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U.S. Citizenship
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Services

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FILE: WAC-02-198-50898 Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

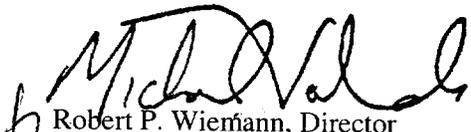
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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. Wienmann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The AAO dismissed the appeal. The matter is again before the AAO on motion to reopen. The motion will be granted. The prior decision of the AAO will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a curry chef. 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. The AAO concurred with the director's decision.

The petitioner substituted counsel subsequent to the AAO's decision. On motion, new counsel submits additional evidence, and a supplemental brief and correspondence. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel asserts that the AAO inconsistently applied precedent and should consider the petitioner's bank account balances and the totality of circumstances in determining the petitioner's ability to pay the proffered wage based on a number of cases he cites to in his brief. Counsel submits affidavits and other new evidence for consideration. Thus, the motion qualifies as a motion to reopen and a motion to reconsider.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 18, 2000. The proffered wage as stated on the Form ETA 750 is \$600.00 per week, which amounts to \$31,200.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1999.

On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$1,480,000, and to currently employ 35 workers. In support of the petition, the petitioner submitted its Forms 1065, U.S. Returns of Partnership Income for 1999, 2000, and 2001¹.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 26, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a signed and completed tax return for 2000 as well as the petitioner's payroll summaries.

In response, the petitioner submitted its signed and completed Form 1065 partnership tax return for the years 2000; a copy of a payroll journal; and copies of W-2 forms issued to the beneficiary from the petitioner in 2000 and 2001 showing that the beneficiary earned \$27,630 in 2000 and \$30,200 in 2001.

The petitioner's tax returns reflect the following information for the following years:

| | 2000 | <u>2001</u> |
|-------------------------|-----------|-------------|
| Net income ² | \$17,623 | -\$65,424 |
| Current Assets | \$124,365 | \$84,734 |
| Current Liabilities | \$183,154 | \$231,738 |
| Net current assets | -\$58,789 | -\$147,004 |

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 November 5, 2002, denied the petition, citing the petitioner's negative net income and net current assets.

On appeal, counsel asserted that the beneficiary was paid close to the proffered wage and that the petitioner supported a payroll of almost half a million dollars in 2000 and 2001. Additionally, counsel submitted a letter from a certified public accountant [REDACTED] and Company, stating that the petitioner has the ability to pay the beneficiary's wages since it already does and that its reported losses on its tax returns are typical of cash based businesses, who accelerate payment of expenses prior to "recognition of income on the books and records of the company." Counsel subsequently submitted an article from the *Los Angeles Times*, dated August 27, 2003, reporting on the petitioner's restaurant and giving it two stars for a "very good" rating.

The AAO dismissed the appeal, identifying an inconsistency in the address information provided on the tax returns against the Form ETA 750. Additionally, the AAO noted a shortfall of \$1,000 between the wages actually paid to the beneficiary in 2001 and determined that neither the petitioner's net income nor its net current assets could cover the difference. The AAO also noted that the shortfall of \$3,570 between the wages actually paid to

¹ Because 1999 precedes the priority date in 2000, the petitioner's financial situation in 1999 as reflected on its tax returns, is not necessarily dispositive of its continuing ability to pay the proffered wage beginning on the priority date.

² Ordinary income (loss) from trade or business activities as reported on Line 22.

the beneficiary in 2000 and the proffered wage and determined that neither the petitioner's net income nor its net current assets could cover the difference.

On motion, counsel asserts that the petitioner's cash in its bank accounts are sufficient to demonstrate its continuing ability to pay the proffered wage in each year since there is enough cash to cover the shortfall between the wages actually paid to the beneficiary and the proffered wage. Counsel states that a fire that damaged the restaurant in 1999 and the attacks on September 11 adversely impacted the petitioner's revenues but it always maintained enough cash to pay its employees' wages. Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and an unpublished AAO case for the premise that the AAO may use cash in bank accounts and the totality of circumstances to consider a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel submits a letter from [REDACTED] owner of the restaurant, describing the ownership structure of the petitioning company and supporting documents to demonstrate that the petitioner is located at the address listed on the ETA 750A, on [REDACTED], and explaining that her personal address was listed on the tax returns. On motion, documents are submitted including articles of incorporation for Fatehpur Enterprises, Inc. and a form electing its organization as an S corporation with [REDACTED] listed as a shareholder; a limited partnership agreement listing fourteen entities, individuals, or married couples, as partners owning the petitioning business; a real estate lease for the petitioner showing its location at [REDACTED]; the petitioner's menu and tax registration certificate; a [REDACTED] deed of trust to her private residence; insurance correspondence concerning a fire at the petitioner's restaurant in 1999; an unaudited³ analysis of business interruption losses due to the fire at the petitioner's restaurant in 1999; the petitioner's bank account statements for 2001 and 2002; Forms W-2 issued to the beneficiary in 2002 evidencing that he was paid \$28,385 in that year and \$35,200 in 2003; and the petitioner's tax returns, including its 2002 and 2003 returns. The petitioner's 2002 and 2003 partnership tax returns reflect that the petitioner's net income in 2002 was -\$8,660 and its net current assets were -\$161,481, and that the petitioner's net income in 2003 was \$64,337 and its net current assets were -\$112,705.

