

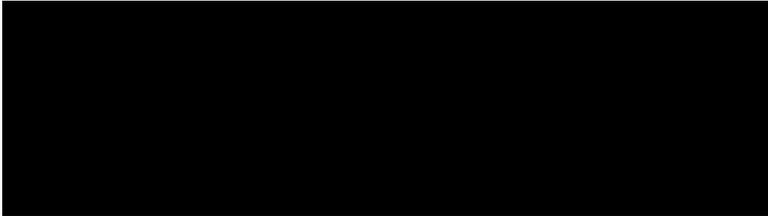
identifying data deleted to
prevent arrangement
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

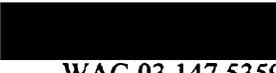
PUBLIC COPY



[Handwritten signature]

APR 27 2005

FILE:



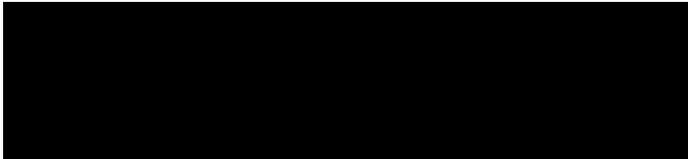
WAC 03 147 53599

Office: CALIFORNIA SERVICE CENTER

Date:

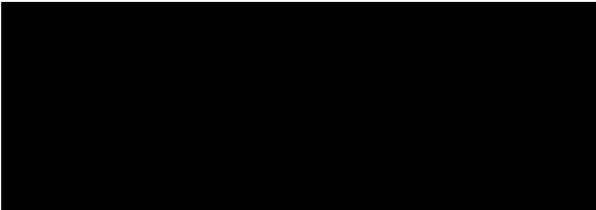
IN RE:

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.

[Handwritten signature]

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that 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 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, 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 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$12.60 per hour, which equals \$26,208 per year.

On the petition, which was submitted on April 9, 2003, the petitioner stated that it was established during 1989 and that it employs 40 workers. The petition states that the petitioner's gross annual income is \$41,757,839 and that its net annual income is \$123,392.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.² Both the petition and the Form ETA 750 indicate that the petitioner is [REDACTED] and will employ the beneficiary in [REDACTED].

¹ A subsequent undated letter, described below, states that the gross and net incomes shown on the petition relate to [REDACTED] and [REDACTED] which it also states no longer owned the petitioning restaurant when the petition was filed.

² On a G-325A Biographic Information form also submitted to CIS, however, the beneficiary claimed to have been working for the petitioner since November 2000.

In support of the petition, counsel submitted the compiled³ financial statements of [REDACTED] Company⁴ for the 2000 and 2001 calendar years and for the first eight months of 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 13, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if the beneficiary has been working for the petitioner, the petitioner provide Form W-2 Wage and Tax Statements showing the wages it paid to the beneficiary during 2001 and 2002.

In response, counsel submitted an undated letter from [REDACTED] who states that he is part owner of the petitioning restaurant.⁵ [REDACTED] states that the petitioning restaurant is no longer [REDACTED] and Company dba [REDACTED] but is [REDACTED] further states that he routinely lends money and moves workers from one of his business interests to another as necessary. [REDACTED] states that the beneficiary works at the petitioning restaurant, but that it does not issue him a W-2 form. The letter also cites the gross income, payroll expense, and depreciation deduction of the petitioning restaurant and [REDACTED] other interests during various years as support for the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel submitted the 2001 and 2002 Form 1065, U.S. Returns of Partnership Income of [REDACTED] and its compiled financial statements for the first four months of 2003.⁶

The 2001 return indicates the petitioner's general partner is [REDACTED]. That return covers the period from September 1, 2001 to December 31, 2001, which apparently indicates that the petitioner changed ownership structure from being part of [REDACTED] and Company to being [REDACTED], a partnership. During the period covered by that return the petitioner reported ordinary income of \$21,103. At the end of that period the petitioner had current assets of \$9,456 and current liabilities of \$2,728, which yields net current assets of \$6,728.

