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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2005

IN RE: Petitioner: [REDACTED]
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:



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 adult residential institution. It seeks to employ the beneficiary permanently in the United States as a cook, adult residential institution. 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024.00 annually. On the Form ETA 750B, signed by the beneficiary on January 2, 1998, the beneficiary claimed to have worked for the petitioner beginning in May 1996 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on May 23, 2002. On the petition, the petitioner claimed to have been established in 1978, and to currently have 13 employees. In the spaces for gross annual income and net annual income the petitioner wrote "see enclosed income tax returns." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated November 15, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and additional evidence relevant to the beneficiary's experience. The due date for the petitioner's response was stated as February 7, 2003.

In a letter dated February 6, 2003 counsel requested an additional thirty days to respond to the RFE. Counsel's letter was received by CIS on February 7, 2003.

Approximately 30 days later, the petitioner submitted additional evidence in response to the RFE. The petitioner's submissions were received by CIS on March 10, 2003.

The petitioner's late response to the RFE should have resulted in a determination by the director that the petitioner had abandoned the petition, and a denial on that ground. No appeal would lie from a denial based on abandonment. *See* 8 C.F.R. §§ 103.2(8), 103.2(13), 103.2 (15). Nonetheless, the director made no finding of abandonment.

In a decision dated March 24, 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 new evidence. All evidentiary documents submitted on appeal are copies of documents which were submitted previously. Counsel also submits a copy of a memorandum dated May 4, 2004 to CIS Service Center Directors and to other CIS officials from ██████████ Associate Director of Operations, CIS. That document is not an evidentiary document, but is submitted by counsel as legal authority in support of the petition.

Counsel states on appeal that the director erroneously stated that the petitioner must show both net income and net current assets in each year to be greater than the proffered wage in order to establish its ability to pay the proffered wage. Counsel states that the memorandum from ██████████ mentioned above states that it is sufficient for the petitioner to establish that either its net income or its net current assets in a given year is greater than the proffered wage in order to satisfy the petitioner's burden of proof on that issue. Counsel further states that the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage, under the criteria in the memorandum by ██████████. Finally, counsel states that the totality of the circumstances establishes the petitioner's ability to pay the proffered wage during the relevant period.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted 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 Sonogawa*, 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 January 2, 1998, the beneficiary claimed to have worked for the petitioner beginning in May 1996 and continuing through the date of the ETA 750B.

The record contains copies of five Form W-2 Wage and Tax statements of the beneficiary. One Form W-2 is submitted for each year for 1996, 1997, and 2000, and two Form W-2's are submitted for 1999.

The beneficiary's Form W-2's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1996	\$900.00	not applicable	not applicable (before priority date)
1997	\$925.00	not applicable	not applicable (before priority date)
1998	W-2 not submitted	\$24,024.00	\$24,024.00*
1999	\$10,442.00	\$24,024.00	\$13,582.00
2000	\$2,576.00	\$24,024.00	\$21,448.00
2001	W-2 not submitted	\$24,024.00	\$24,024.00*
2002	W-2 not submitted	\$24,024.00	\$24,024.00*

* The full proffered wage, since no evidence was submitted of wage payments to the beneficiary in those years.

The record before the director closed on March 10, 2003 with the petitioner's submissions in response to the RFE. As of that date, the beneficiary's Form W-2's for 2001 and for 2002 should have been available, if the beneficiary was employed by the petitioner during those years. In his brief, counsel states that the beneficiary did not work for the petitioner during 2001, and no evidence in the record indicates that the beneficiary worked for the petitioner in either 2001 or 2002.

The foregoing information fails to establish the petitioner's ability to pay the proffered wage for any of the years at issue in the instant petition.

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. 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 the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$84,826.33	\$24,024.00*	\$60,802.33
1999	-\$13,981.35	\$13,582.00**	-\$27,563.35
2000	-\$4,159.00	\$21,448.00**	-\$25,607.00
2001	\$26,717.00	\$24,024.00*	\$2,693.00

* The full proffered wage, since the record lacks evidence of any wage payments made to the beneficiary in those years.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The foregoing information fails to establish the petitioner's ability to pay the proffered wage in 1999 and in 2000.

The record before the director closed on March 10, 2003 with the petitioner's submissions in response to the RFE. As of that date the petitioner's tax return for 2002 was not yet due. Therefore the petitioner's tax return for 2001 was the most recent return then available.

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		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
1998	\$10,500.00	-\$10,000.00	\$24,024.00*
1999	-\$10,000.00	\$6,540.00	\$13,582.00**
2000	\$6,540.00	-\$7,332.00	\$21,448.00**
2001	-\$7,332.00	\$17,205.00	\$24,024.00*

* The full proffered wage, since the record lacks evidence of any wage payments made to the beneficiary in those years.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage for any of the years at issue in the instant petition.



The record also contains a copy of an unaudited financial statement for the petitioner dated October 2002. 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.

Counsel states that the totality of the circumstances establishes the petitioner's ability to pay the proffered wage. Although counsel does not cite authority on that point, counsel appears to be referring to the type of analysis approved in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, any reliance on that case is misplaced. *Matter of Sonogawa* 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 *Sonogawa* 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that any of the years at issue in the instant petitioner were uncharacteristically unprofitable years for the petitioner.

In his decision, the director correctly stated the figures for net income as taken from the petitioner's tax returns. In calculating the end-of-year net current assets from the information on those returns the director erroneously added three extra zeros to the figures for 1998 and 1999. In summarizing the method of analysis to be used the director stated, "When the net income or net current [sic] is less than the proffered wage then ability to pay is not established." (Director's Decision, March 24, 2004, at 2). That statement incorrectly summarizes the proper method of analysis. As discussed above, if a petitioner's net income in each of the relevant years is higher than the proffered wage or is higher than the amount of any increase needed to raise the beneficiary actual salary to the proffered wage, the petitioner's ability to pay the proffered wage is established. If an analysis of net income fails to establish the petitioner's ability to pay the proffered wage, CIS may consider the petitioner's net current assets for each year, calculated from the Schedule L balance sheets attached to its tax returns.

In his brief, counsel attempts to combine the two approaches. However, counsel's approach carries the danger of double counting the same funds, since income in one year will affect the petitioner's net current assets in a succeeding year. The first page of a federal tax return is akin to an income statement that includes the petitioner's net income, which is a figure that summarizes the petitioner's revenues, costs, and expenses over a period of time. Schedule L reflects figures for a specific point in time. The year-end figures on the Schedule L summarize the petitioner's financial condition at that time, including the effect of any changes during the year, such as the effect of the income statement's net income figure.

Counsel also calculates an arithmetical average over the four-year period at issue in the instant petition. However, counsel averages net income figures and net current assets figures together. That calculation produces a figure which is neither an average of annual net income nor an average of net current assets for each year. Although calculating an average might be relevant in certain situations to an analysis of the totality of the circumstances under *Matter of Sonogawa*, 12 I&N Dec. 612, the approach urged by counsel in the instant case does not adequately consider all of the financial factors relevant to the petitioner's ability to pay the proffered wage. In addition to the lack of clarity caused by averaging together figures from two different financial categories, counsel's approach is selective in choosing which figures to include in the average. Counsel's calculations include only the higher number for each year of either net income or net current assets.

Although the director erred in his analysis on certain points, the decision of the director to deny the petition was correct, for the reasons discussed above. The assertions of counsel on appeal fail to overcome the decision of the director.

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.

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.