eight months, if pro-rating, still means the net income does not cover the proffered wage.

which could not cover the proffered wage either, and thus the petitioner has not established its ability to pay the proffered wage in 2002 out of its net income.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. 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.[4] 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 a corporation's end-of-year 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 petitioner's net current assets during 2001, however, were -$3810. The petitioner's net current assets during 2002 were only $2,608. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause. The petitioner could not pay the proffered wage out of either of these figures in 2001 or 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of $17,179 and net current assets of -$3810 and has not, therefore, demonstrated the ability to pay the proffered wage the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a net income of -$3,354 and net current assets of only $2,608 and has not, therefore, demonstrated the ability to pay the proffered wage the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

Finally, counsel states that *Matter of Sonegawa, supra*, applies to this visa petition. Contrary to counsel's assertion, *Sonegawa* 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

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[4] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 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 2002 was an uncharacteristically unprofitable year for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the *continuing* ability to pay the proffered wage beginning on the priority date. The director's decision is affirmed with respect to his determinations concerning the petitioner's inability to pay the proffered wage.

The second issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Blank
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "to prepare and cook all types of omelets including fluffy egg white omelets, western omelets, waffles." Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, he did not indicate any employment, education, or training experience.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications.[5] The director requested additional evidence concerning the evidence of the beneficiary's qualifications on January 17, 2003.

In response to the director's request for evidence, the petitioner provided a letter on "Awtar" letterhead, dated March 4, 2003, stating that the beneficiary was employed in the position of specialty cook with their restaurant from August 1, 1996 to October 10, 1999. The restaurant has a foreign address. The letter provides the following information concerning the beneficiary's employment responsibilities at Awtar:

> [The beneficiary's] job duties included: creation, preparation and cook of various gourmet breakfast specialties such as all varieties of omelets, waffles and other egg and egg white recipes. He further created and prepared various ethnic specialties including, but no limited to Lebanese and Northern African cuisine.
>
> I have personal knowledge that the above facts are true and correct because I was his Manager and immediate Supervisor during this period of [sic].

The letter is signed by Bob Sokhon, Manager of Awtar Restaurant.

The director's decision stated the following:

> The petitioner's response, received April 10, 2003, included unsigned correspondence on Awtar Restaurant letterhead, dated March 4, 2003. ... The letter contains no information regarding any training received by the beneficiary.
>
> Form ETA-750 does not indicate that the petitioner will accept work experience in lieu of formal training.

The director's continued reasoning cites the regulatory provisions at 8 C.F.R. § 204.5(l)(2) as further evidence that a third preference visa petition does not permit training in lieu of experience and that since the petitioner failed to specify the type of training required for the position, that specialized training is not required.

On appeal, counsel provides an additional letter of experience, re-submits the Awtar restaurant letter of experience previously submitted, and states that this proves the beneficiary's receipt of practical training.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

[5] Counsel's accompanying letter to the petition indicates that an experience letter is attached; however, the record of proceeding does not contain it.

> giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

While the incomplete labor certification application form makes it difficult to reconcile the evidence against the beneficiary's sworn declarations, the AAO find the letters pertaining to the beneficiary's qualifications to be acceptable evidence of two years of training. According to the guiding regulation, the training letter must provide the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter provided in response to the director's request for evidence provided the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter on appeal corroborates the beneficiary's practical training as a cook at the restaurant Khan El Mir, in Lebanon, from March 3, 1994 to July 1, 1996, and is signed by the owner/manager. Thus, the part of the director's decision finding that the beneficiary was not qualified for the proffered position is withdrawn.

The director also determined that the petitioner filed the visa petition under the wrong category and that the proffered position does not require two years of training or experience. These determinations are incorrect. The Department of Labor (DOL) certified the alien labor certification application with its requirement of two (2) years of training, which qualifies the visa petition in the third preference category. The director required "specific" training in his decision, but that language is not found in the regulations he cited at 8 C.F.R. § 204.5(l)(2). Thus, the two years of training required for the proffered position accurately places the petition's category into the third preference under 203(b)(3)(A)(i) of the Act. Additionally, CIS may not determine that a proffered position's requirement of two years of experience is invalid after DOL certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As CIS may not alter the terms of the labor certification application after DOL certification, the proffered position requires two years of experience. The portions of the director's decision pertaining to these two issues are withdrawn.

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. The director's decision is affirmed in part and withdrawn in part.[6]

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[6] Instead of sending this file to the Nebraska Service Center where it was initially adjudicated, upon request, the file is being transferred to the California Service Center for adjudication of a family-based immigrant visa petition.