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U.S. Citizenship  
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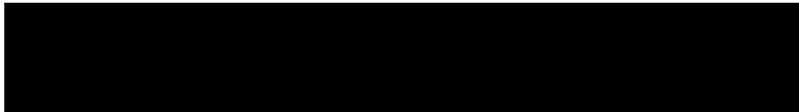
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Office: NEBRASKA SERVICE CENTER

Date FEB 16 2005

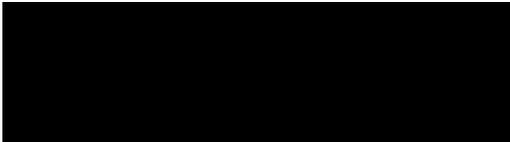
IN RE:

Petitioner:  
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:



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

The petitioner is an Indian restaurant and banquet hall. 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 and denied the petition accordingly.

On appeal, counsel submits a brief, previously submitted evidence, and some additional 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$23,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$1,800,000, and to currently employ 27 workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2000<sup>1</sup>, along with an unaudited financial statement for the period ending November 30, 2001, and quarterly tax statements demonstrating total wages paid by the petitioner for the first three quarters in 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 17, 2002, 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. The director noted that during the past year, the petitioner petitioned for at least eight employees in addition to the present

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<sup>1</sup> Financial information preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

beneficiary and its net income from 2000 would be insufficient to pay nine chef salaries. The director requested evidence concerning the petitioner's employees and the petitioner's 2001 tax return.

In response, the petitioner submitted its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation<sup>2</sup>. The tax return reflects the following information:

	<u>2001</u>
Net income <sup>3</sup>	\$33,068
Current Assets	\$193,919
Current Liabilities	\$7,024
Net current assets	\$186,895

In response to the director's request for evidence, counsel stated that the petitioner made a mistake in the number of its employees indicated on the petition and stated that the real number of employees was 17 "in addition to some employees who have been on 1099 (self-employed)" at the time of filing the petition. Additionally, counsel asserts that the position is not new and the beneficiary would replace "another position of an Indian cook." Counsel asserts that six of the eight petitions approved by Citizenship and Immigration Services (CIS) did not result in immediately employment of the intended beneficiaries since two were awaiting consular processing and four did not have employment authorization or social security numbers. Counsel points to the petitioner's cost of labor and salaries and wages paid figures in the petitioner's tax return as evidence of the petitioner's continuing ability to pay the proffered wage, keeping in mind that the proffered position would replace another employee already paid wages. No specific employee was identified as terminated and replaced by the intended beneficiary, however, a chart was provided listing current employees and six cooks that left employment with the petitioner, leaving the petitioner with a total of three cooks out of nine. Finally counsel states that there is no evidence of wages paid to the beneficiary since he is not employed.

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 October 28, 2002, denied the petition. The director noted the petitioner's payroll liabilities considering current employees and pending sponsored immigrants against the petitioner's net income, and determined the petitioner did not have sufficient income to cover its payroll expenses and thus did not have the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel reasserts arguments made in response to the director's request for evidence and states that the director failed to consider those arguments and corresponding evidentiary submissions. Counsel also states that the director erred by adding the salaries of the eight pending sponsored immigrants since six of those will replace the six terminated chefs and thus should be included among the petitioner's wage expenses reported on its taxes. Counsel asserts that the director also erred by adding full salaries of all ten current employees since two, which are unspecified, are only part-time employees. Counsel asserts that depreciation and cost of labor should be considered in determining the petitioner's continuing ability to pay the proffered wage.

The petitioner resubmits previously submitted evidence and copies of the petitioner's quarterly wage reports for all four quarters of 2002. The quarterly wage reports do not show that the petitioner paid any wages to the

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<sup>2</sup> The petitioner also submitted its 2001 tax return. *See* note 1, *supra*.

<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

beneficiary during the various quarters covered by the reports. The petitioner also submits an unaudited profit and loss statement for the period January 1 through July 1, 2002. A copy of a letter from the petitioner's representative paraphrasing counsel's brief was also submitted on appeal.

The unaudited financial statements that counsel submitted with the petition and on appeal 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.

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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

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, contrary to counsel's assertions. 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). 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 petitioner's net income in 2001 was \$33,068, which is greater than the proffered wage of \$23,000, and would suffice to illustrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date if only one petition was filed or approved in 2001.

Nevertheless, 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.<sup>4</sup> 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 the year in question, 2001, were \$186,895, an amount greater than the proffered wage, which could illustrate the petitioner's continuing ability to pay the proffered wage in either year if not too many other petitions were pending or approved in that same year.

The petitioner's net current assets are greater than its net income, so the AAO will utilize the petitioner's net current assets in its analysis of the petitioner's continuing ability to pay the proffered wage in 2001. Presuming that the petitioner's other petitions involved proffered wages similar to the proffered wage in the instant petition, which is \$23,000, then the petitioner could support salaries of eight employees in 2001. While counsel suggests that some beneficiaries of approved petitions did not obtain permission to enter the country or permission to work, the fact remains that the petitioner has valid employment-based visas to offer beneficiaries and is obligated to pay proffered wages premised upon them. The AAO has accessed an internal CIS database and determined that the petitioner has a total of ten pending (unadjudicated or on appeal for denial or revocation) or approved petitions since 2001, including the instant petition. Thus, the petitioner must illustrate an ability to pay the proffered wages of ten intended beneficiaries of sponsored immigrant visas in 2001. As noted above, the petitioner does not have the net income or net current assets to cover the salaries of ten pending or approved petitions in 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner's net income and net current assets are insufficient to demonstrate its ability to pay the proffered wage for ten petitions including the instant one. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2001. Counsel advised that the proffered position is not new and the beneficiary would replace workers who have left the petitioner. The record does not, however, corroborate the workers' wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary or any other pending immigrant. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that existing positions involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.