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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services

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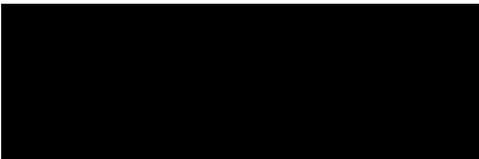
Office: VERMONT SERVICE CENTER

Date: AUG 16 2005

IN RE: Petitioner: [Redacted]
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:



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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) 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 Acting 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$523.60 per week, which equals \$27,227.20 per year.

On the petition, the petitioner did not state when it was established or the number of workers it employs in the spaces provided. The petitioner also failed to state its gross annual income and its net annual income. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since some unstated date during 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on August 13, 2003, the Vermont Service Center requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically

requested the 2001 and 2002 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years.

In response, counsel submitted (1) the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the petitioner's 2001 and 2002 Form W-2 Wage and Tax Statements and W-3 transmittals, (3) a letter, dated November 3, 2003, from the petitioner's accountant, (4) a copy of the beneficiary's 2001 Form 1040 U.S. Individual Income Tax Return and (5) a copy of the petitioner's menu.

The petitioner's 2001 W-3 transmittals show that the petitioner paid total wages of \$171,876 during that year. The corresponding W-2 forms do not show that the petitioner paid any portion of that amount to the beneficiary. One of the W-2 forms shows that the petitioner paid one of its employees, [REDACTED] \$19,344, during that year.

The petitioner's 2002 W-3 transmittals show that the petitioner paid total wages of \$211,319.40 during that year. The corresponding W-2 forms do not show that the petitioner paid any portion of that amount to the beneficiary. One of the W-2 forms shows that the petitioner paid one of its employees [REDACTED] \$19,844, during that year.

The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$16,189 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,468 and current liabilities of \$10,687, which yields net current assets of \$15,781.

The petitioner's 2002 tax return shows that the petitioner declared ordinary income of \$9,927 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$21,989 and current liabilities of \$11,176, which yields net current assets of \$10,813.

The petitioner's accountant's November 3, 2003 letter cites the petitioner's total wages, the salary of its cook, its total assets, its net profits, its depreciation deductions, and its owners' business acumen as indices of its ability to pay the proffered wage. The accountant states that the petitioner paid its cook \$19,344 during 2001. That is the same amount the petitioner paid to its employee [REDACTED] during that year.

The beneficiary's 2001 personal tax return shows that the beneficiary declared, on a Schedule C-EZ, Profit or Loss from Business, that he received \$27,300 working as a cook during that year. That Schedule C-EZ does not indicate who employed the beneficiary. This office notes that the petitioner's 2001 W-2 forms do not show that amount paid to the beneficiary or anyone else. That the petitioner paid the beneficiary that amount during 2001 is insufficiently demonstrated.

The proposition that counsel intended to support with the petitioner's menu is unknown to this office.

In a letter dated November 5, 2003, counsel cited the petitioner's gross revenue, net profit, and depreciation deductions as indices of its ability to pay the proffered wage. Counsel indicates that the petitioner's depreciation deduction should be added to its net profit in determining its ability to pay additional wages during various years. Counsel also stated that the petitioner intends to replace its current cook with the beneficiary.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that tax returns mischaracterize corporations' profits and that the petitioner may submit other evidence of its ability to pay the proffered wage.

The Acting 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 February 17, 2004, denied the petition.

On appeal, counsel submits (1) a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, and (2) a copy of the beneficiary's 2002 Form 1040 U.S. Individual Income Tax Return.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of \$18,324 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$45,115 and no current liabilities, which yields net current assets of \$45,115.

The beneficiary's 2002 personal income tax return includes a Schedule C, Profit or Loss from Business that shows that the beneficiary declared that he earned \$27,601 working as a cook at the petitioner's address during that year. Although the petitioner's 2002 W-2 forms do not support that the petitioner paid that amount to the beneficiary or to anyone else, this office finds that, by submitting the beneficiary's personal tax return indicating that he declared that amount of income from the petitioner, counsel has sufficiently demonstrated that the petitioner paid that amount to the beneficiary during that year.

