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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 13 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

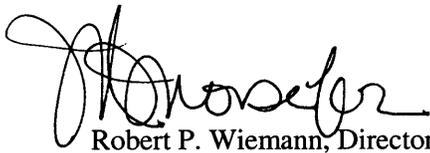
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Polish-style delicatessen. It seeks to employ the beneficiary permanently in the United States as a cook of Polish food specialties. 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)(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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$19 per hour, which amounts to \$39,520 annually.

On the petition, the petitioner indicated it was owner-operated, and was established in 1998. The petitioner stated that its gross annual income in 2001 was \$128,460. With the petition, counsel submitted a bank statement from Wawel Savings Bank, Wallington, New Jersey, that stated that, as of July 30, 2002, the petitioner had a savings account balance of \$21,768. In the petitioner's cover letter, counsel states that the petitioner had sales of \$128,460 in 2001. Counsel also referenced several unpublished AAO decisions that involved petitioners with small net incomes or negative profits. Counsel also cited *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) and identified this decision as a seminal case in which the petitioner showed a loss and yet the petitioner's expectations of a continued increase in business and increasing profits were found to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 10, 2003, the director requested additional evidence

pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2000 and 2001 federal income tax returns with all schedules and attachments. The director also questioned whether the petitioner would fill a newly created position, and if not, what wage had been paid to the incumbent who held this position. The director also asked for evidence to identify any former employee for the position, evidence of his or her salary, and also documentation that the position had been vacated. Finally the director requested copies of the petitioner's Form 941 for the period of time in question.

In response, counsel submitted the petitioner's Form 1065 Federal income tax return for the years 2000 and 2001.¹ Counsel highlighted the monies paid out to subcontractors as described in Schedule A-Other Costs in both tax returns. Counsel stated that the petitioner was an owner-operated entity and that the partner had been performing the duties of a cook and had occasionally used the services of subcontractors, such as the beneficiary. According to counsel, the petitioner's owner wanted to focus solely on overseeing and developing the business, and as a consequence wanted to hire the beneficiary as a full time cook.

Counsel stated that since the petitioner was an owner-operated entity only marginally supplemented by the services of sub-contractors, the petitioner was not required to file a Form 941. Counsel cited again several unpublished AAO decisions and referred to them as decisions that involved petitioners whose federal tax return had shown losses. Counsel also stated that the size of the petitioner's business should not be dispositive as to whether the petitioner has the ability to pay the proffered salary as of April 5, 2001. Counsel referred to the impact and economic fallout of the events of September 11, 2001 in the New York metropolitan area. Counsel states that despite the severe economic slowdown after September 11, 2001, the petitioner had paid its operating expenses, including cost of supplies, utilities, insurance, repairs, and had paid \$20,400 in 2000 for subcontractors and \$10,400 in 2001 for subcontractors. Counsel stated that this was evidence that the petitioner was financially stable and that its expectations of a continued increase in business and profits should be considered in the director's analysis of the petitioner's ability to pay the proffered wage.

Counsel submits a letter from the petitioner's owner who referred to the money in his saving accounts as working capital. The owner also stated that this money, combined with the money paid to subcontractors, was sufficient to pay the \$39,520 proffered salary. Counsel submitted an additional letter from the beneficiary who stated that she was self-employed and occasionally received orders as a cook from the petitioner. The beneficiary stated that she received less than \$600 from the petitioner during this period, and as such the petitioner had not issued a Form 1099-MISC for her.

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 September 15, 2003, denied the petition. The director stated that neither of the petitioner's federal income tax returns indicated sufficient net income to pay the proffered wage.

On appeal, counsel states the director's decision is arbitrary and capricious. Counsel states that the director failed to consider the value of the work input of the owner-cook, who had chosen not to receive a salary for the sake of

¹ These documents indicate the petitioner is a domestic general partnership. No other partners are identified in the tax returns.

maintaining and building up his financially sound business. Counsel reiterates the list of AAO unpublished cases that he states involved businesses with negative net income or a very small net income that nevertheless were found to be able to pay proffered wages.

Counsel also submits an original letter from [REDACTED] dated October 20, 2003, that states the petitioner's owner has \$44,318.71 in his savings account. Counsel states that this sum exceeds the proffered salary of \$39,520, and that the cash at hand clearly demonstrates that the petitioner has the financial ability to pay the proffered wage. In addition, counsel submits an unaudited profit and loss projection statement for 2004 to 2005, as well as a letter from [REDACTED] the petitioner's accountant, Clifton, New Jersey. In her letter, [REDACTED] examines the net income and gross sales of the petitioner, as well as the costs of subcontractor labor. [REDACTED] then states that the petitioner has increased its sales and revenues during the past two years and that in her professional opinion the petitioner has been operating and will continue to operate and grow in a financially healthy manner. She adds that the petitioner expects to realize gross sales and revenues in the amount of \$200,000. Based on the petitioner's ability to pay substantial operating expenses and to continue to operate, the accountant states that she has no doubt that the petitioner has the financial ability to pay the proffered wage.

Counsel in its response to the director's request for further evidence submitted the petitioner's owner savings account statement for July 2002. On appeal, counsel submits the partner/owner's savings account statement as of October 20, 2003, that shows a balance of \$44,318.71. On appeal, counsel states that these bank statements evidence the petitioner's cash on hand.

Counsel's reliance on the balances in this savings account is not persuasive. The Forms 1065 submitted by the petitioner shows that the petitioner is a general domestic partnership. No further evidence is found in the record as to the number of the petitioner's partners. Nevertheless, each of the partners in a general partnership is jointly and severally responsible for the partnership's debts and obligations. Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets, the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage.

Without more persuasive evidence, it appears that the petitioner only has one partner. The petitioner's partner is obliged, however, to demonstrate that he or she could have paid the proffered wage out of his adjusted gross income and supported himself or herself, and his or her family, on the remaining funds. The record reflects that the owner/partner does not receive a salary or compensation from the petitioner. Furthermore the record does not reflect any additional sources of support for the owner/partner beyond his savings account that could support him or any dependents, after paying the proffered wage. In addition, the priority date for the instant petition is April 5, 2001. The petitioner has to establish that the partner/owner had sufficient assets to pay the proffered wage as of this date. The savings account statements from 2002 and 2003 do not establish the financial assets of the owner/partner as of the priority date. All these factors would diminish the petitioner's use of the partner's assets to establish the petitioner's ability to pay the proffered wage in the instant petition.

In the initial petition, in his response to the director's request, and on appeal, counsel also referred to numerous AAO decisions involving petitioners with small or negative net incomes, but does not provide any published

citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, since the petitioner's federal income tax returns do not indicate that the petitioner had negative net income in either 2000 or 2001, the AAO decisions would not necessarily be analogous to the instant petition.

In addition, on appeal, counsel submits an unaudited profit and loss projections that indicates the petitioner will have net income of \$38,587 in 2004 and \$49,210 in 2005. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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 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. Although the beneficiary indicated on ETA Form 750 that she had worked full-time for the petitioner from January 1998, the beneficiary also stated that she had only received \$600 in non-employee compensation from the beneficiary in the time period in question. The petitioner provided no documentation whatsoever with regard to the beneficiary's employment. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 next 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). 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 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, now CIS, should have considered income before expenses were paid rather than net income. Although the director requested and the petitioner provided a copy of the petitioner's Form 1065 for 2000, it is noted that the priority date for the petition is April 2001. Thus, the petitioner's Form 1065 for 2000 is not dispositive in these proceedings, although it could be material in any consideration of the petitioner's totality of circumstances as outlined in *Matter of Sonogawa*. For purposes of reviewing the petitioner's net income, only the federal tax return for 2001 will be examined. Accordingly to this document, the petitioner had \$1,439 in net income in 2001. This figure is not sufficient to pay the proffered wage of \$39,520 as of the 2001 priority date.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation'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. With regard to the instant petition, upon extensive review of the record, the petitioner did not submit a Schedule L for either federal income tax return submitted. Therefore, it is not possible to analyze the petitioner's net current assets for 2001 as to whether the petitioner has the ability to pay the proffered wage.

As stated previously, the assets of the owner/partner, namely his savings account, are not viewed as a source of sufficient additional funds to pay the proffered wage. The petitioner also states that the labor costs for subcontractors, namely, \$20,400 in 2000 and \$10,400 in 2001, will be available to pay the beneficiary's proffered wage. However, the petitioner submitted no documentation as to the actual services provided by the subcontractors, and how their duties were similar to the prospective duties of the beneficiary. Furthermore, the wages for subcontractors is money already spent, and the petitioner may or may not have revenues sufficient to support the proffered wage in the future, based on the non-use of subcontractors. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel also referred to *Matter of Sonogawa* in his response to the director's request for further evidence and on appeal. *Matter of Sonogawa*, 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 *Sonogawa* 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

² 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.

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

The AAO acknowledges the difficulties faced by businesses in the metropolitan New York area in the aftermath of the September 11, 2001 tragedy; however, the instant petition lacks sufficient evidence in the record to find the petitioner's business analogous to the petitioner in *Sonegawa*, with regard to a specific period of economic downturn within a greater pattern of profitable business and financial viability. In addition, at the time of filing the petition, the petitioner had been in business for only four years which is not analogous to the business longevity of the petitioner in *Sonegawa*.

In sum, the petitioner has not provided sufficient evidence to establish that the petitioner has the ability to pay the proffered wage, both in terms of the petitioner's partner's assets as well as the petitioner's net current assets, from 2001 and onward. The petitioner has not, therefore, shown the ability to pay the proffered wage from the 2001 priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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. The appeal is dismissed. The petition is denied.

ORDER: The appeal is dismissed.