

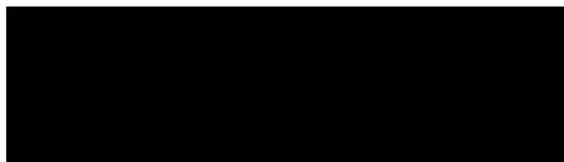
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U.S. Citizenship
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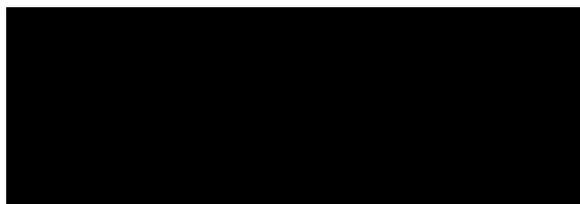
FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:
SRC 03 090 52340

OCT 20 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 service center director denied the employment-based visa petition, and the matter 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 of Chinese food. 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 with additional documentation.

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 an hourly wage of \$8.75, or an annual salary of \$18,200.

On the petition, the petitioner claimed to have been established in 1997, to have six employees, an estimated gross annual income of \$230,000 and an estimated net annual income of \$40,000. The petitioner also submitted a copy of one page of the Form ETA 750 Labor Certification.

Because the director deemed the evidence submitted insufficient, on February 4, 2004, the director requested additional evidence pertinent to the Form ETA 750, the petitioner's ability to pay the proffered wage, and the beneficiary's qualifications to perform the proffered wage. The director specifically requested that the petitioner provide the original ETA-750, parts A and B. The director also requested that the petitioner provide evidence of its ability to pay the proffered wage as of the April 2001 priority date, by submitting copies of its 2001 to 2003 annual reports, prepared federal tax returns, and/or audited financial statements. Finally the

director requested documentation to establish that the beneficiary met the minimum job requirement of three years of work experience as outlined in the Form ETA 750.

In response, counsel submitted the first page of the petitioner's IRS Form 1120S for the years 2001, 2002, and 2003. These pages indicated that the petitioner had the following ordinary income for the years 2001 to 2003: -\$72,750, -\$18,892, and -\$10,005. Counsel also submitted the original certified ETA 750, Part A and B, and a translated certificate of Chinese cooking excellence from the Department of Labor in China. In addition, counsel submitted a copy of a certificate of service statement that indicated the beneficiary was employed by the Asian Hotel in Wuhan, China, from November 1994 to May 1997. The petitioner also submitted a certification of service from the Oriental Hotel in Wuhan, China, that stated [REDACTED] worked there from June 1997 to June 2000 in three distinct positions: executive supervisor, cooker, and executive chef in a Chinese restaurant.

Counsel, in his response, noted that the petitioner was located directly across the street from a major hospital construction project of the University of Alabama at Birmingham that began in 2000. Counsel submitted photographs of the site and stated that they illustrated that even in 2004 the area was congested. Counsel stated that the congestion had had an adverse impact on the petitioner's business volume as reflected in the financial documents submitted to the record. Counsel finally stated that the new hospital was scheduled to be occupied in late 2004 and that the opening of the hospital building should have a positive impact on the petitioner's finances. Counsel submitted two copies of photographs of a street with a construction site on the left hand side of the photograph and an arrow written on the right hand side of the photo that indicated the petitioner's location.

The director denied the petition on June 17, 2004. In his denial of the petition, the director stated that the proffered wage was \$16,800.¹ The director examined the petitioner's Forms 1120S for 2001, 2002, and 2003, and noted that the ordinary income reflected business losses for each year in the amounts of -\$72,750, -\$18,892, and -\$10,005. Based on these business losses, the director stated that the petitioner had not clearly established that it had the ability to pay the beneficiary the proffered wage as of the 2001 priority date and continuing.

On appeal, counsel states that the petitioner is similar to the petitioner in *Matter of Sonogawa* 12I&N 612 (BIA 1967). Counsel asserts that the petitioner had been in operation at its current location for many years, and pays in excess of \$6,000 a month for rent of its location. Counsel further asserts that the petitioner has survived the construction of a construction project directly across the street from its location, and that at one point customers could not walk down the sidewalk to enter the petitioner's business. Counsel states that the petitioner should be permitted to continue its growth and reap the rewards offered by the beneficiary's employment.

With regard to the petitioner's ability to pay the proffered wage, counsel states that the petitioner has paid the proffered wage to the beneficiary since the beneficiary obtained his work authorization. Counsel states that

¹ The proffered wage, based on 2080 annual hours of work multiplied by \$8.75, the hourly wage, equals \$18,200.

the beneficiary waited over one year for the processing of his employment authorization document, and that this factor alone would account for the petitioner not paying the proffered wage for a greater period of time. Counsel submits a copy of the beneficiary's employment authorization card, as well as a document entitled "Check History for May 3, 2004 to June 30, 2004." This document reflects that the beneficiary worked 320 hours in these two months and was paid \$2,946.66.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 as of April 27, 2001. On appeal, counsel submits the only evidence in the record with regard to wages paid to the beneficiary by the petitioner, namely, the petitioner's wage record for two months employment in May and June 2004. This document indicates that the beneficiary was paid \$1,473.33 a month for 160 hours for both months. The hourly rate for the beneficiary's work would be \$9.20, which is higher than the hourly rate for the proffered wage, namely \$8.75. Therefore, the petitioner did establish that it paid the beneficiary a salary equal to or greater than the proffered wage for May and June 2004. Nevertheless, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the petitioner cannot pay the proffered wage as the priority date, but expects to be able to do so at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner has not established that it paid the proffered wage as of the priority date and continuing to the present date.

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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As stated previously, the petitioner's tax returns for 2001 to 2003 show the following amount of ordinary income:

-\$72,750, -\$18,892, and -\$10,005. These figures fail to establish the ability of the petitioner to pay the proffered wage, based on its ordinary income.

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.² 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. In the instant petition, the petitioner only submitted the first page of its federal income tax returns for 2001 to 2003. Thus, the AAO cannot examine the petitioner's Schedule Ls for 2001 to 2003 to determine the petitioner's net current assets for the years in question. Therefore, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date onward, based on its ordinary income or net current assets.

On appeal, counsel states that the petitioner is similar to the petitioner in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. With regard to the instant petition, the petitioner has been in business for six years at the time of filing the petition, and for three years prior to the beginning of the hospital construction.

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

However, the record contains no information as to any profitable years prior to the submission of the instant petition, or the beginning of the hospital construction. While the submitted tax returns do indicate a decrease in the petitioner's business losses from 2001 to 2003, this fact would not make the petitioner in the instant petition analogous to the petitioner in *Sonegawa*. Without more persuasive evidence, counsel has not established that the totality of the circumstances in the instant petition warrant a favorable evaluation of the petitioner's ability to pay the proffered wage.

It should also be noted that the second letter of cooking work experience submitted by counsel from the Oriental Hotel is inconclusive evidence that the beneficiary worked in the hotel from 1997 to 2000. The employee's name listed on this document, [REDACTED] varies from the beneficiary's name listed on the I-140 petition, [REDACTED]. The petitioner needs to provide further clarification of the beneficiary's name before the Oriental Hotel letter could be utilized to establish the beneficiary's requisite three years of work experience. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Thus, for this additional issue relating to the beneficiary's qualifications, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The director's decision shall stand, and the petition shall be denied.

ORDER: The appeal is dismissed. The petition is denied.