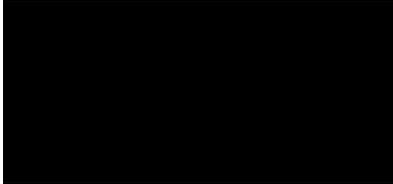


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FILE: EAC 03 069 53380 Office: VERMONT SERVICE CENTER Date: **DEC 21 2005**

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 Acting Director, Vermont 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 garde manger.¹ 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 petitioner² 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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$13.20 per hour, which equals \$27,456 per year.

On the petition, the petitioner stated that it was established 30 years ago and that it employs eight workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for New Ranch Restaurant since January 1996.³ Both the petition and the Form ETA 750 indicate that New Ranch Restaurant would employ the beneficiary in the Bronx, New York.

¹ The position is commonly called "cold chef." The incumbent in such a position is responsible for preparing the cold foods for service.

² Within today's decision both [REDACTED] and [REDACTED] are referred to, in their turn, as "the petitioner," notwithstanding that this office, as is further explained below, does not find that the substitution of one for the other as petitioner in this matter was permissible under existing regulations and precedent.

³ The beneficiary claims to have worked for New Ranch Restaurant since 1996 although New Ranch Incorporated did

In support of the petition, counsel submitted copies of the 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an [REDACTED] of [REDACTED] in [REDACTED] of [REDACTED] in the Bronx, the address given as that of New Ranch Restaurant on all of the salient forms in the file. Counsel further submitted the 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation of New Ranch Incorporated of the same address.⁴

The returns of [REDACTED] show that it was a corporation, that it incorporated during December of 1988, and that it reported taxes pursuant to the calendar year and cash convention accounting. The returns of New Ranch Incorporated show that it is a corporation, that it incorporated on November 15, 1999, and that it reports taxes pursuant to the calendar year and cash convention accounting.

The 1998 return shows that [REDACTED] declared a loss of \$7,283 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$8,083 and no current liabilities, which yields net current assets of \$8,083.

The 1999 return shows that [REDACTED] declared a loss of \$22,502 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$7,765 and current liabilities of \$3,204, which yields net current assets of \$4,561. That return does not show that it is [REDACTED] final return, as it should have indicated if [REDACTED] anticipated that it would not be filing another Form 1120S, U.S. Income Tax Return for an S Corporation during 2000.

The 2000 return shows that New Ranch Incorporated declared a loss of \$20,355 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year New Ranch Incorporated had current assets of \$4,492 and current liabilities of \$2,842, which yields net current assets of \$1,650. That return does not indicate that it is the initial return of New Ranch Incorporated, as it should have indicated if New Ranch Incorporated did not file a Form 1120S, U.S. Income Tax Return for an [REDACTED] during 1999.

The 2001 return shows that New Ranch Incorporated declared ordinary income of \$9,028 during that year. The corresponding Schedule L shows that at the end of that year New Ranch Incorporated had current assets of \$20,037 and current liabilities of \$3,262, which yields net current assets of \$16,775.

Further, counsel submitted an affidavit, dated November 5, 2002, attested to by [REDACTED] and [REDACTED] the owners of New Ranch Incorporated, stating that the it has the ability to pay the proffered wage. That letter

not apparently exist prior to November 15, 1999 and did not begin to operate the restaurant until January 1, 2000. This suggests that New Ranch Restaurant was a dba name of both [REDACTED] and New Ranch Incorporated.

⁴ Counsel also submitted a notarized letter dated October 4, 2002, and attested to by [REDACTED] and [REDACTED]. That letter states that the petitioner became a partnership in 1999, an assertion directly contradicted by the tax returns submitted. That letter further asserts that, either contemporaneously or subsequently, the petitioner changed its name to New Ranch Restaurant. That the petitioner changed its name to New Ranch Restaurant during or after 1999 appears to be contradicted by the Form ETA 750, submitted on January 12, 1998, which states that the company was then called the New Ranch Restaurant.

cites the Line 7 Compensation of officers as an index of that ability, and pledging that the proffered wage will be paid however well or poorly the company fares.

Because the evidence submitted was insufficient to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 24, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested W-2 forms showing the wages paid to the beneficiary.⁵

In response, counsel submitted an affidavit from the beneficiary, dated February 10, 2004. In that affidavit the beneficiary attested that he worked for New Ranch Restaurant beginning during 1996 but was issued no W-2 forms prior to 2002 because he had no social security number during those previous years. Counsel also submitted 2002 and 2003 W-2 forms showing that New Ranch Incorporated paid the beneficiary \$6,890 and \$27,560 during those years, respectively.

