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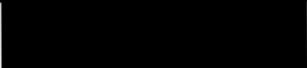
U.S. Citizenship  
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Office: NEBRASKA SERVICE CENTER

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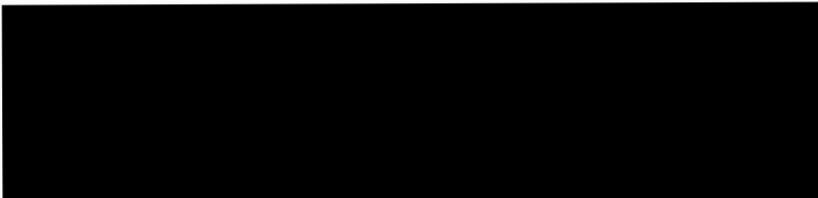
Petitioner:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based 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 Italian style restaurant. It seeks to employ the beneficiary permanently in the United States as a banquet and party captain. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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. *See also* 8 C.F.R. § 204.5(l)(2).

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 [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Part A of the ETA 750 is \$786.22 per week, which amounts to \$40,883.44 per year. On Part B of the ETA 750, signed by the beneficiary on April 27, 2001, the beneficiary claims to have worked for the petitioner from November 1998 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on June 30, 2006,<sup>1</sup> the petitioner states that it was established in 1984, reports a gross annual income of \$559,529, a net annual income of \$4,303 and currently employs nine workers.

With the petition and in support of the petitioner's ability to pay the proffered salary, the petitioner provided a letter from its CPA, [REDACTED] who itemized the petitioner's gross sales, gross profit, annual payroll and net income and stated that it has had the capacity to pay the proffered wage of \$786.22 per week as of at least April 2002.<sup>2</sup>

The petitioner further supplied copies of four local newspaper articles in 2004 and 2005 mentioning the petitioner, as well as copies of its bank statements from the Bank of New York covering April 17, 2001 to June 15, 2001; January 17, 2003 to July 16, 2003; December 16, 2003 to October 29, 2004; December 1, 2004 to December 31, 2004; January 5, 2005 to June 30, 2005; and September 1, 2005 to February 28, 2006. Besides reflecting the petitioner's various balances in its checking account, these statements also reflect the petitioner's draws against a line of credit managed by the bank.

The petitioner also provided copies of Wage and Tax Statements (W-2s) that it had issued to the beneficiary for 2002-2005. They indicate that the following wages were paid to the beneficiary:

Year	SS Wages (Box 3, Social Security Wages)	Difference from Proffered Wage \$40,833.44
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<sup>1</sup> The petitioner filed a previous I-140 (EAC0513751296) for the same beneficiary on April 12, 2005, using the same labor certification. It was denied by the director of the Vermont Service Center on October 25, 2005, based on the petitioner's failure to establish its continuing ability to pay the proffered wage. No appeal was filed.

<sup>2</sup> The petitioner must establish its ability to pay from April 2001 onward.

Reported in previous proceeding)	2001	\$5,200	- \$35,633.44
	2002	\$5,200	- \$35,633.44
	2003	\$5,200	- \$35,633.44
	2004	\$5,200	- \$35,633.44
	2005	\$5,200	- \$35,633.44

It is noted that in each year from 2001 through 2005, the majority of the beneficiary's income from working at the petitioner's establishment was received from tips, which were voluntary payments from the customers that the beneficiary reported to the petitioner. The Internal Revenue Service (IRS) indicates that by the tenth of each month employees must report their tips to their employer, which include cash, and tips on credit cards or to accounts, unless they amount to less than \$20, which remain taxable to the employee but would not need to be reported to the employer. The employer must collect income tax, social security tax, and employee Medicare tax on tip income. See <http://www.irs.gov/businesses/small/article/0,,id=155253,00.html>. In this case, on each respective W-2 from 2002 through 2005, the beneficiary's social security tips were declared as \$18,040 in Box 7 of the W-2, the same amount each year.<sup>3</sup> In 2001, the social security tips were \$19,095. The combined total of social security wages and social security tips were reported in Box 1. For the purpose of the review of the petitioner's financial ability to pay the proffered wage and because tip income was not part of the wages that the petitioner paid to the beneficiary for the duties performed but was a voluntary gratuity paid by the customer to the beneficiary, it will not be included in the calculation of the wages that the petitioner paid in each of the respective years.

Copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2000, 2002, 2003, 2004, and 2005 were also submitted in support of its ability to pay the certified wage of \$40,883.44. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns additionally contain the following information:

	2000	2001	2002	2003	2004	2005
Net Income <sup>4</sup>	\$14,387	\$ 510	\$36,717	\$4,303	\$9,243	\$11,067

<sup>3</sup>The director notes in his decision that it would be unusual to receive the same exact amount in tips each year from customers since tips reflect a voluntary amount paid by each customer.

