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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC-03-196-50484

IN RE: Petitioner:
Beneficiary: [redacted]

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, 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 an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is $13.01 per hour, which amounts to $27,060.80 annually. On the Form ETA 750B, signed by the beneficiary on October 15, 2002, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on June 9, 2003. On the petition, the petitioner claimed to have been established in 1975, to currently have two employees and to have a gross annual income of $150,000.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated July 29, 2003, the director requested additional evidence relevant to the petitioner's 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 October 3, 2003.

In a second RFE dated December 3, 2003, the director again requested additional evidence relevant to the petitioner's 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 second RFE were received by the director on February 4, 2004.

In a decision dated April 26, 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, counsel submits a brief and no additional evidence. Counsel states on appeal that the petitioner has experienced growth since 2000 of $5,382.00 per year. Counsel also states that the petitioner paid officer compensation of $28,560.00 in 2001 and $32,965.00 in 2002, and that the $5,382.00 increase in income has been invested in the business in the form of officer compensation. Counsel states that based on the petitioner's growth in income of approximately $10,700.00 from 2000 to 2002, it is a fair assumption that the petitioner will have continued growth in later years.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted for the record prior to the director's decision.

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 October 15, 2002, 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 the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002. The record before the director closed on February 4, 2004 with the receipt by the director of the petitioner's submissions in response to the second RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show amounts for taxable income on line 28 as set forth in the table below.

Tax year	Net income	Proffered wage	Surplus or deficit
2001	$677.00	$27,060.80	-$26,383.80
2002	$208.00	$27,060.80	-$26,852.80

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either of the two 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 corporate 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 corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation'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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		
	Beginning of year	End of year	Proffered wage
2001	-$12,953.00	-$8,348.00	$27,060.80
2002	-$8,348.00	-$4,213.00	$27,060.80

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.

Counsel states that amounts paid for officer compensation represent additional funds available to pay the proffered wage. The amounts shown on the petitioner's Form 1120 tax returns as compensation of officers are shown in the table below.

Tax year	Compensation of officers	Net Income	Total available income	Proffered wage	Surplus or deficit
2001	$28,560.00	$677.00	$29,237.00	$27,060.80	$2,176.20
2002	$32,965.00	$208.00	$33,173.00	$27,060.80	$6,112.20

The foregoing information shows that if the proffered wage had been paid to the beneficiary in 2001 and 2002, only $2,176.20 would have been available for compensation of officers in 2001 and only $6,112.20 would have been available for compensation of officers in 2002.

The record also contains copies of Form 1040 U.S. Individual Income Tax Returns of the petitioner's president for 2000, 2001, and 2002 . The return for 2000 shows the figure of $22,200.00 as income on line 7, for wages, salaries, tips, etc., and shows income from all other sources as $367.00. The return for 2001 shows the figure of $28,560.00 as income on line 7, for wages, salaries, tips, etc., and shows income of $401.00 from all other sources. The return for 2002 shows the figure of $32,965.00 as income on line 7 and shows no income from any other sources.

The figures on line 7 of the president's returns for 2001 and 2002 match the amounts paid by the petitioner for compensation of officers in those years. For the year 2000, it may be inferred that the figure on line 7 of the president's return also was equal to the amount paid by the petitioner for compensation of officers in 2000.

The foregoing figures show that compensation of officers paid by the petitioner was the source of nearly all of the income of the petitioner's president during the years 2000, 2001 and 2002. Although counsel asserts that the funds paid by the petitioner for compensation of officers in 2001 and 2002 could have been available to pay the proffered wage, the record fails to establish that the petitioner's president would have been willing and able to forego that income in those years. As shown above, if the proffered wage had been paid to the beneficiary in 2001, only $2,176.20 would have remained available for compensation of officers that year, and if the proffered wage had been paid to the beneficiary in 2002, only $6,112.20 would have been available for compensation of officers that year.

The record fails to establish that the amounts paid by the petitioner as officer compensation were in fact available to pay the proffered wage to the beneficiary in 2001 and 2002.

Counsel states that the petitioner's income grew by approximately $10,700.00 from 2000 to 2002. Counsel's statement is supported by the information in the tax returns of the petitioner and of the petitioner's owner which are discussed above.

Under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. *Matter of Sonegawa* relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 $100,000.00. 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 moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. The growth in the petitioner's available income of approximately $10,700.00 from 2000 to 2002 which is cited by counsel is already reflected in the petitioner's figures for its net income and its expenses for compensation of officers which are discussed above. That growth in available income provides no additional support to help establish the petitioner's ability to pay the proffered wage during the period relevant to the instant petition.

For the above reasons, 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.

In his decision the director correctly summarized the information on the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002 and found that it failed to establish the petitioner's ability to pay the proffered wage during that year. The director failed to discuss the petitioner's Form 1120 tax return for 2001, which was also in the record. The analysis of the director was therefore incomplete. Nonetheless, for the reasons discussed above, the decision of the director to deny the petition was correct. The assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence in the record fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). As noted above, the priority date in the instant petition is April 30, 2001.

The Form ETA 750 states that the position of Italian cook requires four years of experience in the offered position.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains four letters from a person who is the proprietor of two different pizza restaurants where the beneficiary was formerly employed. Those letters state the beneficiary's experience at a pizza restaurant in Boston, Massachusetts, from 1992 to 1993 and at another pizza restaurant in Natick, Massachusetts, from February 1993 through 1995. The beginning and ending months of the beneficiary's work at the Boston restaurant are not specified, although in the two letters concerning the beneficiary's experience at the Boston

restaurant the proprietor says that the beneficiary worked there for over one year. Concerning the beneficiary's experience at the Natick restaurant, in one letter the proprietor says that the beneficiary's employment was "from 2/1/03 through 6/30/94." (Letter from proprietor, April 24, 2001). In another letter, the proprietor says that the beneficiary's employment was "During 1993-1995." (Letter from proprietor, Undated). The dates of the beneficiary's employment at the two restaurants therefore are not fully specified, but the letters document employment of approximately three years in total.

On the ETA 750B the beneficiary states that he was employed a pizza restaurant in Brighton, Massachusetts from February 1994 until March 1995, at a pizza restaurant in Cambridge, Massachusetts from March 1995 until December 1995, and at a pizza restaurant in Quincy, Massachusetts from January 1996 until August 2000. However, the record contains no letters from any of those former employers to establish those periods of employment.

As noted above, the ETA 750 requires four years of experience in the offered position. The evidence in the record, however, establishes only about three years of experience of the beneficiary in the offered position. Therefore the evidence fails to establish that the beneficiary had the minimum job qualifications required on the ETA 750 as of the priority date.

In summary, 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. Beyond the decision of the director, the evidence fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's 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.