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U.S. Citizenship
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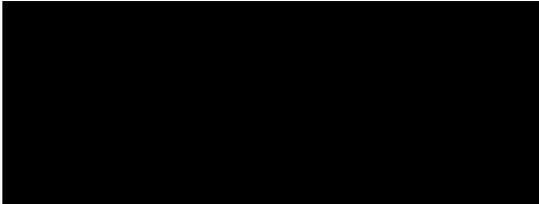
Office: VERMONT SERVICE CENTER

Date FEB 22 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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and 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 an international style cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner's continuing ability to pay the proffered wage has been established.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Services (CIS)].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 17, 2001. The beneficiary's salary as stated on the labor certification \$18.89 per hour, which amounts to \$39,291.20 per year.

On Part 5 of the visa petition, the petitioner claims that it was established in 1999, employs fifty-eight workers, and has a gross annual income of approximately 4.9 million dollars. Form ETA 750B, signed by the beneficiary on February 26, 2001, indicates that the petitioner has employed the beneficiary full-time since 1998. By way of contrast, a biographic information document, Form G-325A, signed by the beneficiary on August 13, 2002, reflects that he worked as a parking attendant from 1997 to February 2002 and has worked as a cook since March 2002 for "Southwest NY Gourmet." It is unclear if this restaurant is related to the petitioner. No clarification appears within the record.

The petitioner, through counsel, initially submitted a partial copy of its Form 1065, Return of Partnership Income for 2000 as evidence of its ability to pay the proffered wage of \$39,291.20 per annum. The partnership tax return indicates that the petitioner declared income of -\$408,328 for the year 2000. Schedule L of the return shows that

the petitioner had \$104,877 in current assets and \$2,041,170 in current liabilities, resulting in -\$1,936,293 in net current assets. Besides net income, CIS reviews a petitioner's net current assets as an alternative source out of which a proffered wage may be readily available. Net current assets are a measure of a petitioner's liquidity during a given period and represent the difference between current assets and current liabilities.¹ If a petitioner's end-of-year 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.

On December 12, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to submit its federal tax return for 2001, as well as the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner employed the beneficiary. The director also advised the petitioner that the tax returns for 1999 and 2000 do not show sufficient taxable income or net current assets to pay the beneficiary's proffered salary.

In response, counsel submitted a copy of the petitioner's 2001 partnership tax return. It shows that the petitioner reported net income of -\$491,398. Schedule L of the tax return reflects that the petitioner had \$49,654 in current assets and \$2,012,175 in current liabilities, resulting in -\$1,962,521 in net current assets. Counsel also offered a letter from the petitioner, dated January 20, 2003, signed by "Richard L. Cohn, VP." Mr. Cohn states that the petitioner has the ability to pay the proposed wage offer based on its gross sales, its number of employees, and its positive cash flow. He reports that the petitioner was closed after the September 11th terrorist attack until February 2002, but still had gross sales of 4 million. In a transmittal letter accompanying these documents, counsel states that the petitioner employed the beneficiary as a sub-contractor in 2001 and was not issued any W-2.

The director denied the petition, concluding that the petitioner's corporate tax returns failed to establish that it has had a continuing ability to pay the beneficiary's proffered salary of \$39,291.20. The director noted that, despite consideration of the effects of the attack on September 11th, the petitioner's 2000 and 2001 tax returns failed to demonstrate that either the petitioner's net income or net current assets could meet the proffered salary.

On appeal, counsel asserts that the petitioner's 2002 gross sales were \$3,849,509 and that this volume, combined with the restaurant's history of its ability to covering its payroll demonstrates its ability to pay the proffered salary despite reported losses. Counsel cites a 1993 case decided by the Board of Alien Labor Certification Appeals (BALCA) in support of this argument. Counsel also provides another letter from Mr. Cohn, dated April 2003. Mr. Cohn explains that in addition to depreciation, other non-cash and cash deductions taken on the tax returns would show the petitioner's positive cash flow. He mentions that a legal expense of \$399,516, deducted on the 2001 tax return, was a one-time charge incurred as a result of litigation between the petitioner, its affiliates, and American Express. He states that the average legal expense of a restaurant the size of the petitioning business would be about \$25,000. He adds that the legal expense in 2000 was \$67,000 when the litigation was initiated. He further notes that an expense of \$200,000 taken as a "management fee" is only paid whenever sufficient cash flow is available. An internally generated, unaudited profit and loss statement for 2002 is also submitted by way of illustration of the petitioner's ability to pay the proposed wage offer during that period.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

At the outset, it is noted that internally generated unaudited financial statements such as the profit and loss statement submitted on appeal are not persuasive evidence of a petitioner's ability to pay a certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. The regulation neither states nor implies that unaudited financial statements are acceptable as a substitute for the required evidence. Unsupported representations of management in the form of internally produced documents do not establish a petitioner's ability to pay the proffered wage.

It is further noted that the BALCA case cited by counsel is not binding on CIS. Moreover, that case would also not be considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, as noted above, the record is not consistent in demonstrating exactly when or how the petitioner may have employed the beneficiary. As the director also stated in his denial, the petitioner failed to submit any evidence in the form of a W-2 or Form 1099, which might substantiate any payments made to the beneficiary.

Counsel cites the Mr. Cohn's opinion that the depreciation expense and other deductions taken by the petitioner should be added back to the petitioner's net income because they were merely tax avoidance strategies. No legal authority is cited in support of this proposition and the AAO does not find this assertion persuasive. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will review 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). Showing that the petitioner's gross receipts reached a certain level or exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages or expended substantial other monies such as bonuses, officers' compensation, management or legal fees is not convincing as is claimed here. It remains that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to establish its ability to pay a certified wage as of a priority date and continuing until the beneficiary achieves permanent resident status. During this period of review, it is not reasonable to consider gross revenue without also reviewing the expenses incurred in order to generate that 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 the Service should have considered income before expenses were paid rather than net income. For example, in relation to depreciation, the court in *Chi-Feng Chang* noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net

cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

Eligibility for the visa classification must be established at the time of filing the petition. A petitioner cannot establish a priority date for visa issuance when at the time of making the job offer and the filing of the petition with CIS, the petitioner could not pay the wage as stated in the labor certification. *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977).

Counsel's assertion that the petitioner's ability to pay the certified wage was established despite its reported losses is somewhat similar to principles enunciated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), where an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. Further, the two tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Here, the petitioner's net income, as set forth in its federal tax returns, still shows substantial losses in both 2000 and 2001, even when considering September 11th related losses such as the \$141,707 contained on the 2001 tax return. Both years also show that the petitioner's current assets exceeded its current liabilities by almost 2 million dollars. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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

ORDER: The appeal is dismissed.