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U.S. Citizenship
and Immigration
Services

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JAN 31 2005

FILE: EAC 03 086 50908 Office: VERMONT SERVICE CENTER Date:

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:

[REDACTED]

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 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 \$13.02 per hour, which equals \$27,081.60 per year.

On the petition, the petitioner stated that it was established on March 1, 2000 and that it employs three workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Boston, Massachusetts.

In support of the petition, counsel submitted a copy of the 2001 Massachusetts Business or Manufacturing Corporation Excise Return of JUGDHAMBA, Incorporated.

That return does not show JUGDHAMBA's net income. The return shows that at the end of that year JUGDHAMBA had current assets of \$67,641. JUGDHAMBA's total current liabilities cannot be computed from the data on that form, therefore JUGDHAMBA's 2001 year-end net current assets cannot be computed.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 3, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2001 Federal tax return or 2001 annual reports with audited financial statements. The Service Center requested that, if the petitioner employed the beneficiary during 2001, it provide copies of 2001 Federal Form W-2 Wage and Tax Statements showing the amount paid to the beneficiary during that year.

In response, counsel submitted the 2001 Form 1120 U.S. Corporation Income Tax Return of JUDGHAMBA. That return shows that [REDACTED] declared a loss of \$20,491 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$6,417 and current liabilities of \$2,949, which yields \$3,468 in net current assets.

In a brief filed with that response, counsel emphasized the amount of the petitioner's total assets¹, its gross receipts and its gross profits in arguing that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Counsel also argued that the pay stubs show the petitioner's ability to pay the proffered wage.

In his argument, counsel cited a non-precedent CIS decision. The proposition for which counsel cited that case is unclear and, in any event, this office is not bound by that decision. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petitioner may show the continuing ability to pay the proffered wage beginning on the priority date notwithstanding that its net profit during a given year was insufficient to pay the annualized amount of the proffered wage. Counsel states that the petitioner expects an increase in profits based on its proximity to colleges.

Counsel cited the minutes of a November 16, 1994 teleconference between representatives of an immigration lawyer's association's and representatives of the Vermont Service Center. Counsel states that the Service Center indicated that a favorable decision pertinent to ability to pay the proffered wage would be granted if the petitioner has a favorable enough ratio of total current assets to total current liabilities or if the difference between the petitioner's current assets and current liabilities is sufficient to pay the proffered wage.

The positions espoused in those minutes is not binding on this office, and this office does not find all of them convincing. If, at the end of a given year, the specific dollar amount of the difference between the petitioner's current assets and current liabilities is such that the petitioner could have paid the proffered wage out of its net current assets, then the petitioner will be found to have had the ability to pay the proffered wage during that year. That statistic, the amount of a petitioner's net current assets, is addressed below as part of the analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather than relying on the **ratio** of the petitioner's current assets to its current liabilities, this office finds a specific dollar amount to be a better method of ascertaining the petitioner's ability to pay the proffered wage.

¹ In the first paragraph of that brief counsel incorrectly referred to the petitioner's total assets as the petitioner's "revenue from investment capital." Total assets are not the same as revenue.

As was noted above, the Service Center requested that, if the petitioner had employed the beneficiary during 2001, it provide a copy of the W-2 form showing the amount it paid the beneficiary during that year. Counsel provided no W-2 forms and did not explain their absence. Either the petitioner did not employ the beneficiary during 2001, as it claimed to have done on the Form ETA 750, Part B, or it failed to respond to the Service Center's request.

Counsel did provide four pay stubs, dated February 2, 2004, February 9, 2004, February 16, 2004, and February 23, 2004. The gross income on each of those weekly paychecks was \$530, for a total of \$2,120.

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 July 9, 2004, denied the petition.

On appeal, counsel purports to cite a May 4, 2004 memo from CIS' Associate Director for Operations. That memo gives guidance to Service Centers in adjudicating petitions, including guidance pertinent to the determination of a petitioner's ability to pay the proffered wage. Counsel states that the memo indicates that a petitioner has demonstrated the ability to pay the proffered wage during a given year if "the evidence reflects that the petitioner' [sic] current assets are equal to or greater than the proffered wage."

There is no apparent conflict between the policies of this office and the Associate Director's guidance on the issue of determining a petitioner's ability to pay the proffered wage. However, the language of the Associate Director's memo is inconsistent with counsel's quotation, ostensibly taken from it. In fact, the memo refers to a petitioner's **net** current assets, not current assets.² That distinction will be explained below.

Counsel again emphasizes the petitioner's gross receipts, gross profit, salary and wage expense, and total assets in arguing that it has demonstrated the ability to pay the proffered wage. Counsel also implies that the amount of the petitioner's depreciation deduction should be included in the determination of its ability to pay the proffered wage.

