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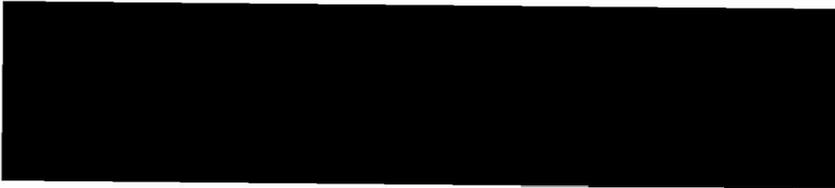


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: SEP 05 2006
SRC 04 047 50524

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a night shift manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour, which amounts to \$22,880 per annum. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on December 1, 2003, the petitioner¹ claims to have been established in 1999, to currently employ two workers, and to have a gross annual income of \$261,139. In support of its ability to pay

¹ The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity

the beneficiary's proposed wage offer of \$22,880 per year, the petitioner submitted copies of its Form 1065, U.S. Return of Partnership Income for 2001, 2002, and 2003. They reflect that the petitioner files its returns using a standard calendar year. The returns contain the following information:

	2001	2002
Ordinary Income (loss) from		
Trade or business activities	-\$109,120	-\$68,725
Current Assets (Sched. L)	\$ 1,535	\$10,181
Current Liabilities (Sched. L)	\$ 2,867	\$ 2,968
Net current assets	-\$ 1,332	\$ 7,213

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net taxable income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. As reflected on Form 1065, a limited liability company's year-end current assets and current liabilities are shown Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 15(d) through 17(d). If the petitioner's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of its quarterly federal tax returns (Form 941) for 2002 and the first two quarters of 2003, as well as a copy of a letter, dated September 23, 2003, from its bank. Referring to the petitioner's new name of [REDACTED] which was changed by amendment on May 7, 2003, as indicated in the record, the bank notes that [REDACTED] has been a valued client since September 2000.

The director denied the petition on January 5, 2005. She reviewed the petitioner's financial data contained within its 2001 and 2002 partnership returns, and concluded that neither the petitioner's net income, nor its level of current assets could support payment of the proffered salary as of the priority date of April 30, 2001.

On appeal, counsel provides a copy of the petitioner's 2003 Form 1065. It reflects the following:

separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

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.

2003

Ordinary Income (loss) from	
Trade or business activities	-\$ 33,676
Current Assets (Sched. L)	\$ 1,042
Current Liabilities (Sched. L)	\$ 3,242
Net current assets	-\$ 2,200

Counsel also provides a copy of the beneficiary's Wage and Tax Statement for 2004. It indicates that the petitioner paid him \$19,200 in wages. Counsel further submits copies of the petitioner's quarterly federal returns for 2001, 2002, 2003 and the first three quarters of 2004, as well as another letter, dated January 28, 2005, from its bank. This letter repeats its endorsement of the petitioner's good standing and is similar in content to the earlier letter submitted to the underlying record.

Counsel also offers copies of the first page of three of the petitioner's bank statements for July 30, 2004, October 29, 2004, and November 30, 2004, as well as a copy of a letter, dated February 1, 2005, from the petitioner's accountant, Navin Shah, CPA. Mr. Shah asserts that the petitioner had profits of \$42,000 in 2004 and \$35,000 in 2003 before appreciation. He adds that the petitioner has employed the beneficiary for over a year and has continuously paid his salary.

In his brief, counsel claims that even by the principles outlined in a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), the petitioner has established its ability to pay through a combination of adding net current assets to net income. He refers to the petitioner's net current assets as being \$1,535 in 2001, \$17,000 in 2002, and \$19,963 in 2003. Counsel also suggests that the factors set forth in the minutes from a 1993 and 1994 AILA teleconference(s) with the Vermont Service Center should be considered such as adding depreciation back to the petitioner's net income and viable levels of bank accounts as referenced by two 1988 AAO decisions, counsel mentions. He further contends that combining the pay of the beneficiary (\$19,200) and the current assets of the petitioner establishes the ability to pay the proffered wage.

Counsel additionally maintains that the petitioner's ability to pay the certified wage should be based on the expectations of increasing business as outlined in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel states that the petitioner has recently opened a branch of his business at a shopping center in Atlanta and that a copy of a lease agreement is submitted.

Counsel's arguments are not persuasive and are not supported by the record. It is noted that CIS authority includes a review as whether the petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the 1993 and 1994 AILA/Vermont Service Center conference minutes or the 2004 Yates Memorandum, it is noted that these events or documents are not intended to create any right or benefit or

constitute a legally binding precedent, but merely offered as guidance.³ Similarly prior AAO cases are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. It is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

That said, the review process employed in this case is consistent with the guidance offered in the Yates Memorandum. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. CIS will not combine a beneficiary's wages with a petitioner's net current assets as suggested by counsel, however, if any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no first-hand evidence that the petitioner employed the beneficiary until 2004, as shown by the W-2 submitted on appeal. It is further noted that his wages appear to have been \$3,680 less than the proffered wage. Without a 2004 tax return or audited financial statement in order to determine whether the petitioner's net income or net current assets could cover this difference, the petitioner's ability to pay the certified wage during this period of time cannot be accurately reviewed.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts or the level of payroll is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

³*See also, Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

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 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. In this case, it is unclear how counsel's calculations of the petitioner's net current assets were determined. The AAO rejects, counsel's suggestion that net current assets and a petitioner's net income should be combined. The AAO views net current assets as not cumulatively included with net income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. Net current assets at the end of a given year 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. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its 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/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

It is additionally noted that the three selected 2004 bank statements submitted to the record are not determinative of the petitioner's ability to pay the proffered wage. 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 provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's assets and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. The three bank statements offered to this record may reflect the level of funds in the petitioners account during three months in 2004, but they are not indicative of its continuing ability to pay the proffered wage beginning at the priority date of April 30, 2001.

In this case, as set forth above, neither the petitioner's net income of -\$109,120, nor its net current assets of -\$1,332 could cover the proffered salary of \$22,880 and demonstrate its ability to pay in 2001.

Similarly in 2002, neither the petitioner's net income of -\$68,725, nor its net current assets of \$7,213 were enough to pay the certified wage offer. The petitioner did not establish its ability to pay the proposed wage offer in 2002.

Finally, in 2003, both the petitioner's net income of -\$33,676 and its net current assets of -\$2,200 were each insufficient to pay the proffered salary of \$22,880, and failed to establish its ability to pay the proffered wage in this year.

Counsel cites *Matter of Sonogawa, supra*, in claiming that the petitioner's increasing profits and recent expansion to a another location at a shopping center support its future prospects for success and establishes its ability to pay the proffered wage. In *Matter of Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the three federal tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Each year, the petitioner reported a loss of net income. Moreover, counsel's assertion as to the plans for expansion and petitioner's new branch of the business is not supported by any first-hand evidence provided to the record. No lease agreement has been submitted. The assertions of counsel in this regard 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). The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak, supra*. As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered wage beginning on the visa priority date of April 30, 2001, the petition may not be approved.

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.