³ Although the accountants' reports did not accompany those financial statements, as they should have, an inscription at the bottom of each report says, "See Accountants' Compilation Report," indicating that the reports were, in fact, produced pursuant to a compilation rather than an audit.

⁴ The 2000 and 2001 financial statements are for [REDACTED]. The 2002 statement is for [REDACTED] and Affiliates.

⁵ The petitioner's 2001 and 2002 income tax returns contradict the assertion that [REDACTED] owns any part of the petitioning restaurant, as is discussed further below.

⁶ Again, although counsel declined to provide the accountant's report that should have accompanied the financial statements, the statements indicate that they were produced pursuant to a compilation rather than an audit.

The 2002 return covers the entire 2002 calendar year and indicates that the petitioner declared ordinary income of \$14,918 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel submitted tax returns and Arizona quarterly wage statements pertinent to [REDACTED] Supreme. Those returns, as will be further explained below, are irrelevant to the instant case.

As evidence that the petitioner is paying wages to the beneficiary, counsel submitted what appears to be a pay stub for the two-week pay period ending November 15, 2003. That pay stub shows that the petitioner paid the beneficiary \$1,000 during that pay period. The year-to-date total indicates that was the first paycheck the petitioner issued to the beneficiary during the 2003 calendar year. Counsel also submitted documents pertinent to the leasing and remodeling of the petitioner's premises.

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, on December 10, 2003, denied the petition.

On appeal, counsel submits copies of the documentary evidence previously submitted and argues that it demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, citing the income and assets of [REDACTED] which operates [REDACTED], and which counsel states is owned by the same partners as the petitioning restaurant.⁷ Counsel states that these partnerships should be treated as sole proprietorships, and the income and assets of the owners, including other partnerships, should be considered in the calculation of the funds that were available to pay the proffered wage.

Counsel argues that the petitioner's depreciation deduction should be included in the calculation of funds available to pay the proffered wage and confesses an inability to calculate the petitioner's net current assets from its tax returns. That calculation is covered at length below.

Counsel further argues that, as the petitioner employed the beneficiary during 2001 and 2002, it could clearly afford to pay him the proffered wage during those years, as it did, in fact, pay it to him. Counsel also states, possibly in the alternative, that the petitioner's assertion that it employed the beneficiary during those years implies that he was paid a reasonable salary.

Further still, counsel argues that various adjustments are necessary to the petitioner's income tax return to cause it to reflect more accurately the petitioner's cash position.

Finally, counsel argues that the petitioner's low income since the priority date does not evince inability to pay the proffered wage, but is due to the necessity of remodeling the premises.

⁷ Contrary to counsel's assertion, according to its 2001 and 2002 tax returns [REDACTED], which owns and operates the [REDACTED] Palace restaurant, is owned by [REDACTED] whereas the petitioning restaurant, [REDACTED] according to its 2001 and 2002 tax returns, is owned by [REDACTED]. Even if common ownership were a factor, counsel's argument would fail.

The unaudited financial statements submitted in this matter are not convincing evidence. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial statements submitted were produced pursuant to a compilation rather than an audit. 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.

This office unmoved by counsel's assertion that various adjustments are necessary to the figures on the petitioner's tax returns to cause them to accurately reflect the petitioner's financial condition. Any number of additions to, and subtractions from, the figures on the petitioner's tax returns might be necessary to convert them from tax accounting to one of the financial accounting conventions. Having provided only additions, counsel has not convinced this office that its list of adjustments is exhaustive.

Further, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage but has declined to provide either of the other two acceptable types of evidence. The petitioner is now bound by the figures on those forms.

The 2001 return, as was noted above, indicates the petitioner's general partner is [REDACTED]. That the petitioner has one general partner indicates that it is a limited partnership. In a limited partnership, only the general partner is personally responsible for the debts and obligations of the company. The other partner or partners are limited partners. They are not bound to pay the debts and obligations of the company except to the extent of their capital contribution. Their personal income and assets are shielded from liability.

