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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: WAC 04 078 50797 Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2006

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

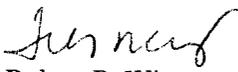
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sushi restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi 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 record contains a Form G-28 Entry of Appearance executed by the petitioner recognizing an attorney as its counsel of record. Subsequent to that attorney filing the appeal in this matter CIS received a letter dated January 24, 2006 from another attorney. That other attorney stated that she represents the beneficiary in this matter and asked this office to forward all materials pertinent to this case to her.

The beneficiary, however, is not an affected party to this proceeding within the meaning of 8 C.F.R. § 103.3(a)(1)(iii)(B). Neither the beneficiary nor his attorney has any standing in this matter. All representations will be considered but neither a copy of the record of proceedings nor a copy of this decision will be provided to the petitioner or his attorney.

On appeal, counsel submitted 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 granting 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 March 11, 2002. The proffered wage as stated on the Form ETA 750 is \$10.40 per hour, which equals \$21,632 annually.

The Form I-140 petition in this matter was submitted on January 27, 2004. On the petition, the petitioner stated that it was established during 1990 and that it employs seven workers. The petition states that the petitioner's gross annual income is \$409,856 but does not state the petitioner's net annual income in the space

provided. On the Form ETA 750, Part B, signed by the beneficiary on February 27, 2002, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Chandler, Arizona.

With the petition, the petitioner submitted (1) an accountant's report stating that it accompanies the petitioner's 2003 compiled financial statements, (2) a computer printout of what purport to be the petitioner's compiled 2003 financial statements, unaccompanied by the requisite corresponding accountant's report, (3) 2000, 2001, 2002, and 2003 Form W-2 Wage and Tax Statements issued by the petitioner, and (4) the petitioner's 2000, 2001, 2002 and 2003 W-3 transmittals.

The W-3 transmittals show that the petitioner paid total gross wages of \$142,312.52, \$162,049.52, \$166,229.06 and \$138,098.49 during 2000, 2001, 2002 and 2003, respectively. None of the W-2 forms submitted purports to show wages paid to the beneficiary, [REDACTED]

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the California Service Center, on November 22, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the service center requested copies of annual reports, federal tax returns, or audited financial statements pertinent to 2002 and 2003. The service center also specifically requested the beneficiary's 2001, 2002, and 2003 tax returns including corresponding W-2 forms or the beneficiary's Social Security Administration detailed earnings printout.

In response, the petitioner submitted (1) a letter dated February 8, 2005 from the petitioner's owner, (2) a letter dated February 11, 2005 from counsel, and (3) the 2002 and 2003 joint Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED]

The petitioner's owner's February 8, 2005 letter states that he owns two restaurants, the petitioning restaurant and another restaurant that he founded during 2002. That letter further states that the petitioner is profitable but that the other restaurant, as a recent start-up company, caused him to report a loss as his adjusted gross income during 2002 and 2003.¹ The letter continues that the lack of profitability of the other restaurant is of no concern, as its profitability is improving. Counsel's February 11, 2005 letter states that the alien is not working for the petitioner.

The tax returns submitted show that [REDACTED] owns the petitioner as a sole proprietorship and that he and his spouse have no dependents. During 2002 the petitioner reported a net profit of \$4,537. The petitioner's owner and owner's spouse reported adjusted gross income of \$24,346 during that year, including the petitioner's profit. During 2003 the petitioner reported a net loss of \$31,448. The petitioner's owner and spouse reported a loss of \$87,518 as their adjusted gross income during that year.

The petitioner failed to submit the beneficiary's 2001, 2002, and 2003 tax returns as the service center requested on November 22, 2004. That request was not conditioned upon the petitioner currently employing the beneficiary.

¹ In fact, the petitioner's owner did not report a loss during 2002. During 2003, however, both the petitioning restaurant and the petitioner's owner's other restaurant reported losses.

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 May 10, 2005, denied the petition.

On appeal counsel stated,

[The petitioner's owner] has several restaurants. The 2004 tax return shows she [sic] makes enough money to pay the wages of the applicant. They acquired a second restaurant this year so they can't show this for 2002 and 2003, but now they can afford to pay his wages. Petitioner asks you to take that into consideration in showing her ability to pay the proffered wages.

With the appeal counsel submitted a copy of the joint 2004 Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse. During 2004 the petitioner returned net income of \$10,772. The petitioner's owner and owner's spouse reported adjusted gross income of \$30,373 during that year.

The financial statements provided were not produced pursuant to an audit. Counsel's reliance on unaudited financial records 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. The unaudited financial statements will not be considered.

Further, the financial statements provided indicate that they were produced pursuant to a review, and should have been accompanied by an accountant's corresponding accountant's report. The accountant's report submitted, however, indicates that the accountant compiled financial statements for the petitioner, making explicit that the reports were not reviewed or audited. The petitioner appears to have submitted an accountant's report unrelated to the financial statements submitted.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The discrepancy between the financial statements submitted and the accompanying accountant's report was not addressed in the decision of denial and the petitioner has not been accorded an opportunity to respond to that issue. Therefore, today's decision will not rely, even in part, on that basis. If the petitioner attempts to overcome today's decision on appeal, however, it should address that discrepancy.

In determining the petitioner's ability to pay the proffered wage during a given period, 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.

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).

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$21,632 per year. The priority date is March 11, 2002.

During 2002 the petitioner's owner reported adjusted gross income of \$24,346. If obliged to pay the proffered wage out of that amount the petitioner's owner would have been left with \$2,714 with which to support his household of two people. The service center did not request evidence pertinent to the petitioner's owner's expenses during that year and the petitioner's owner provided none. To believe that the petitioner's owner could have maintained his household for a year on \$2,714, however, is unreasonable. The record contains no reliable evidence of any other funds available to the petitioner's owner with which he could have paid the proffered wage or supported himself and his wife. The petitioner has not shown the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner reported a loss as his adjusted gross income during that year. The petitioner's owner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of his income during that year. The record contains no reliable evidence of any other funds available to the petitioner's owner with which he could have paid the proffered wage or supported himself and his wife. The petitioner has not shown the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner reported adjusted gross income of \$30,373. If obliged to pay the proffered wage out of that amount the petitioner's owner would have been left with \$8,741 with which to support his household of two people. The service center did not request evidence pertinent to the petitioner's owner's expenses during that year and the petitioner's owner provided none. To believe that the petitioner's owner could have maintained his household for a year on \$8,741, however, is unreasonable. The record contains no reliable evidence of any other funds available to the petitioner's owner with which he could have paid the proffered wage or supported himself and his wife. The petitioner has not shown the ability to pay the proffered wage during 2004.

Counsel and the petitioner's owner assert, however, that the profitability of the petitioner's owner's new restaurant is improving and imply that its profits will be sufficient, at some point, to pay the proffered wage. Counsel urges that, under these circumstances the petitioner's losses and low profits should not preclude approval of the petition.

Counsel is correct that, if a petitioner's losses and low profits are uncharacteristic and unlikely to recur, then they do not necessarily mandate that a petition be denied. The seminal case pertinent to that issue is *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity 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 it 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which basis has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial. On November 22, 2004 the service center requested that the petitioner provide beneficiary's 2001, 2002, and 2003 tax returns and W-2 forms showing compensation received from the petitioner. No such evidence was provided.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Merely providing that requested evidence on motion, however, would not cure the failure to provide it when requested. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that

deficiency that is offered for the first time on appeal or motion. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

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.