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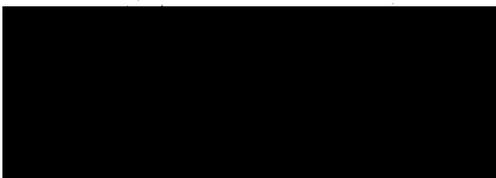
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: WAC 03 149 52130 Office: CALIFORNIA SERVICE CENTER Date: **APR 14 2005**

IN RE: 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.

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 (AA9) on appeal. The appeal will be dismissed.

The petitioner is a bakery business. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

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 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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition, filed on April 15, 2003, states that the business was established in 1982 and currently employs three workers. Among the items submitted with the petition were a Form G-28; a certified ETA 750, application for labor certification; copies of the petitioner's 2001 and 2002 Form 1065 partnership tax returns; and copies of the petitioner's Form DE-6 Employer's Quarterly Wage and Withholding report for the last three quarters of 2002.

The federal tax returns reflect for 2001 reflected gross receipts of \$288,855; gross profit of \$288,765; salaries and wages paid of \$34,347; and ordinary income of \$10,042. The federal tax return for 2002 reflected gross receipts of \$335,813; gross profit of \$335,813; salaries and wages paid of \$28,543; and ordinary income of \$10,407.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is September 20, 2001. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per annum.

On August 18, 2003, the director sent a request for evidence related to items unrelated to the petitioner's ability to pay.

In response, counsel submitted the requested information. However, the director on November 19, 2003, determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel asserts that the director's RFE made no mention of deficiencies in the petitioner's evidence of ability to pay, and accordingly on appeal has submitted the following information pertinent to that ability:

- Pay stubs showing the petitioner has paid the beneficiary wages since September 1, 2003, pursuant to employment authorization by CIS in August 2003;
- A CPA's December 12, 2003 letter asserting that problems with leasehold property forced the petitioner to pay \$12,960 in extra rent for the last four months of 2001 and \$20,880 in extra rent for the first six months of 2002.
- Various copies of checks, promissory notes and lease agreements pertaining to the petitioner's business relocation; and
- Bank statements of the petitioner's account during 2001.

The CPA's December 12, 2003 letter states that Pierre's Pastries specializes in Russian, Armenian and Eastern European pastries, and began in business by taking over a 10-year lease from a predecessor business at the leased site in Tarzana, California. It states that the September 2001 business relocation "created an extraordinary event [emphasis in place] that had an impact on the cash flow and overall financial condition of Pierres [sic] Pastry." The letter asserts that the petitioner had to pay double rent despite the move, driven by health department concerns at the old site, when a tenant that had assumed the old lease backed out.

The petitioner's circumstances may call to mind *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relating to petitions claimed to have been filed during uncharacteristically unprofitable or difficult years within a framework of mostly 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.

Counsel has not cited *Sonogawa* but implies that the petitioner's prospects for a resumption of successful business operations are well established. The petitioner in *Sonogawa* was a fashion designer whose work had been featured in Time and Look magazines. Her clients included movie actresses, and society matrons and had made various best-dressed lists among California women. The petitioner in that case had lectured on fashion at design and fashion shows throughout the United States and at a number of 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.

Counsel has provided no evidence that establishes that unusual circumstances existed in this case which parallel those in *Sonogawa*, nor has it been established that 2001-2002 was an uncharacteristically unprofitable period for the petitioner. Counsel has submitted no financial information for any of the years surrounding the period when the claimed double rents occurred. The petitioner's tax returns for calendar years 2001 and 2002 show ordinary incomes of just over \$10,000, from which it cannot safely be assumed that the petitioner could pay a salary of \$24,024 a year.

Counsel's argument is not persuasive.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the

petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage or that it was employing the beneficiary until 2003.

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, CIS will next examine the net income figure reflected on the petitioner's 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If the petitioner demonstrates that the net income it had available during that period, added to the wages paid to the beneficiary during the period, do not at least equal the proffered wage, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets, including add-back depreciation deductions, should have been considered in the deciding the petitioner's ability to pay the proffered wage. The petitioner's total assets do include depreciable assets used in its business, but those depreciable assets will typically not be converted into cash in the ordinary course of business to become available funds to pay the proffered wage. Further, the petitioner's total assets must be offset by his liabilities to properly be considered in the determination of the petitioner's ability to pay. CIS considers *net current assets* as an alternative method of demonstrating 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 the salient portion of 2001 or subsequently during 2002 or 2003. Its Form 1065 tax returns for 2001 and 2002 reflect the following information:

	<u>2001</u>	<u>2002</u>
Ordinary Income	\$10,042	\$10,407
Total Current Assets	0	0
Total Current Liabilities	0	0
Net Current Assets	0	0

The petitioner's income for each year was thus less than the proffered wage.

Net current assets, as the term is used above, refers to the difference between the petitioner's current assets and current liabilities.¹ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 5(d) of its

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

Form 1065 tax return. Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership's end-of-year net current assets are at least equal to the proffered wage, the petitioner is capable of paying the proffered wage out of those net current assets. However, the petitioner's net current assets during the years in question, 2001 and 2002, were less than half the amount of the proffered wage for each of those years. As such, the director correctly considered the petitioner's net current assets as insufficient to pay the proffered wage.

Accordingly, the petitioner has not established that it had the continuing ability to pay the proffered wage, \$20,024, beginning on the priority date and continuously thereafter.

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. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.

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.