As the limited partners are not obliged to pay those debts and obligations out of their personal income and assets, the income and assets of the limited partners are not available to the company as a matter of right. Therefore, the ability of the limited partners, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The income and assets of the limited partners, and the income and assets of other companies they own, will not be considered. The petitioner must show the ability to pay the proffered wage out of its own funds and the income and assets of its general partner.

The record, however, contains no evidence of any personal income and assets of the petitioner's general partner except the income shown on the petitioner's tax returns. No other income and assets of the general partner are in evidence and, therefore, no other income and assets of the general partner can be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner must, in this instance, demonstrate the ability to pay the proffered wage out of its own funds.

Counsel's reliance on the petitioner's depreciation deduction is misplaced. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that during 2003 it employed the beneficiary and paid him \$1,000. The petitioner did not establish that it employed and paid the beneficiary at any other time.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

End-of-year net current assets are the taxpayer's end-of-year current assets less the taxpayer's end-of-year current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash

within one year. Current liabilities are liabilities due to be paid within a year. A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 3(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

This office emphasizes, however, that because of the nature of net current assets, 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, 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 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. A petitioner's net income may not correctly be added to its net current assets in determining the petitioner's ability to pay the proffered wage.

The proffered wage is \$26,208 per year. The priority date is April 17, 2001.

The instant case is complicated by the fact that the petitioner changed ownership on September 1, 2001. In such a case the successor-at-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

From the priority date to September 1, 2001 the petitioner was held as an asset of [REDACTED] and Company. The petitioner has not demonstrated that it paid any wages to the beneficiary during that period. The three types of evidence of ability to pay additional wages acceptable under 8 C.F.R. § 204.5(g)(2) are copies of annual reports, federal tax returns, and audited financial statements. The petitioner submitted none of those three types of evidence pertinent to the finances of [REDACTED] and Company during that period. Therefore the petitioner has not demonstrated its ability to pay the proffered wage from April 17, 2001 to September 1, 2001.

From September 1, 2001 to the end of that year the petitioner was held as a partnership. Because that is approximately one-third of a calendar year the petitioner must demonstrate the ability to pay one-third of the proffered wage, or \$8,736,⁸ during that period. The petitioner has not demonstrated that it paid any wages to the beneficiary during that period. During that period, however, the petitioner, [REDACTED] reported ordinary income of \$21,103. That amount is sufficient to pay the salient portion of the proffered wage during that period. The petitioner has demonstrated the ability to pay the proffered wage from September 1, 2001 to the end of that calendar year.

During 2002 the petitioner declared ordinary income of \$14,918. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The

⁸ \$26,208/3.

petitioner has submitted no reliable evidence of any other funds available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Counsel argues that the petitioner's low income during 2002 was occasioned by the necessity of renovating its premises, and is not indicative of an inability to pay additional wages. In support of that assertion counsel submitted evidence of that renovation.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years. The petitioning entity in *Sonogawa* 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 *Sonogawa*, 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel 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, however, no reliable evidence has been submitted that the petitioner has ever posted a large profit. The only period during which the petitioner has demonstrated that it would have been able to pay the proffered wage is the last third of 2001. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. Counsel has submitted no convincing argument that the petitioner's failure to show its ability to pay the proffered wage during the balance of the time between the priority date and the present should be disregarded.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage from the priority date to September 1, 2001. The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition may not be approved.

An additional issue exists in this matter not mentioned in the decision of denial. The Form ETA 750 was issued to [REDACTED] and Company dba [REDACTED]. Counsel now seeks to substitute [REDACTED] a limited partnership, for [REDACTED] and Company. In such a situation the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *Matter of Dial Repair Shop, Supra*.

In the instant case, [REDACTED] apparently did not assume all of the rights, duties, obligations, and assets of [REDACTED] and Company. The undated letter from [REDACTED] indicates that the various assets of [REDACTED] and Company were divided up between various newly formed companies, including the [REDACTED] partnership, which acquired the petitioning restaurant, and the [REDACTED] Supreme LLC, which acquired the [REDACTED] restaurant. As the petitioner did not acquire all of the assets of [REDACTED] and Company it is not a true successor-at-interest within the meaning of *Dial Repair Shop*. The petition should have been denied for this additional reason.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.