

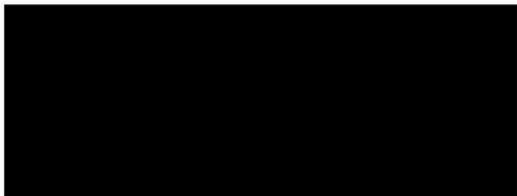
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 05 2006**
SRC 03 142 51903

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, Chief
Administrative Appeals Office

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

The petitioner is an authentic traditional Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a head chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

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 regulation at 8 CFR § 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 U.S. 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was not accompanied by financial evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on September 20, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested annual reports, U.S. federal tax returns for 2001, 2002 and 2003, and, audited financial statements.

The director also requested the beneficiary's wage information for 2002, 2002 and 2003, and that the petitioner submit Form 941 Employer's Quarterly Federal Tax Return statements for 2003 and 2004. The director provided guidance concerning three evidentiary methods of how the ability to pay may be demonstrated as well as indicated that it was necessary to provide evidence concerning the corporation's financial wherewithal and not the shareholder's or individuals' finances.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted Form 941 Employer's Quarterly Federal Tax Return statements 2001, 2002, 2003 and 2004 and W-3 statements for 2003 and 2004; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for year 2001, 2002 and 2003; bank statements; a letter from the petitioner and the petitioner's accountant; and, the beneficiary's pay stubs for three pay periods in 2004.

The director denied the petition on January 6, 2005, 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.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary by the petitioner's letter dated December 10, 2004. The petitioner paid the beneficiary \$25,200.00 in 2004. Pay stubs were submitted for August, September, October and November 2004 that show the beneficiary was paid \$1589.44 per month, and, that in the 4th quarter of 2003 the beneficiary received \$5,040.00. In the 1st quarter of 2004, the beneficiary earned \$6,720.00. Since the proffered wage is \$29,120.00 per year, this is less than the proffered wage.

Counsel contends that the quarterly tax returns and annual tax returns evidence the petitioner's ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,120.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1120 stated taxable income of <\$6,046.00>.¹
- In 2002, the Form 1120 stated taxable income of \$19,203.00.
- In 2003, the Form 1120 stated taxable income of <\$4,152.00>.

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. No tax return, audited or reviewed financial statement, or annual report was submitted for 2004 that would enable this calculation.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

¹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

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.

- In 2001, petitioner's Form 1120 return stated current assets of \$27,222.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$27,222.00 in net current assets. Since the proffered wage is \$29,120.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$22,112.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$22,112.00 in net current assets. Since the proffered wage is \$29,120.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$19,963.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$19,963.00 in net current assets. Since the proffered wage is \$29,120.00 per year, this sum is less than the proffered wage.

Therefore, for the years 2001, 2002 and 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

On appeal, counsel asserts, "We do not believe that the regulations ... [i.e. 8 C.F.R. § 204.5(g)(2) cited previously in counsel's brief] or the above mentioned Memo ... [i.e. a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004] precluded the combined use of this evidence." Counsel, in the same paragraph, in a successive fashion, opines various alternative methods to determine the petitioner's ability to pay the proffered wage without reference to case precedent or regulation.³

One of the alternative methods counsel proposes involves combining the net income and net current assets from the petitioner's tax return. Net current assets are the difference between a corporation's current assets and current liabilities. Net current assets may properly be considered in determining a petitioner's ability to pay the proffered wage. Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2001 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

Counsel contends, "[The petitioner] sought the services of the beneficiary because he lost the services of some of his employees to competition." Therefore, counsel asserts, again without reference to case precedent or regulation, that "... the combination of the pay of these employees and the current assets of this petitioner far exceed the proffered wage." The logic of counsel's statement is unclear on this point. Counsel is not stating that the beneficiary's employment is intended to replace existing employees since these employees are already gone, in a manner it could not control (i.e. employment market forces). Counsel has not identified those past employees or indicated their duties or pay, or why the beneficiary could replace multiple

³ The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

employees, if that is a fair interpretation of counsel's statement. Further, since the petitioner already employs the beneficiary, that fact would seem to moot the petitioner's statement. The petitioner already has benefit of the beneficiary's employment.

Counsel further contends, in his brief, that the retained earnings or un-appropriated retained earnings expressed in the tax returns submitted are evidence of the petitioner's ability to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to 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 net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Counsel asserts that the funds stated in the petitioner's bank statements and a term deposit are evidence of the ability to pay the proffered wage. 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 states that CIS has "expressed a willingness" to consider the depreciation as evidence of the ability to pay the proffered wage. There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg*, 719 F. Supp. 532 (N.D. Tex. 1989) noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel contends that CIS "... if a corporate employer shows a taxable income before net operating loss, and then a net operating loss followed by a taxable income, it is the taxable income before net operating loss figure that should be used in evaluating the employer's ability to pay." Counsel cites AILA⁴ liaison minutes for this proposition but not case precedent or regulation for support of this contention. CIS and the AAO look at taxable income on Line 28, not taxable income on line 30 of the return after deductions.

Counsel has submitted the following documents to accompany the appeal statement: a legal brief; the beneficiary's W-2 Wage and Tax Statement for 2004 stating wages paid of \$25,200.00; an unqualified⁵ financial statement for 2004; a U.S. federal tax return for 2003; bank statements for 2004; a lease of business premises dated June 30, 2004; approximately 20 construction proposal documents and materials invoices; a letter from the petitioner dated December 10, 2004; and, a letter from an accountant.⁶

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) as evidence of the ability to pay finding parallels between the petitioner and that case. Counsel states generally, again without substantiation, that "... the employer's business has been growing and his expectation of continued growth was realistic" Counsel states that that the petitioner has opened another business that he refers to as a branch in another location. Counsel has introduced a lease of business premises at the address referenced between the landlord and Roy's International Inc.

In the totality of all the evidence submitted in this case, there is no evidence to demonstrate that the petitioner's business could pay the proffered wage of \$29,120.00 per year in 2001, 2002 and 2003. For the years 2001 through 2003, the taxable income for the petitioner was <\$6,046.00>, \$19,203.00, and,

⁴ American Immigration Lawyers Association (AILA).

⁵ A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statement presented was not qualified to determine if the financial statement was audited, reviewed or compiled. Since the petitioner has not provided statements indicating the scope of the audit nor provided an opinion of an independent auditor that may qualify the statement provided, we are unable to conclude that this statement is in fact audited. See Statement of Auditing Standards No. 58, "*Reports on Audited Financial Statements*," concerning generally accepted auditing standards, American Institute of Certified Public Accountants.

⁶ While CIS and AAO will review any evidence that the petitioner desires to submit, the probative value of that evidence must always be weighed. In this instance, the petitioner's accountant has opined to the ultimate issue to be decided in this matter, which is not within his prerogative. Therefore his opinion on the ultimate issue at hand has no probative value in this matter.

<\$4,152.00> respectively for the years mentioned. The net current asset values for those years were insufficient to pay the proffered wage, being \$27,222.00, \$22,112.00, and, \$19,963.00 respectively.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that because the petitioner is expanding into two other locations and expending funds for that expansion that this is such an unusual and unique circumstance that caused the petitioner's profits to be depressed. However upon closer examination, as mentioned above, the petitioner has substantially increased its gross profits without appreciably effecting or increasing its taxable income which is much lower than the proffered wage. By the evidence presented, the petitioner has not proven its ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the three corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.