U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: EAC-03-110-50929 Office: VERMONT SERVICE CENTER Date: OCT 05 2007

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: 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, Vermont Service Center, and 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 specialty chef, foreign food. 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 and denied the petition accordingly.

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.

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 26, 2001. The proffered wage as stated on the Form ETA 750 is $13.00 per hour, which amounts to $27,040.00 annually. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 21, 2003. On the petition, the petitioner left blank the items for the date on which it was established, its current number of employees, its gross annual income and its net annual income. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 7, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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 to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 1, 2004.

In a decision dated June 4, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits no brief and submits additional evidence. The petitioner states on appeal that the petitioner intends to hire the beneficiary to replace the wife and the daughter of the petitioner's president. The petitioner states that the Form W-2 Wage and Tax Statements of the wife and daughter show compensation in amounts totaling more than the proffered wage.

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).

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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although 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. 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 19, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has 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 (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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of Form W-2 Wage and Tax Statements issued a corporate name with the same employer identification number as appears on the petitioner's I-140 petition. Similarly, a letter dated March 31, 2004 from a certified public accountant refers to financial statements in the record under the same corporate name as appears on the Form W-2 statements in the record. The name under which the petition was submitted is therefore evidently a trade name.

The record contains no copies of any federal tax returns for the petitioner. For this reason, the record provides no basis on which to evaluate the petitioner's net income as shown on its tax returns, and no basis to evaluate the petitioner's net current assets, which is another criteria for analysis which may be used by CIS when evaluating a petitioner's ability to pay the proffered wage. Net current assets are calculated from the figures for current assets and current liabilities which appear on the Schedule L's attached to the Form 1120 U.S. Corporation Income Tax Returns. Since no tax returns were submitted for the record, neither net income nor net current assets for any given year are established in the instant petition.

As alternative forms of evidence the regulation at 8 C.F.R. § 204.5(g)(2) permits a petitioner to submit copies of annual reports or copies of audited financial reports. However, the petitioner also failed to submit evidence in either of those two alternative forms.

The record contains copies of Form W-2 Wage and Tax Statements for employees of the petitioner for the year 2000 and 2001. The beneficiary is not one of the employees for whom Form W-2 statements were submitted. In the notice of appeal, the petitioner states that two of the Form W-2's each year for 2000 and for 2001 are those of the wife and daughter of the petitioner's president. For the year 2001 those W-2's show compensation to the president's wife in the amount of $21,250.00 and compensation to the president's daughter in the amount of $8,381.25. The total of those two amounts is $29,631.25, an amount greater than the proffered wage of $27,040.00. The petitioner asserts that it intends to hire the beneficiary to replace the president's wife and daughter. However, the record contains no information on the responsibilities performed by those two persons during 2001 and no further details on the petitioner's claimed plan to replace those two persons with the beneficiary. Moreover, the record lacks evidence in one of the three alternative required forms, namely tax returns, annual reports or audited financial statements. Therefore no analysis can be made of the overall financial condition of the petitioner. Therefore the W-2 forms in the record fail to establish the petitioner's ability to pay the proffered wage as of the priority date or thereafter.

The record also contains copies of unaudited financial statements for the year ending December 31, 1999. Unaudited financial statements 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 of its 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. Moreover, the financial statements submitted in the instant petition are for the year 1999, two years before the year of the priority date, 2001. Therefore those statements have little relevance to the instant petition.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage.

For the above reasons, the evidence 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.

In his decision, the director noted the absence of evidence in one of the three alternative forms required by the regulation. The director therefore found that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date. The director therefore denied the petition.

The decision of the director to deny the petition was correct, based on the evidence in the record before the director. For the reasons stated above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.