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

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 10 2005

WAC 00 083 52332

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: SELF-REPRESENTED

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an artificial breeding operation. It seeks to employ the beneficiary permanently in the United States as an artificial breeding ranch supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, the petitioner provides additional evidence and asserts that it has established its financial ability to pay the proffered salary.

As a preliminary matter, it is noted that this petition would not be eligible for approval because it does not contain Part B of the ETA 750. An incomplete ETA 750 does not comply with the regulation at 8 C.F.R. § 204.5(l)(3), which requires either an individual labor certification, an application for Schedule A designation or evidence that the alien qualifies for one of the shortage occupations in the DOL'S Labor Market Information Pilot Program. Additionally, the alien beneficiary, not the petitioner, signed the petition. The petition should have been rejected as not complying with proper filing procedures pursuant to 8 C.F.R. § 103.2(a)(2). Nevertheless, as the case has been pending for a substantial time, the substantive issues raised in the director's denial and on appeal will be addressed.

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 at 8 C.F.R. § 204.5(g)(2) provides:

> *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. 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 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 May 16, 1996. The proffered wage as stated on the Form ETA 750 is $9.40 per hour, which amounts to $19,552 per annum.

On Part 5 of the visa petition, the petitioner claims to have been established in 1992, to currently employ 25 workers, and to have a net annual income of $90,000.

The petitioner initially submitted no evidence of its ability to pay the beneficiary's proposed wage offer of $19,552 per year. On October 18, 2000, the director requested additional evidence pertinent to this ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that it must submit additional evidence in the form of either federal tax returns, annual reports, or audited financial statements to demonstrate its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

In response, the petitioner submitted a partial copy of its Form 1065, U.S. Partnership Return of Income for 1999, consisting of only the first page. It shows that the petitioner files its returns using a standard calendar year. In 1999, the petitioner reported net income of $299,270.

The director denied the petition on February 24, 2001. By submitting financial information relevant only to 1999, the director concluded that the petitioner had failed to demonstrate its continuing financial ability to pay the certified wage beginning on the priority date of May 16, 1996.

On appeal, the petitioner's owner claims he misunderstood the request for evidence as asking for only his most recent financial statement. On appeal, he submits copies of several financial statements titled "statement of income," for the years 1996 through 2000. These financial statements do not appear to be audited as required by 8 C.F.R. § 204.5(g)(2). The statement for 2000 is stamped as a preliminary draft, "for discussion purposes only."

The unaudited financial statements that the petitioner's owner submitted on appeal cannot be considered as persuasive evidence of the petitioner's continuing financial ability to pay the beneficiary's wage offer. 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 do not convincingly demonstrate a petitioner's ability to pay the proffered wage.

It is noted that in examining a petitioner's ability to pay a certified wage, CIS will generally review the net income figure reflected on the petitioner's federal income tax return, or audited financial statement if submitted, without consideration of depreciation or other expenses. A petitioner's federal tax returns have long been recognized as a basis for determining a petitioner's ability to pay the proffered wage. *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). 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.

Besides net income, CIS will also examine net current assets as an alternative method of evaluating a petitioner's ability to pay a proposed wage offer,[1] or whether a petitioner may have actually employed an alien beneficiary at a given wage.

In this case, as noted by the director, the petitioner failed to provide sufficient persuasive evidence of its continuing ability to pay the proffered wage, although the cover page of the petitioner's 1999 tax return suggests that it had more than enough net income to pay the proffered wage of $19,552 during that period. The financial statements submitted on appeal, however, are not audited and do not comply with the regulatory guidelines. They cannot be considered as probative evidence of the petitioner's continuing ability to pay the proffered wage.

In view of the foregoing, and based on a review of the evidence submitted to the underlying record as well as on appeal, the AAO concurs with the director's decision to deny the petition based on the petitioner's failure to establish its continuing ability to pay the proffered salary as of the priority date of May 16, 1996.

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.

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[1] Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period. If a petitioner's year-end 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.