

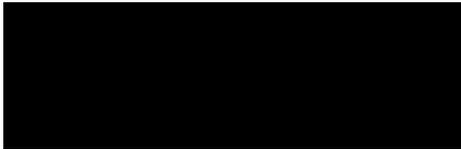
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted]
EAC-05-105-50205

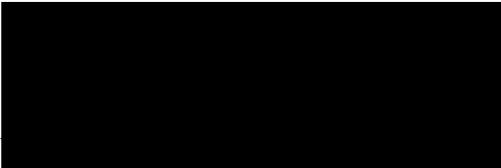
Office: VERMONT SERVICE CENTER

Date: 7/23/2005

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 preference 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 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)(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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.91 per hour, which amounts to \$26,852.80 annually. On the Form ETA 750B, signed by the beneficiary in April 2001, the beneficiary did not claim to have worked for the petitioner¹.

On the petition, the petitioner claimed to have been established in 1990 and to currently employ two workers. In support of the petition, the petitioner submitted the first page of its Form 1120, U.S. Corporation Income Tax Return, for 1999 reflecting a fiscal calendar year running from July 1, 1999 through June 30, 2000².

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 March 26, 2003, 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

¹ On Form G-325, Biographic Information sheet, submitted with the beneficiary's application to adjust status to lawful permanent resident, and signed on December 20, 2002, the beneficiary indicated that he worked for the petitioner from November 2002 to the present.

² Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's 2001 corporate tax return, annual report or audited financial statements, as well as any evidence of wages actually paid to the beneficiary from the petitioner in 2001.

In response, the petitioner submitted its complete Form 1120 Corporate tax return for 2001 and a Massachusetts state tax Form 355, Business or Manufacturing Corporation Excise Return.

The petitioner's federal corporate tax return reflects the following information:

	<u>2001</u>
Net income ³	\$664
Current Assets	\$24,873
Current Liabilities	\$16,982
Net current assets	\$7,891

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 24, 2003, denied the petition, stating that the petitioner had no taxable income⁴ and not enough net current assets to pay the proffered wage. The director also referenced the petitioner's state excise return and stated that that form also did not reflect that the petitioner had sufficient funds to pay the proffered wage.

On appeal, counsel asserts that the director's focus on the petitioner's liabilities was improper⁵. Counsel cites to unreported AAO cases to support the addition of depreciation and retained earning expenses to the petitioner's net income, and cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) as a premise that the director should consider the totality of circumstances when examining the director's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner submits a Form W-2, Wage and Tax Statement the petitioner issued to the beneficiary in 2002. The Form W-2 reflects wages of only \$4,600 in that year, which is \$22,252.80 less than the proffered wage. The petitioner also submits cancelled paychecks for the end of 2002 and half of 2003 and a pay summary for the beneficiary from November 2002 through July 2003.

At the outset, counsel refers to decisions issued by the AAO but does not provide 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).

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁴ The director erroneously referenced Line 30.

⁵ The director's decision noted that the petitioner's current assets outweighed its current liabilities by an amount insufficient to pay the proffered wage, not that the petitioner's liabilities outweighed its assets, whether current or not.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS employs a multi-prong evaluation of the totality of circumstances pertaining to a petitioning entity's continuing ability to pay the proffered wage. 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 did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year. The petitioner did establish that it paid the beneficiary \$4,600 in 2002, which is \$22,252.80 less than the proffered wage. The petitioner also established that it paid the beneficiary a total of \$12,449 in 2003 from January through July 2003, which represents a pay rate of \$21,360.50⁶ for that year, which is \$5,492.30 less than the proffered wage.

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 expenses⁷. 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.

⁶ Multiplying \$1,776.88 by five months (January through May) and then \$1,782.30 by seven months (June through December) and adding the two together, which is reflected by the amounts on the cancelled paychecks from the petitioner to the beneficiary submitted on appeal.

⁷ Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$664 and net current assets of only \$7,891 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

In 2002, the petitioner demonstrated that it paid the beneficiary \$4,600, which is \$22,252.80 less than the proffered wage. The petitioner did not submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage in that year, such as a corporate tax return, audited financial statement, or annual report. Thus, the AAO cannot evaluate the petitioner's net income or net current assets, wages paid to its staff, total revenues, or other financial data that might assist in determining whether the petitioner could pay the proffered wage. Thus, the petitioner has not demonstrated its ability to pay the proffered wage in 2002.

Likewise, in 2003, the petitioner established that it paid the beneficiary a total of \$12,449 from January through July 2003, which represents a pay rate of \$21,360.50⁹ for that year, which is \$5,492.30 less than the proffered wage. Since the petitioner also did not submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage in that year, such as a corporate tax return, audited financial statement, or annual report, the AAO cannot evaluate the petitioner's net income or net current assets, wages paid to its staff, total revenues, or other financial data that might assist in determining whether the petitioner could pay the proffered wage. Thus, the petitioner has not demonstrated its ability to pay the proffered wage in 2003.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel cited to *Matter of Sonogawa*, 12 I&N Dec. at 612 as applicable to the instant petition; however, *Sonogawa* 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

⁸ 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.

⁹ See footnote 6, *supra*.

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 *Sonegawa* 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 *Sonegawa*, nor has it been established that 2001, 2002, or 2003 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, or 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 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.