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U.S. Citizenship  
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 27 2006  
SRC 03 246 51152

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.

*Kevin S. Pombo for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a car rental business. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 3, 2005 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 June 14, 2002. The proffered wage as stated on the Form ETA 750 is \$43,000 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a brief and additional evidence.

Relevant evidence submitted on appeal includes the petitioner's quarterly wage reports from the State of Florida for 2004 and unaudited financial statements for the year ending November 30, 2002. Other relevant evidence in the record includes the beneficiary's W-2 forms.

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).

On appeal, counsel states, in part, that the petitioner inadvertently failed to correct the information on the petition regarding the number of its employees, which is more than 100. Counsel states: "The petitioner failed to note the inconsistency as the petition has been pending since 2003 and overlooked the inadvertent failure to correct the information regarding its number of employees." Counsel states further that the petitioner has net assets over \$700,000, which is more than sufficient to pay the proffered salary.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported number of employees was a clerical error does not qualify as independent and objective evidence. The petition was signed by the petitioner's president on July 2, 2003. On the petition, the petitioner claimed to currently employ 44 workers. In response to the director's notice of intent to deny dated January 26, 2005, the petitioner submitted a letter dated February 22, 2005 from the petitioner's president indicating that the petitioner employs over 100 workers and that the petitioner has the ability to pay the proffered wage. On appeal, counsel submits the petitioner's quarterly wage reports for 2004 and the petitioner's unaudited financial statements for the year ending November 30, 2002. Despite counsel's assertion that the petitioner's financial statements indicate that the company has over 100 employees, the petitioner's financial statement does not indicate the number of workers employed by the petitioner. No additional evidence regarding the number of workers employed by the petitioner was submitted for 2002 or 2003. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, the petitioner's quarterly wage report for the quarter ending on June 30, 2004, reflects no employees for April and May of 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Moreover, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 May 10, 2002, the beneficiary claimed to have worked for the petitioner beginning in September 1999 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary. The beneficiary's Form W-2's for 2002, 2003, and 2004 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.
2002	\$23,316.38	\$43,000.00	\$19,683.62*
2003	\$31,149.38	\$43,000.00	\$11,850.62*
2004	\$29,594.56	\$43,000.00	\$13,405.44*

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002, 2003 and 2004.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

In this case, the petitioner was put on notice of required evidence, namely, federal tax returns, annual reports, or audited financial statements. In a letter dated February 23, 2005, counsel responded that no federal income tax returns are required of the petitioner, as the petitioner has over 100 employees. The issue regarding the petitioner’s number of employees is discussed above.<sup>1</sup> The record as it is presently constituted does not contain federal tax returns, annual reports, or audited financial statements. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record contains copies of the petitioner’s unaudited financial statements. 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.

The record contains no other evidence relevant to the petitioner’s financial situation.

Based on the foregoing analysis, 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 her decision, the director correctly stated the amounts on the beneficiary’s W-2 forms for 2002, 2003, and 2004. The director found that those amounts failed to establish the petitioner’s ability to pay the proffered wage. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> This office notes that although the regulation at 8 C.F.R. § 204.5(g)(2) allows CIS to accept a declaration by a financial officer of a petitioner, the regulation does not require CIS to defer to the opinion of any financial officer. The regulation requires that any such statement be one “which establishes the prospective employer’s ability to pay the proffered wage.” The sentence in the regulation which allows for the submission of a statement by a financial officer of a petitioner therefore does not imply that every such statement must be deemed sufficient to establish a petitioner’s ability to pay the proffered wage. Rather, the effect of the regulation is to allow an additional form of acceptable evidence for any petitioner which has at least 100 employees, in addition to tax returns, annual reports or audited financial statements, which are acceptable forms of evidence for all petitioners.