<sup>4</sup>Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) and line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares

Current Assets	\$40,202	\$33,179	\$18,491	\$23,048	\$28,215	\$28,493
Current Liabilities	\$ 5,527	\$ 6,466	\$ 8,491	\$13,048	\$18,215	\$18,493
Net Current Assets	\$34,675	\$26,713	\$10,000	\$10,000	\$10,000	\$10,000

Besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, USCIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>5</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner’s year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Following a review of the evidence submitted, the director denied the petition on April 9, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record. The director noted that the petitioner’s tax returns reflected that neither their net income nor net current assets were sufficient cover the proffered wage of \$40,883.44. The director declined to rest his decision the petitioner’s bank statements and determined that even when considering the wages paid to the beneficiary, the evidence failed to indicate that the petitioner had the continuing financial ability to pay the proffered salary.

On appeal, the petitioner, through counsel, asserts that corporations arrange their affairs in such a way as to minimize tax liability, but that the petitioner is a long-established Italian restaurant and maintains a very positive cash flow so as to cover its expenses. Counsel submits documentation on appeal in addition to that previously provided including a copy of the petitioner’s corporate tax return for 2006 and a copy of the beneficiary’s W-2 for 2006. The tax return reflects the following:

	2006
Net Income (page 1, line 21)	\$27,241
Current Assets (Sched. L)	(not included)
Current Liabilities (Sched. L)	(not included)

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of the corporation’s income, deductions, credits, etc.). Because the petitioner had no additional deductions shown on its Schedule K for 2001 through 2005 the petitioner’s net income is found on line 21 of page 1 of its tax returns for those years.

<sup>5</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.

Net Current Assets

n/a

The W-2 for 2006 reflects that social security wages were \$5,200 and social security tips were reported as \$18,040. As in previous years, the difference between wages actually paid by the petitioner and the proffered salary of \$40,883.44 was \$35,633.44.

Counsel's assertions related to the petitioner's ability to pay the proffered salary are not convincing. 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. As noted above, the language set forth in the regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that the ability to pay the certified wage is demonstrated at the time the priority date is established and is *continuing* until the beneficiary obtains lawful permanent residence. (Emphasis added.) *See also Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As noted above, in each of the years from 2001 through 2006, the difference between actual wages paid by the petitioner (not tips) and the certified salary was \$35,633.44.

Similarly, reliance on copies of the petitioner's selected bank statements is misplaced. Bank statements are not among the three types of evidence, consisting of federal tax returns, audited financial statements, or annual reports, enumerated in 8 C.F.R. § 204.5(g)(2) that are required to illustrate a petitioner's ability to pay a proffered wage. While this regulation permits additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence, but bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. For example, such statements were not shown to demonstrate that the funds reported somehow reflect additional available funds that were not reflected on the corresponding tax return, such as the cash specified on Schedule L that would already be considered in determining the petitioner's net current assets.

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, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this matter, with the exception of 2002, none of the petitioner's corporate tax returns from 2001 through 2006 reflect sufficient net income or net current assets sufficient to cover the \$35,633.44 difference between actual wages paid and the proffered wage of \$40,883.44. The existence of the petitioner for twenty years and the desire to minimize tax liability, does not represent the kind of uncharacteristic and unique business circumstances that were present in *Sonogawa* nor demonstrate the petitioner's continuing ability to pay the proffered wage. It is noted that if the petitioner was dissatisfied with its financial profile as set forth on its federal tax returns, it could have elected to provide audited financial statements. However, the petitioner did not provide such documentation. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In this case, the \$35,633.44 shortfall between the beneficiary's actual wages of \$5,200 paid in 2001 and the proffered wage of \$40,883.44 cannot be covered by either the petitioner's net income of \$510 nor the \$26,713 in net current assets. The petitioner's ability to pay the proffered wage has not been established for this year.

In 2002, the petitioner has demonstrated its ability to pay the proffered wage because its net income of \$36,717 was enough to cover the \$35,633.44 difference between actual wages paid to the beneficiary and the certified salary of \$40,883.44.

In 2003, neither the petitioner's net income of \$4,303 nor its net current assets of \$10,000 was sufficient to meet the \$35,633.44 difference between the actual wages of \$5,200 paid to the beneficiary and the proffered wage. The petitioner's ability to pay the proffered salary has not been established for this year.

In 2004, neither the petitioner's net income of \$9,243, nor its net current assets of \$10,000 was enough to pay the difference between the actual wages of \$5,200 and the certified wage or demonstrate the petitioner's ability to pay the proffered wage during this year.

In 2005, the petitioner's reported net income of \$11,067 and its net current assets of \$10,000 were each insufficient to pay the proposed wage offer. The petitioner has not established its ability to pay the proffered wage in this year.

Similarly in 2006, as reflected by the corporate tax return submitted on appeal, the petitioner's net income of \$27,241 was not sufficient to cover the \$35,633.44 difference between the beneficiary's actual wages of \$5,200 and the certified salary of \$40,883.44. Net current assets were unavailable as Schedule L of this tax return was omitted from the submission.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is April 27, 2001. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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.