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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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EG

[Redacted]

FILE: EAC 00 272 53378 Office: VERMONT SERVICE CENTER Date: **DEC 02 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The AAO concurred with the director's decision on appeal and motion.

On second motion, counsel submits a brief.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 13, 2000. The proffered salary as stated on the labor certification is \$476.00 per week or \$24,752 per year.

On motion, counsel reiterates her position that the petitioner has established its ability to pay the proffered wage. Counsel states:

A careful review of the petitioning business' tax returns for the relevant year (2000) indicates that it did have the ability to pay the proffered annual salary of \$24,752.00 at the relevant time (i.e. March of 2000). The returns indicate that the business registered a net profit of \$11,218.00 in fiscal year 2000 (See Form 1065 Line 22). Additionally, it

claimed depreciation in the amount of \$4,388.00 (Line 16a). Moreover, the business maintained the sum of \$12,270.00 in its business account at the end of the year. (Schedule L Line 1 column d). These sums alone were sufficient to pay the proffered wage, since the combined amount is \$27,876.00.

Additionally, the business registered assets in the amount of \$39,462.00, which sum must also be considered when assessing ability to pay. Finally, the business maintained inventory in the amount of \$2,365.00 (Schedule L Line 3 column d). This is a cash amount which is immediately available to the business, and must also be considered when assessing ability to pay. When these sums are added to the net profit, cash balance and depreciation figures, the total amount of money available to pay the proffered annual wage to the alien beneficiary is \$69,703.00. It is beyond peradventure that this sum is sufficient to cover the proffered wage.

In addition to the fact that the Petitioner has shown that it had the ability to pay the proffered wage at the time the offer of employment was made to the alien beneficiary, the Petitioner is also in a position to demonstrate its continuing ability [sic] to pay. Along with this Motion, we are including a copy of the 2001 taxes (as well as an additional copy of the 2000 taxes which were already provided to the Service). A review of those figures indicates that, in fiscal year 2001, the petitioning business registered net profits in the amount of \$6,044.00, depreciation in the amount of \$4,386.00, cash on hand at the end of the year in the amount of \$29,165.00, inventory in the amount of \$2,731.00 and total assets in the amount of \$52,851.00. When combined, this yields the sum of \$75,177.00 which sum is also more than sufficient to pay the proffered annual wage of \$24,752.00.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not provide evidence that the beneficiary was compensated at a salary equal to or greater than the proffered wage in 2000 or 2001.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The

court specifically rejected the argument that CIS 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. In this case, as noted by the previous AAO decision, the petitioner's taxable income before the net operating loss deduction and other special deductions as reflected on each of the tax returns contained in the record, was far less than the beneficiary's proffered wage of \$24,752.

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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 years in question, 2000 and 2001 were -\$541 and \$9,375, respectively. The petitioner could not have paid the proffered wage in 2000 or 2001 from its net current assets.

Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is; a 2000 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2000 out of its income. Net current assets at the end of 2000 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The petitioner is a general partnership. Partners/owners of general partnerships are required to pay the debts and obligations of the partnership out of their own funds. The petitioner's owners are also obliged to show that they were able to pay the proffered wage out of their adjusted gross income, the amount left after all appropriate deductions. Furthermore, they are obliged to show that the amount remaining after the proffered wage is subtracted from their adjusted gross income is sufficient to support their family, or that they have other resources and need not rely upon that income. Therefore, the income and assets of the partners may be considered in determining the ability of the petitioner to pay the proffered wage. In this case, the evidence does not include the personal income tax returns of either of the partners/owners. It is noted that the Service Center requested no budget information from the partners/owners and they provided none.

Counsel cites several non-precedent decisions to support her assertion that depreciation and other factors should be considered when determining the petitioner's ability to pay the proffered wage. However, counsel does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) in support of her contention that the petitioner has established its ability to pay the proffered wage. However, *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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. 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 that 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 have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2000 and 2001 were uncharacteristically unprofitable years for the petitioner.

The tax return for 2000 reflect an ordinary income of \$11,218 and net current assets of -\$541. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2000.

The tax return for 2001 reflect an ordinary income of \$6,044 and net current assets of \$9,375. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2001.

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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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of February 23, 2003 is affirmed. The petition is denied.