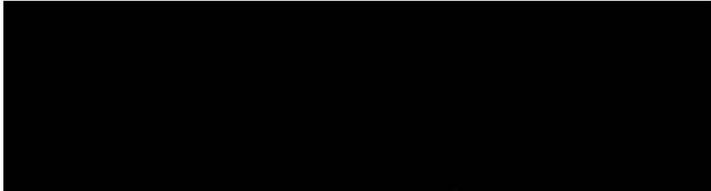




U.S. Citizenship
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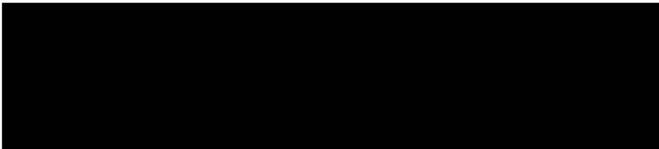
BG

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAY 16 2006**
WAC 03 213 53844

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant and nightclub. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

The petitioner was established in 1985, and, it employs 14 individuals.

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 August 22, 2000. The proffered wage as stated on the Form ETA 750 is \$12.16 per hour (\$26,540.80 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; U.S. Internal Revenue Service Form tax returns for 2000, 2001, and 2002; 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 insufficient 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 May 3, 2004 pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested federal tax returns with signatures, annual reports, audited financial statements for 2002 and 2003. The director requested profit/loss statements and balance sheets with any audited financial statements submitted. Also the director requested California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees."

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1065 tax returns for years 2000, 2001, 2002 and 2003; Form 941 Employer's Quarterly Federal Tax Returns for 2003 and 2004; Worker's Compensation Insurance Payroll Reports; City of Santa Barbara Business Tax Certificates; a realty lease; Municipal Services fee bills; other permits and licenses; 25 photos of the business premises as well as other documents.

The director denied the petition on August 9, 2004, 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.

On appeal, counsel asserts that the director based its denial on the petitioner's lack of evidence of its ability to pay the proffered wage. Counsel contends that the beneficiary will replace "Cook, [REDACTED]" and, the beneficiary's expertise in banquets and catering will increase revenues for the petitioner. The petitioner states in a letter dated December 17, 2004, that [REDACTED] who was the Chef/Kitchen Manager has departed as of March 2001, and, his work has since been distributed through the last three years among "a number of hourly employees."

Counsel has submitted the following documents to accompany the appeal statement and in follow-on letters to the AAO: an explanatory letter; page four of the petitioner U.S. federal tax return for year 2003; a payroll summary; a letter from a prior employer; and, a letter from a bank analysis showing employer's funds.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else.¹ As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Alternatively, 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 \$26,540.80 per year from the priority date of August 22, 2000:

- In 2000, the Form 1065 for [REDACTED] stated taxable income² of \$20,451.00.
- In 2001, the Form 1065 for [REDACTED] stated taxable income of \$16,743.00.
- In 2002, the Form 1065 for [REDACTED] stated a taxable income loss of <\$31,026.00>.³
- In 2002, the Form 1065 for [REDACTED] stated a taxable income loss of <\$18,244.00>.

¹ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

² IRS Form 1065, Line 22.

³ 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. The Federal Employer Identification Number (FEIN) for [REDACTED] for year 2002 is different from years 2000 and 2001. [REDACTED] assumed the FEIN number for tax years 2002 and 2003.

⁴ The record contains no evidence that the petitioner [REDACTED] qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the tax returns and partial

- In 2003, the Form 1065 for [REDACTED] stated a taxable income loss of \$<\$62,561.00>.

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 2000 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.⁵ 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 1065 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 1065 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns⁶ indicates the following:

- In 2000, petitioner's Form 1065 return for [REDACTED] stated current assets of \$73,297.00 and \$85,946.00 in current liabilities. Therefore, the petitioner had <\$12,649.00>⁷ in net current assets. Since the proffered wage is \$26,540.80 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1065 return for [REDACTED] stated current assets of \$107,729.00 and \$28,557.00 in current liabilities. Therefore, the petitioner had \$79,172.00 in net current assets. Since the proffered wage is \$26,540.80 per year, this sum is more than the proffered wage.
- There was no Schedule L submitted for 2002.
- In 2003, petitioner's Form 1065, Schedule L stated current assets of \$79,615.00 and \$31,021.00 in current liabilities. Therefore, the petitioner had \$48,594.00 in net current assets. Since the proffered wage is \$26,540.80 per year, this sum is more than the proffered wage.

It is unclear that by combining the first two pages of the 2003 tax return for [REDACTED] LLC and the later submitted 2003 Schedule L without the rest of the return, that this is in fact the return filed with the U.S. Internal Revenue Service.

tax returns were submitted for [REDACTED] for years 2000, 2001 and 2002, and in 2002 and 2003 returns were then submitted for [REDACTED]

⁵ 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.

⁶ The 2002 and 2003 returns were submitted incomplete without a Schedule L. The 2003 Schedule L was submitted later in this process without any other Form 1065 material.

⁷ 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.

Therefore, for the tax years 2000 and 2002 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel contends that the beneficiary will replace "Cook, [REDACTED] and, the beneficiary's expertise in banquets and catering will increase revenues for the petitioner. On appeal, counsel asserts the beneficiary will replace other workers on the payroll. The petitioner submitted no documentation establishing that the duties of the other workers are the same as those of the proffered position. If the duties are not the same, then in that case, the wages paid cannot be utilized to demonstrate the ability to pay the proffered wage from the priority date.

However, the petitioner stated in a letter dated December 17, 2004, that [REDACTED] who was the Chef/Kitchen Manager has departed as of March 2001, and, his work has since been distributed through the last three years among "a number of hourly employees." The petitioner argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel advocates the use of the cash balance of the three business accounts to show the ability to pay the proffered wage. While the negative balance in the combined statement is negative (i.e. <\$9,992,26>) for the period October 1, 2004 through October 31, 2004, counsel's reliance on the balances in the petitioner's bank account 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.

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2000, 2001, 2002 and 2003. The taxable income for the petitioner was in 2000, \$20,451.00, in 2001 \$16,743.00; in 2002, the Form 1065 for [REDACTED] stated a taxable income loss of <\$31,026.00>, in 2002, the Form 1065 for [REDACTED] stated a taxable income loss of <\$18,244.00>, and in 2003, the Form 1065 for [REDACTED] stated a taxable income loss of <\$62,561.00>. The net current asset value for year 2000 is negative, <\$12,649.00> with Schedule L for 2002 missing from the record of proceeding. It is uncertain whether or not Schedule L submitted separately for tax year 2003 is part of the entire 2003 tax return filed.

⁸ 8 C.F.R. § 204.5(g)(2).

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. 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 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.