[REDACTED] letter states that the petitioner is structured as a limited partnership, that its general partner is an S corporation called [REDACTED] of which she and [REDACTED] are 50% owners. She states that in addition to the restaurant "being 50% owned by the general partner, [REDACTED] the remaining 50% ownership of [the petitioner] is owned by approximately 14-16 people with varying ownership interests each of whom have been designated as [l]imited [p]artners for the company." She states that the four pages of tax returns submitted into the record of proceeding are complete and the only items missing are copies of every limited partner's schedule "that, due to the large number of individuals involved, is not practical to produce." [REDACTED] states that the petitioner is only one restaurant and no other restaurants are involved or associated with the petitioner. She states that the restaurant had a lot of expenses from 1999 onwards due to the fire that damaged the premises but they have always paid wages due to their employees, but states that the shortfall between wages actually paid to the beneficiary and the proffered wage could be paid out of the petitioner's bank funds.

At the outset, the AAO determines that the petitioner has sufficiently clarified the use of its address.

³ Footnote 1 at the last page of Schedule 4 indicates that it is a compilation.

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. In the instant case, the petitioner established that it employed and paid the beneficiary the full proffered wage in 2003 and thus established its ability to pay in that year. In the years 2000, 2001, and 2002, the petitioner paid the beneficiary partial wages of \$27,630, \$30,200, and \$28,385, respectively. The difference between the wages actually paid and the proffered wage in each year, 2000, 2001, and 2002, is \$3,570, \$1,000, and \$2,815, respectively.

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 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.

The petitioner's net income in 2000 is sufficient to pay the remaining wage of \$3,570. However the petitioner's net incomes in the other pertinent years, 2001, and 2002, -\$65,424, and -\$65,424, respectively, is insufficient to pay the remaining wages of \$1,000 and \$2,815. Thus the petitioner has not demonstrated its ability to pay the proffered wage out of its net income in 2001 or 2002.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁴ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

⁴ 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,

are shown on lines 15 through 17. If a partnership'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. The petitioner's net current assets during 2001 and 2002, however, were always negative, and thus, the petitioner has not demonstrated its ability to pay the proffered wage out of its net current assets in 2001 or 2002.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel refers to a decision issued by the AAO concerning the use of bank statements, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of 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).

Finally, counsel urges the AAO to apply *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) to the instant case, which 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa* that 2001 or 2002 were uncharacteristically unprofitable years for the petitioner.

However, in adjudicating third preference employment-based immigrant visa petitions, the AAO implements an approach, derived from *Sonogawa's* holding, that includes considering the totality of circumstances in determining whether or not a petitioning entity has the continuing ability to pay the proffered wage beginning on the priority date. A critical issue in this case overlooked by the director, the AAO's prior adjudicator, and both current and prior counsel is the fact that the petitioner is structured as a limited partnership, and as such, each partner is entitled to demonstrate that she, he, or it has sufficient liquifiable and unencumbered personal assets to bolster the petitioner's continuing ability to pay the proffered wage. In this case, there are many individuals, couples, and business entities comprising the petitioner's partnership. Since the shortfall between the wages paid

short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

to the beneficiary and the actual proffered wage is so modest, it is highly likely that one of those individuals, couples, or business entities have anywhere between \$1,000 to \$2,815 in liquieifiable and unencumbered personal assets to contribute to the petitioner's business to bolster its continuing ability to pay the proffered wage⁵. Additionally, the petitioner submitted its review from the *Los Angeles Times*. Such a review is an endorsement of a good enough reputation to show that the petitioner's business is thriving enough to catch the attention of a major newspaper. Finally, the petitioner's gross revenues and wages paid to its employees are not modest and demonstrate a serious business⁶. Considering the unique and limited circumstances of this case, the AAO is exercising favorable discretion considering the totality of factors surrounding the petitioner's financial situation, and determining that the petitioner does have a continuing ability to pay the proffered wage beginning on the priority date.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The AAO's decision of March 17, 2004 is withdrawn. The motion to reopen is granted. The appeal is sustained. The petition is approved.

⁵ Thus, the AAO will not remand the case to the director to acquire evidence consistent with this finding.

⁶ Gross receipts and sales are always approximately \$1.3 to \$1.5 million and its wages paid are almost always approximately half a million dollars.