Finally, counsel submitted the 2002 Form 1120S, U.S. Income Tax Return for an S Corporation of New Ranch Incorporated. That return shows that New Ranch Incorporated declared ordinary income of \$21,044 during that year. The corresponding Schedule L shows that at the end of that year New Ranch Incorporated had current assets of \$49,238 and current liabilities of \$43,917, which yields net current assets of \$5,321.

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 June 21, 2004, denied the petition. In addition to considering the net profit or loss during each of the salient years, the Acting Director computed the net current assets during each of those years.

On appeal, counsel cites gross receipts, gross profit, and retained earnings as indices of ability to pay the proffered wage. Counsel further asserts that the depreciation deduction during various years should have been considered in determining the ability to pay the proffered wage, asserting that a depreciation deduction "is merely a 'paper loss, not an actual cash disbursement.'" Among the other calculations urged by counsel, he states that the ordinary income, the depreciation deduction, and the Schedule L Line 1 end-of-year Cash, added together, show the ability to pay the proffered wage.

Counsel further states that the petitioner's assets are greater during each of the salient years than the amount indicated by the Acting Director. The figures cited by counsel indicate that he was referring to the Total assets as shown on Line E of the submitted tax returns. This office notes that the Acting Director referred to net current assets as calculated from figures provided on the Schedules L. That calculation, and the reason that total assets are not an index of the ability to pay additional wages, are discussed below.

Finally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of the petition is not precluded by the fact that net income was insufficient to pay the proffered wage. In

⁵ Although the Request for Evidence appears to request W-2 forms for all years from 1996 onward, this office notes that the priority date of the petition is January 12, 1998. Evidence pertinent to wages the petitioner paid to the beneficiary during 1996 and 1997 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. This office is unable to find any reason for requesting those specific returns and excuses the petitioner from providing them.

that context counsel states that the petitioner has shown a reasonable expectation of increasing profits, but does not detail the evidence that demonstrates that expectation or that it is reasonable.

Counsel's reliance on total assets is misplaced. A petitioner's total assets are not available to pay a proffered wage as some items included in total assets, its interest in real estate, for instance, are not expected, pursuant to the ordinary course of business, to be converted to cash. Other assets might be expected to be converted to cash, but by no set deadline. Only the petitioner's current assets, those expected to be converted into cash within the coming year, may be considered. The calculation of net current assets is addressed further below.

Gross receipts and gross profits are not indices of a petitioner's ability to pay the proffered wage. Showing that a petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁶ or otherwise increased its net income,⁷ the petitioner is generally obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year.⁸ 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. 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's gross profits are merely an interim figure in computing the petitioner's net profits after some of its expenses, its cost of goods sold, have been subtracted from its gross receipts but before other expenses, its operating expenses, have been subtracted. This office does not consider gross profits to be an index of a petitioner's ability to pay additional wages.

Counsel's argument that the depreciation deduction should be included in the calculation of ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible 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 cost of equipment and buildings and the value lost as they 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 a 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*

⁶ 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.

⁷ 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.

⁸ Exceptions to this general rule exist, as counsel notes in citing *Matter of Sonogawa, supra*. That precedent and those exceptions are addressed further below.

Restaurant Corp. v. Sava, 632 F.Supp. 1049 (S.D.N.Y. 1985). A petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. That expense may not now be shifted to some other year as convenient to the present purpose, nor treated it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds remaining to pay wages. Such a scenario is unacceptable.

Counsel appears to urge that Schedule L Cash should be added to net profits in calculating the funds available to a petitioner to pay additional wages. That calculation would be inappropriate. Some portion of a corporate taxpayer's revenue during a given year is paid in expenses and the balance is the taxpayer's net income. Of its net income, some may be retained as cash. Because a petitioner's Schedule L cash may be derived from its net income, adding that petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part.

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 is therefore duplicative, at least in part.

Further, even if considered separately from net income, 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 alleges that the Form 1120S, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained to pay the proffered wage. Counsel provides an affidavit, dated November 5, 2002, in which the owners of New Ranch Incorporated guarantee payment of the proffered wage, indicating that they are willing to forego compensation as necessary to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2), set out above, makes clear that a petitioner that employs 100 or more workers may submit such a statement as evidence of its ability to pay the proffered wage. That clause in the regulation permits a large company to forego the cumbersome process of numerically demonstrating its ability to pay the proffered wage. The petitioner in the instant case, however, employs approximately eight workers. Use of that clause is unavailable to the petitioner. The petitioner must numerically show its ability to pay the proffered wage.