Counsel also notes that, according to that memo, a petitioner has demonstrated the ability to pay the proffered wage if it demonstrates that it "is employing the beneficiary [and] has paid or currently is paying the proffered wage." Counsel argues that, therefore, the provision of the four pay stubs also demonstrates that the petitioner is able to pay the proffered wage.

Finally, counsel notes that the petitioner's gross receipts have increased and states that the petitioner has a reasonable expectation of increased profits. Counsel again cites *Matter of Sonogawa, supra*, for the proposition that the petitioner has therefore demonstrated the ability to pay the proffered wage.

With the appeal counsel submitted copies of 2002 and 2003 Form 1120 U.S. Corporation Income Tax Returns of [REDACTED] Incorporated.

² The memo states, "CIS adjudicators should make a positive ability to pay determination [if the] initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage."

The 2002 return shows that [REDACTED] declared a loss of \$4,301 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year JUGDHAMBA had current assets of \$6,299 and current liabilities of \$5,299, which yields net current assets of \$1,000.

The 2003 return shows that [REDACTED] declared taxable income before net operating loss deduction and special deductions of \$5,593 during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$7,280 and current liabilities of \$2,856, which yields net current assets of \$4,420.

Counsel's reliance on the petitioner's gross receipts, gross profits, and salary and wage expense is misplaced. Showing that the petitioner paid wages in excess of 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 expenses³ or otherwise increased its net income,⁴ 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.

Counsel's reliance on the petitioner's depreciation expense is similarly 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. 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.

Counsel's citation of *Matter of Sonogawa, supra*, is unconvincing. *Sonogawa* 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* changed business locations during the year in which the petition was filed 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.

³ 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.

⁴ 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.

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 states that the petitioner has a reasonable expectation of increasing profits. As support for that proposition counsel notes that the petitioner has been in the same location, adjacent to the state house and Suffolk College, for over 20 years and that it is also located near other colleges.

If the petitioner has enjoyed that location for over 20 years, then how it could reasonably contribute to an expectation of increased profits is unclear. If the petitioner had recently acquired a more desirable location then this might, at least arguably, lead one to expect that its business would improve in the near future. If the state house and Suffolk College had recently opened adjacent to the petitioner's location then this, too, might, arguably, cause a reasonable anticipation of improved profits. If the nearby colleges had recently experienced a significant increase in their enrollment or their on-campus population that, too, might lend itself to such a reasonable expectancy.

In the instant case, however, no such change has occurred, and counsel has not supported that the petitioner's expectation that its business will improve is a reasonable expectation. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 Service Center requested that the petitioner provide the W-2 form showing the amount it paid the beneficiary during that year. The petitioner failed to provide that form. The petitioner provided no W-2 forms for other years, either. The petitioner did provide February 2004 pay stubs showing that it employed the beneficiary during that month and paid him \$2,120. The petitioner has not demonstrated that it employed the beneficiary at any other time or paid him any additional amount.

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 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 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.

The proffered wage is \$27,081.60 per year. The priority date is April 30, 2001. The petitioner, however, had two other alien worker petitions recently approved. The proffered wages in those cases are \$34,320 and \$27,081.⁵ In order to demonstrate that it is able to pay the proffered wage, the petitioner must demonstrate that it can pay not only the amount of the proffered wage in the instant case, but that it can pay the proffered wage in those two cases as well. The total additional wages that the petitioner must show the ability to pay the proffered wage is \$88,482.60.⁶

The petitioner's name, as stated on the petition, is Primo's Restaurant. In response to the Request for Evidence and on appeal counsel submitted corporate tax returns of [REDACTED], Incorporated. Counsel did not explicitly state that Primo's Restaurant and [REDACTED] are identical. This office notes that the address of [REDACTED] as stated on the tax returns, however, is the same address at which the petitioning restaurant states it operates. Further, the Service Center did not request additional evidence that the petitioner and [REDACTED] are identical. For the purpose of this decision, this office shall assume that they are.

During 2001 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of the year the petitioner had net current assets of \$3,468. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence that any other funds were available during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

⁵ EAC 03 249 52127 and EAC 03 199 51847, respectively.

⁶ \$34,320 + \$27,081 + \$27,081.60

During 2002 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of the year the petitioner had net current assets of \$1,000. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence that any other funds were available during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,593. That amount is insufficient to pay the proffered wage. At the end of the year the petitioner had net current assets of \$4,420. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence that any other funds were available during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$2,120 during February 2004. The petitioner submitted no other evidence, however, pertinent to its ability to pay the proffered wage during 2004. The appeal in this matter, however, was submitted on February 9, 2004, when the petitioner's 2004 tax return was unlikely to be available. The petitioner could not, therefore, have submitted a copy of its 2004 tax return either on appeal or earlier. The ability to pay the proffered wage during 2004 will not be considered in this decision.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. 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.