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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

BC



FILE: [Redacted]  
EAC 04 151 50514

Office: VERMONT SERVICE CENTER

Date: JUN 21 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.

Robert P. Wiemann, Chief  
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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's October 5, 2004 denial, 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 also determined that the beneficiary did not possess the two years of experience required by Form ETA 750 submitted in this case. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes specific allegations of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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, 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 DOL. See 8 CFR § 204.5(d). 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 DOL 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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$13.50 per hour (\$28,080.00 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience as a baker.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal,

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

counsel submits IRS Forms W-2, Wage and Tax Statements, for Nader Harfouche for the years 2000, 2001, 2002 and 2003, IRS Form 1099-MISC for the beneficiary for 2003 and a calculation prepared by counsel relating to the petitioner's ability to pay the proffered wage for the years 2001, 2002 and 2003. Counsel resubmits the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for the years 2001, 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in April 1993, to have a gross annual income of \$299,162.00, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The record before the director closed in 2004. Therefore, the petitioner's income tax return for 2003 is the most recent return available. On the Form ETA 750B, signed by the beneficiary on February 10, 2001, the beneficiary claimed to have worked for the petitioner as a baker since August 2000.

On appeal, counsel states that in 2001, the petitioner revised its business plan and decided to replace its baker, [REDACTED] who also served as President and 50% owner of the petitioner, with the beneficiary. Counsel states that the beneficiary took over [REDACTED] role as baker in 2003. Counsel asserts that Mr. [REDACTED] officer compensation should be allocated to the beneficiary's wages. Further, counsel states that the company has experienced expansion and growth. Counsel asserts that the use of a corporation's taxable income figure from its tax return mischaracterizes the corporation's profits and does not recognize various assets, trends and the potential for growth. Counsel further asserts that tax returns may be supplemented by other forms of evidence in the determination of a petitioner's ability to pay the proffered wage pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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, despite the beneficiary's assertions that he had been employed by the petitioner since August 2000, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2001 and 2002. On appeal, the petitioner submits the beneficiary's Form 1099-MISC for 2003 indicating that

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are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the petitioner paid the beneficiary \$28,080.00 in nonemployee compensation in 2003. Therefore, the petitioner has shown its ability to pay the proffered wage in 2003.

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 contrary to counsel's assertions. 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 sales exceeded 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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$3,812.00.
- In 2002, the Form 1120 stated net income of \$504.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$2,405.00.
- In 2002, the Form 1120 stated net current assets of \$151.00.

For the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the

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<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 2003.

Counsel advised that the beneficiary replaced one worker, [REDACTED] in 2003. However, the evidence shows that the beneficiary began employment with the petitioner as a baker in August 2000.<sup>3</sup> The record does not verify the full-time employment of [REDACTED] verify his duties or provide evidence that the petitioner has replaced or will replace him with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position held by [REDACTED] involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty and replacement of Mr. Harfouche. If Mr. [REDACTED] performed other kinds of work, then the beneficiary could not have replaced him. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel also asserts that [REDACTED] officer compensation should be allocated to the beneficiary's wages. The documentation presented here indicates that [REDACTED] holds 50% percent of the company's stock. The majority shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for net income. In 2001, the petitioner had net income of \$3,812.00. In 2002, the petitioner's net income was \$504.00. Thus, taking into account the petitioner's net income, the petitioner needed \$24,268.00 in officer compensation in 2001 and \$27,576.00 in 2002 to meet the proffered wage. According to the petitioner's 2001 and 2002 IRS Forms 1120 at Line 12 (Compensation of Officers), [REDACTED] elected to pay himself \$23,600.00 in 2001 and \$26,000.00 in 2002. These figures are supported by [REDACTED] W-2 Forms for 2001 and 2002, which were submitted on appeal. Therefore, in 2001 and 2002, [REDACTED] officer compensation was insufficient to meet the amounts needed to pay the proffered wage. Further, the evidence presented does not establish that [REDACTED] could or would be willing to forgo 100% of his compensation in 2001 or 2002. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, the amount of officer compensation is less than the proffered wage.

Counsel further asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), allows the petitioner to supplement its tax returns with other forms of evidence to determine its ability to pay the proffered wage. *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 \$100,000.00. 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

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<sup>3</sup> 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 shown that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel further asserts that it made a purchase of equipment in the amount of \$80,000.00 in 2002, and that the one-time expense demonstrates there were sufficient funds to pay the proffered wage. Counsel has not provided any evidence of this expense, nor has she shown that 2002 was an uncharacteristically unprofitable year for the petitioner.

Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent residence.

In addition to finding that petitioner did not have the continuing ability to pay the proffered wage, the director also determined that the beneficiary did not possess the two years of experience required by Form ETA 750 submitted in this case. On appeal, counsel asserts that on the priority date, the beneficiary had two years of experience a baker and submits a letter from the beneficiary's former employer in support of her claim.

The petitioner must 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of baker. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |       |
|-----|-------------------------|-------|
| 14. | Education               |       |
|     | Grade School            | 6     |
|     | High School             | blank |
|     | College                 | blank |
|     | College Degree Required | blank |
|     | Major Field of Study    | blank |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements. The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked for the petitioner since August 2000 and that he worked as a baker for Rahala, Inc. from June 1998 to June 2000. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(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.

On appeal, counsel asserts that on the priority date, the beneficiary had two years of experience as a baker. In support of counsel's claim, counsel submits a letter dated October 25, 2004 from [REDACTED] President of Rahala, Inc., indicating that the beneficiary worked in a full-time capacity for Rahala, Inc. from June 1998 to June 2000 as a baker.<sup>4</sup> The letter meets the requirements of 8 C.F.R. § 204.5(1)(3) and, therefore, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petitioner has overcome the portion of the director's decision determining that the beneficiary did not possess the required two years of experience. However, the petition was properly denied based on the portion of the director's decision determining that the petitioner did not have the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.

<sup>4</sup> This office notes that [REDACTED], President of Rahala, Inc., and [REDACTED] President of the petitioner, appear to be the same person. Statement 3 to Schedule K of the petitioner's Form 1120S for 2001 indicates that the petitioner is owned 50% by [REDACTED] and 50% by [REDACTED]. Statement 3 to Schedule K of the petitioner's Forms 1120S for 2002 and 2003 indicate that the petitioner is owned 50% by [REDACTED] and 50% by [REDACTED]. The social security numbers listed for [REDACTED] on the 2001 return and [REDACTED] on the 2002 and 2003 returns are the same. This office also notes that the beneficiary's former employer, Rahala, Inc., is located at the same address as the petitioner. [REDACTED] is located at [REDACTED]. The IRS Forms W-2 for [REDACTED] submitted by counsel list the petitioner's address at [REDACTED] Rutherford, NJ 07070. Further, a menu for the petitioner submitted by counsel on appeal lists one of the petitioner's locations at [REDACTED].



**ORDER:** The appeal is dismissed.