Further, [REDACTED] paid Officer compensation of \$55,900 and \$72,800 during 1998 and 1999, respectively. New Ranch Incorporated paid Officer compensation of \$67,200, \$72,800, and \$72,800 during 2000, 2001, and 2002, respectively. Those amounts do not demonstrate, absent additional evidence, that the petitioner's

owners could necessarily have paid the amount of the proffered wage, or any part of it, out of that compensation and still retained enough to support their two households. Thus, the record does not demonstrate that the pledge to forego compensation is credible. Although they have indicated that they were willing to forego compensation, they have not demonstrated that they could have foregone it. The petitioner has not demonstrated that any portion of its officer compensation was available, during any year, to pay additional wages.

Counsel's citation of *Matter of Sonegawa, supra*, is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful 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 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.

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. Counsel might have satisfied that condition by demonstrating, rather than alleging that he demonstrated, that the petitioner has a reasonable expectation of increasing profits. Here, the evidence does not establish that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998 and 1999 were uncharacteristically unprofitable years for Jonikel or that 2000, 2001, and 2002 were an uncharacteristically unprofitable years for New Ranch Incorporated. No reliable evidence has been submitted to demonstrate that the petitioner has a reasonable expectation of increasing profits.

In determining a petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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, New Ranch Incorporated established that it paid the beneficiary \$6,890 and \$27,560 during 2002 and 2003. The beneficiary's February 10, 2004 affidavit is insufficient to show the wages paid during the other salient years.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on its 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).

However, a 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.

As was noted above, however, a petitioner's total assets are not available to pay the proffered wage, as they include the petitioner's fixed assets. Only a petitioner's current assets, which includes its year-end cash and those assets expected to be consumed or converted into cash within a year, may be considered. Further, a petitioner's current assets cannot be viewed as available to pay wages without reference to its current liabilities, those liabilities projected to be paid within a year. CIS will consider a 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.

The proffered wage is \$27,456 per year. The priority date is January 12, 1998.

During 1998 [REDACTED] declared a loss of \$7,283. [REDACTED] cannot show the ability to pay any portion of the proffered wage of the proffered wage out of its ordinary income during that year. At the end of that year [REDACTED] had net current assets of \$8,083. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 [REDACTED] declared a loss of \$22,502. [REDACTED] cannot show the ability to pay any portion of the proffered wage of the proffered wage out of its ordinary income during that year. At the end of that year [REDACTED] had net current assets of \$4,561. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 New Ranch Incorporated declared a loss of \$20,355. New Ranch Incorporated cannot show the ability to pay any portion of the proffered wage of the proffered wage out of its ordinary income during that year. At the end of that year New Ranch Incorporated had net current assets of \$1,650. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 New Ranch Incorporated declared ordinary income of \$9,028. That amount is insufficient to pay the proffered wage. At the end of that year New Ranch Incorporated had net current assets of \$16,775. That amount is insufficient to pay the proffered wage. The petitioner has 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.

New Ranch Incorporated established that it paid wages of \$6,890 to the beneficiary during 2002 and must show the ability to pay the \$20,566 balance of the proffered wage during that year. During 2002 New Ranch Incorporated declared ordinary income of \$21,044. That amount was sufficient to pay the balance of the proffered wage. New Ranch Incorporated has demonstrated the ability to pay the proffered wage during 2002.

New Ranch Incorporated established that it paid the beneficiary \$27,560 during 2003. That amount exceeds the annual amount of the proffered wage. New Ranch Incorporated 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 1998, 1999, 2000, and 2001. 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 was correctly denied on that basis.

The record in this case raises an addition issue that was not addressed by the decision of denial. During 1998 and 1999 Jonikel operated the petitioning restaurant. During 2000, 2001, and 2002 New Ranch Incorporated operated the restaurant. Notwithstanding that the owner of Jonikel became one of the owners of New Ranch Incorporated, the ownership of the petitioning restaurant changed on January 1, 2000.

The substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It 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.

The evidence in this matter is sufficient to show that the business changed corporate ownership and that it continues to operate as a restaurant. The evidence does not demonstrate, however, that New Ranch Incorporated assumed all of the rights, duties, obligations, and assets of Jonikel. The evidence does not demonstrate, for instance, that no debts were extinguished pursuant to the reincorporation. The petition should have been denied on this additional basis. Because that issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, today's decision does not rest, even in part, on that additional basis for denial.

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.