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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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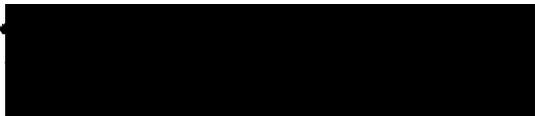
Office: CALIFORNIA SERVICE CENTER

Date AUG 23 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, 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 (AAO) on appeal. The appeal will be sustained.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook – specialty foreign food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 director denied the petition accordingly.

On appeal, the 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 nature, for which qualified workers are not available in the United States.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, copies of documentation concerning the beneficiary's qualifications, and other documents.

Because the Director determined 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 February 13, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Tax Documents: Submit IRS issued copies of filed tax returns or the filed tax return information as provided by the IRS such as IRS computer generated printouts. The tax return information should be accompanied by all supporting documents such as related tables, schedules and notes. This information should be for the ... tax years: 2001 and 2002 ...

* * *

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 the ability shall be either in the form of copies of annual reports, copies of the filed (must be signed) federal income tax returns, or audited financial statements

* * *

Form DE-6, Quarterly Wage Report: Submit copies of the U. S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last 8 quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1040 tax returns for years 2001, and 2002 as well as Forms 941, Employer's Quarterly Federal Tax Reports.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,960.00 per year from the priority date.

- In 2002, the Form 1040 stated adjustable gross income¹ of \$58,235.00.
- In 2001, the Form 1040 stated adjustable gross income of \$36,182.00.

The director denied the petition on March 26, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

"The Petitioner did have the ability to pay the prevailing wage in 2001 when you consider his additional income and assets."

Along with counsel's brief in the matter, she submitted the following additional copies of documents: a certificate of deposit; bank statements; and, a Form 1120S tax return for the 2003.²

¹ IRS Form 1040, Line 34.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two. In tax years 2001 and 2002, the sole proprietorship's adjusted gross incomes of \$58,235.00 in 2002 and \$36,182.00 in 2001 does cover the proffered wage of \$24,960.00 per year. However, it is improbable that the sole proprietor could support himself and his family on the remainder of \$11,222.00 after paying the proffered wage for an entire year (i.e. what remains after reducing the adjusted gross income by the amount required to pay the proffered wage) without the additional assets mentioned below.

The record of proceeding contains bank statements, submitted by petitioner upon appeal, as proof of the ability to pay. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

However, on appeal, petitioner submitted evidence of a "Certificate of Deposit Receipt" dated September 12, 2001, evidencing personal assets held by petitioner in the amount of \$80,000.00. The petitioner's substantial cash assets as reflected in its savings certificate shift this decision in the petitioner's favor relative to years 2001 and 2002, coupled with other factors mentioned below. Taxable income after payment of the proffered wage but including the cash savings would be sufficient for petitioner and his spouse to meet their living costs.³

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will 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

² Counsel asserted that the petitioner employed the beneficiary since November 2003 upon receipt of an Employment Authorization Document from CIS.

³ There is also evidence submitted of petitioner's spouse's own wages but these are already included in their tax returns.

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. Counsel asserted that the petitioner employed the beneficiary, but, petitioner has not submitted the beneficiary's wage statements.

As mentioned above, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

On appeal, counsel submitted an additional tax return for year 2003 that demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,960.00 per year from the priority date.

- In 2003, the Form 1120S stated taxable income⁴ of \$29,054.00.⁵
- In 2002, the Form 1040 stated adjusted income⁶ of \$58,235.00.
- In 2001, the Form 1040 stated adjusted income of \$36,182.00.

In 2003, the petitioner had sufficient taxable income to pay the proffered wage. In tax years 2002 and 2001, taxable income plus the \$80,000.00 certificate of deposit proves the petitioner's ability to pay the proffered wage during this period.

Circumstances have been shown to exist in this case to parallel those in the *Sonegawa* case. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), 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

⁴ IRS Form 1120S, Line 21.

⁵ The petitioner converted from a sole proprietorship to corporate form of business organization.

⁶ IRS Form 1040, Line 35.

Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Since there was a change in the form of business, the gross sales of the petitioner's business (whether reported as a sole proprietorship or a Subchapter "S" corporation) are a stable indicator of its viability. Gross sales in 2001 were \$253,543.00; and, in 2002 they lowered to \$239,004.00. In 2003 they rose to \$310,266.00. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Counsel, by forthrightly submitting complete tax and personal financial data of petitioner, has established a case for application of *Matter of Sonegawa*. The petitioner is a viable business, and, it has proved the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained.