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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 20 2005
EAC 02 250 50376

IN RE: Petitioner:
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, Director
Administrative Appeals Office

DISCUSSION: The 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a statement 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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also

demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 4, 2001. The proffered wage as stated on the Form ETA 750 is $18.89 per hour, which equals $39,291.20 per year. The Form ETA 750 states that the position requires three years of experience in the job offered.

On the petition, the petitioner stated that it was established during 1991 and that it employs 15 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the Fireside Inn, at the same address given for the petitioner, from February 1992 to February 1995. A note on the Form ETA 750, Part B indicates that the Fireside Inn and the petitioner, [redacted] are different restaurants owned by the same person, [redacted]. As those restaurants have the same address they were apparently owned sequentially. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Rochelle Park, New Jersey.

With the petition, counsel submitted the 1999 Form W-2 Wage and Tax Statements and W-3 transmittal issued by the U.S. International Hospitality dba Fireside Inn. The W-3 form shows that the Fireside Inn paid total wages of $61,950.60 during that year. The W-2 forms show that amount was split between seven workers. Those W-2 forms do not demonstrate that the Fireside Inn paid anything to the beneficiary during that year.

Counsel submitted the 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns of the Fireside Inn. Those returns show that the Fireside Inn reported taxes pursuant to the calendar year.

The 1999 return shows that during that year U.S. Hospitality dba Fireside Inn declared a loss of $23,111 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the current liabilities of the Fireside Inn exceeded its current assets.

The 2000 return shows that during that year U.S. Hospitality dba Fireside Inn declared a loss of $67,880 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the Fireside Inn had current assets of $59,675 and current liabilities of $51,787, which yields net current assets of $7,888.

A letter from the petitioner's counsel's law firm, dated August 23, 2002, states that until 2000 the petitioner operated as U.S. International Hospitality.

The priority date is April 4, 2001. Even assuming that U.S. Hospitality dba Fireside Inn, a corporation, is the predecessor-at-interest to the petitioner, evidence pertinent to its finances prior to that year is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted the petitioner's 2001 Form 1065, U.S. Return of Partnership Income. That return shows that the petitioner is a limited liability company and that during 2001 it declared a loss of $10,090 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $77,607 and current liabilities of $47,986, which yields net current assets of $29,621.

Counsel submitted the petitioner's 2001 W-3 and W-2 forms. The W-3 form shows that during that year the petitioner paid salaries and wages of $97,463.90. The W-2 forms show that amount was distributed to nine employees but do not show that the petitioner employed the beneficiary during that year. A payroll statement for the second quarter of 2002 shows that the petitioner employed 11 people during that quarter, but does not show that it employed the beneficiary during that quarter.

Counsel submitted no evidence pertinent to the beneficiary's employment history with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite two years work experience, the Vermont Service Center, on December 23, 2002, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In response, counsel submitted a letter, dated February 25, 2003, from the petitioner's "Managing Member." That letter notes that the restaurant claimed a depreciation deduction during 2001 of $1,724 paid rent of $37,442 to a related party. That letter concludes that, but for the restaurant's rent expense and depreciation deduction, it would have made a profit of $29,076 during 2001. The letter further states that the rental agreement was designed to minimize the restaurant's profit, and that the second half of 2001 was a slow period for businesses in the New York/New Jersey area.

That letter further states that during 2002 the petitioner's sales improved by $65,000 and that during 2003 it opened a catering facility that had already proved successful. To support the statement pertinent to 2002 counsel submitted the petitioner's unaudited 2002 income statement.

With the response to the Request for Evidence, counsel submitted no evidence pertinent to the beneficiary's employment history.

The director denied the petition on September 25, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite three years of salient work experience.

On appeal, counsel emphasizes the petitioner's total labor expense and gross profit in stating that it had the ability to pay the proffered wage during 2002.

With the appeal counsel submits part of the petitioner's 2002 Form 1065, U.S. Return of Partnership Income. That return shows that the petitioner declared ordinary income of $25,007 during that year. Because counsel did not submit the corresponding Schedule L, this office is unable to calculate the petitioner's 2002 end-of-year net current assets.

Neither counsel's statement on appeal nor the additional evidence submitted addresses the lack of evidence pertinent to the beneficiary's employment history.

Counsel's reliance on the petitioner's gross profit and its 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 expenses[1] or otherwise increased its net income,[2] 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1084 (S.D.N.Y. 1985), 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.

Reliance on the amount of the petitioner's depreciation deduction is similarly misplaced. The petitioner is correct that 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. But 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 reliance on the unaudited income statement submitted in this case is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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[1] 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.

[2] 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.

The petitioner's assertion that it paid rent to a related party is insufficient to render its rent payments a fund available to pay the proffered wage. The record does not demonstrate that the rent the petitioner paid exceeded the market rent for the space it occupies. Further, the record contains no evidence that the related party was willing to forego all rental payments, or any portion of them, so that the petitioner could pay its cook.

The petitioner notes that business declined for various enterprises in its area after the events of September 11, 2001 and implies that, but for that decline, its profit would have been greater during 2001. The petitioner, however, submitted no evidence in support of its assertion that its business would otherwise have been better. Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), a petitioner's low profits or losses during a given year can be overlooked if the petitioner demonstrates that the low profits or losses were uncharacteristic, occurred within a framework of significantly more profitable or successful years, and are unlikely to recur. During the year in which the petition was filed in *Sonegawa* 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 the petitioner 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.

In the instant case, counsel implies that the petitioner would have been profitable during 2001 and able to show the ability to pay the proffered wage during that year but for the economic decline occasioned by the events of September 11, 2001. This office notes that September 11 is more than two-thirds of the way through the calendar year, and could not have affected the previous portion of the year. Further, the 2000 return of the petitioner's putative predecessor-at-interest, a restaurant operated at the same address, rather than showing greater profits, shows an even greater loss than the petitioner declared during 2001, which certainly does not support the petitioner's implicit assertion. Assuming that the petitioner's business would have been substantially better absent the influence of the events of September 11, 2001 is speculative.

In determining the 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, the petitioner did not establish that it employed and paid the beneficiary during 2001 or 2002.

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, supra*; *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The petitioner's net income, however, 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 that 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 April 4, 2001. The priority date is $39,291.20 per year.

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 that year the petitioner had net current assets of $29,621. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of $25,007. That amount is insufficient to pay the proffered wage. Counsel did not submit evidence from which the petitioner's 2002 end-of-year net current assets could be calculated. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner submitted no other reliable evidence of funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

Having failed to demonstrate the ability to pay the proffered wage during 2001 and 2002, the petitioner has not established the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that ground.

The petitioner has submitted no evidence to establish that the beneficiary has the requisite three years experience in the job offered. Therefore, the petitioner has not demonstrated that the beneficiary is qualified for the proffered position and the petition was correctly denied on that additional ground.

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.