In his brief, counsel cites the petitioner's gross sales, its increase in gross sales, its alleged history of "almost a decade" as a profitable and successful business, its retained earnings, its owner/shareholder projections, and its depreciation and amortization deductions as indices of its ability to pay additional wages. Counsel asserts that "Depreciation figures demonstrate sufficient resources to pay wages, thus depreciation should be added to the total amount calculated to pay wages."

Counsel again cites *Matter of Sonogawa, supra*, this time for the proposition that "income tax returns tend to mischaracterize corporations as having low profits." *Sonogawa*, however, makes no such blanket statement nor enunciates any such general rule.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful 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 the petitioner 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

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, the evidence does not demonstrate that the petitioner has posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. Counsel has alleged no unusual circumstances to exist in this case to parallel those in *Sonegawa*, nor is this office able to discern any such special circumstances. Counsel has not established that any of the salient years was an uncharacteristically unprofitable year for the petitioner. Counsel's citation of *Sonegawa* in this instance is unconvincing.

Showing that the petitioner paid wages in excess of the proffered wage is insufficient.¹ Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava* 623 F.Supp. 1080 (S.D.N.Y. 1985), 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.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that 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*

¹ The petitioner's accountant, in his letter of November 3, 2003, alluded to the petitioner's total wage expense as an index of its ability to pay additional wages.

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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 present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Counsel asserts that the petitioner has a history of "almost a decade" as a profitable and successful business. This office calculates the period from the petitioner's inception to the date of the brief, in which counsel made that assertion, at closer to six years and three months.⁴ Counsel asserts that "[the petitioner] has been profitable since their inception of business in 1997," but provides no evidence of that additional assertion.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Counsel's unsupported assertion that the petitioner has been profitable since its inception will be accorded no weight.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Counsel alludes to, but does not detail, projections of the petitioner's owners and shareholders of the petitioner's future success. Such projections are not, in themselves, an index of the ability to pay the proffered wage. Counsel was free to provide the evidence upon which those projections are based, and to argue from that evidence. This office does not accept the projections alluded to as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a letter dated November 3, 2003 the petitioner's accountant stated that the petitioner intends to replace its current cook with the beneficiary, thus freeing up that current cook's wages to pay the proffered wage.

⁴ The petitioner's tax returns state that it incorporated on December 11, 1997. The appeal brief is dated March 19, 2004.

Reference to the wage statements submitted indicates that the current cook the accountant apparently referred to is [REDACTED]. The accountant did not state his basis for the statement that the petitioner will dismiss that cook. Further, the beneficiary is already working for the petitioner. How, under these circumstances the beneficiary could, in the future, replace the current cook is not explained.⁵

Further, the accountant does not state why the current cook would be replaced. This office notes that the fundamental purpose of the visa category pursuant to which the petition in this case was filed is to aid U.S. business owners in filling jobs for which workers are otherwise unavailable. The position is currently filled. If the petitioner were seeking to replace the incumbent with the beneficiary out of preference, rather than necessity, that would be inconsistent with the purpose of the instant visa category. The petitioner has not demonstrated that the wages paid to the current cook during various years should be viewed as an indicator of the petitioner's ability to pay the proffered wage during those years.

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 it employed and paid the beneficiary \$27,601 during 2002, but did not demonstrate that it paid any wages to the beneficiary during 2001.

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*, *supra*; *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 total 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 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

⁵ At least one explanation is possible that would support the assertion that the wages paid to [REDACTED] should be considered in the determination of funds available to pay the proffered wage. The petitioner may employ both the beneficiary and [REDACTED] part-time, and the petitioner may anticipate giving [REDACTED] hours to the beneficiary, thus freeing [REDACTED] wages to pay part of the proffered wage to the beneficiary. Counsel did not allege that scenario, however, and certainly did not provide evidence to demonstrate that it is so.

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.

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 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. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$27,227.20 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared ordinary income of \$16,189. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$15,781. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner established that it paid the beneficiary \$27,601 during 2002. Neither counsel, nor the petitioner, nor the accountant cited that figure as evidence of the petitioner's ability to pay the proffered wage during 2002. Nevertheless, the fact that the petitioner paid that amount, which exceeds the annual amount of the proffered wage, to the beneficiary during 2002 demonstrates, without additional reference to the petitioner's profits or net current assets during that year, that the petitioner was able to pay the proffered wage to the beneficiary during that year.

During 2003 the petitioner declared ordinary income of \$18,324. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$45,115. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

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 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.