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U.S. Citizenship and Immigration Services

[redacted]

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File: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 12 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. 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 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 and denied the petition accordingly.

On appeal, counsel submits a brief and 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 granting 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. Here, the Form ETA 750 was accepted for processing on March 12, 2001. The proffered wage as stated on the Form ETA 750 is $10.50 per hour, which equals $21,840 per year.

With the petition, counsel submitted an unaudited 2001 profit and loss statement. Counsel also submitted copies of the petitioner's bank account statements for March through December 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 14, 2002, requested additional evidence pertinent to that ability. The Service Center noted that the figures on the unaudited financial statements submitted are the representations of management and are of little evidentiary value. The Service Center also noted that only two of the balances on the account statements submitted exceed the monthly amount of the beneficiary's proffered wage and that the balances did not increase each month by an amount equal to the monthly amount of the proffered wage. The Service Center specifically requested either the petitioner's 2001 tax returns or its 2001 annual reports. The Service Center also requested, if the petitioner employed the beneficiary during 2001, that it provide copies of the Form W-2 wage and tax statements showing the amount the beneficiary was paid during that year.

The Service Center further requested that the petitioner state whether the proffered position is a newly created position, if not, how long the position has existed, the wage the petitioner has been paying to the employee currently in the proffered position, and evidence of the employee's wage and the amount paid to

him or her. Finally the Service Center requested copies of the Form 941 petitioner's Form 941, Employer's Quarterly Tax Returns for of the quarters since the priority date.

In response, counsel submitted a copy of the 2001 profit and loss statement previously submitted, and a letter, dated July 23, 2002, from an accountant. That letter stated, "I have complied (sic) the Statement of Income – cash basis for [the petitioner] for the fiscal year ended December 31, 2001. The net income for the twelve months then ended was $20,756.10." Counsel also submitted a letter from the petitioner's owner, dated July 24, 2002, which states that the position is not new and that the owner and his wife have been working in the position as necessary, although they did not put themselves on the payroll.

Counsel also submitted his own letter, dated August 6, 2002. In that letter, counsel observed that the petitioner is only obliged to show the ability to pay the proffered wage for a pro-rated portion of 2001 beginning on the priority date. Counsel reasoned that the petitioner is not, therefore, obliged to show the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. Counsel further observed that the petitioner's 2001 net income, as shown on the profit and loss statement, is greater than the salient portion of the proffered wage.

Counsel did not provide the requested 2001 tax return or 2001 annual report, and provided no W-2 forms.

In a decision rendered on October 25, 2002, the Director, Vermont Service Center, reiterated his observation that the bank balances submitted did not show a monthly increase sufficient to pay the proffered wage and that only two end-of-month balances were greater than the monthly amount of the beneficiary's proffered wage. The director noted that the petitioner did not submit its 2001 tax returns as requested. The director further noted that the profit shown on the compiled[1] 2001 profit and loss statement was less than the annual amount of the proffered wage.

The director addressed counsel's observation, that the petitioner's net profit during 2001, as shown on the profit and loss statement, was greater than the portion of the proffered wage that the petitioner must show the ability to pay during 2001. The director stated that the petitioner's 2001 profit must also be pro-rated, and that the petitioner has not demonstrated that, during the portion of 2001 after the priority date, the petitioner had pro-rated net profits equal to the pro-rated portion of the proffered wage appropriate to that same period. 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 denied the petition.

On appeal, counsel asserts that the petitioner has moved to a new, profitable location where the rent is half that of its previous location. Counsel stated that the money saved on rent will accrue as profit, and should be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel further asserts that, pursuant to the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the fact that the petitioner's profit during a single year was less than the proffered wage should not dispose of the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel states, but submits no evidence to demonstrate, that the petitioner has moved. Counsel asserts that the

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[1] This office assumes that the accountant intended to state that she produced the profit and loss statement pursuant to a compilation.

new location is profitable, but provides no evidence of that assertion. Even if the petitioner has moved, counsel states, but submits no evidence to demonstrate, that its current rent is half of its previous rent. The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). An unsupported assertion is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, even if the petitioner's current rent is half of its previous rent, counsel submits no figures from which this office might compute the difference. The amount that the petitioner is allegedly saving on rent will not be included in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, no evidence was submitted to show that the petitioner has ever posted a large profit or even a profit equal to the proffered wage. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The regulation at 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, audited financial statements are the preferred evidence of the petitioner's ability to pay the proffered wage. Counsel provided no copies of annual reports, no federal tax returns, and no audited financial statements. Counsel provided no reason for his failure to provide that documentation, even in view of a direct request that he provide either the petitioner's 2001 tax returns or its 2001 annual report. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The only evidence pertinent to the petitioner's annual income is the compiled 2001 profit and loss statement. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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.