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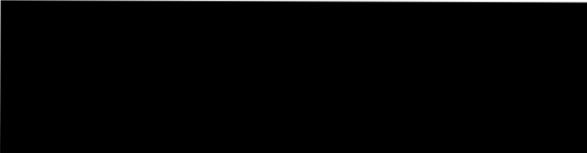
U.S. Department of Homeland Security
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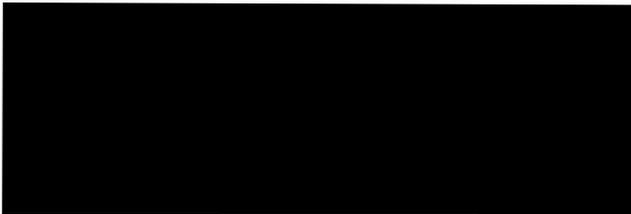
Office: VERMONT SERVICE CENTER

Date: SEP 12 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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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

On appeal counsel submitted a brief and additional evidence.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$53,313 per year.

On the petition, the petitioner stated that it was established on November 26, 1996 and that it employs 10 workers. The petition states that the petitioner's gross annual income is \$579,418. The petitioner did not state its net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 1998. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Mineola, New York.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns.

The petitioner's tax returns show that it is a corporation and confirm that it incorporated on November 26, 1996. The petitioner reports taxes pursuant to cash accounting and a fiscal year that runs from November 1 of the nominal year to October 31 of the following year.

The petitioner's 2001 tax return shows that it reported taxable income before net operating loss deductions and special deductions of \$6,295 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that it reported taxable income before net operating loss deductions and special deductions of \$9,148 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,891 and current liabilities of \$11,251, which yields net current assets of \$11,640.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on December 13, 2004, denied the petition.

On appeal, counsel submitted (1) the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) 2001, 2002, and 2004 Form W-2 Wage and Tax Statements, (3) monthly statements pertinent to the petitioner's bank account, and (4) a brief.

The petitioner's 2003 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$15,219 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$25,234 and current liabilities of \$14,023, which yields net current assets of \$11,211.

The W-2 forms submitted show that the petitioner paid the beneficiary \$21,040.63, \$20,538.95, and \$26,645.26 during 2001, 2002, and 2004, respectively.¹ No 2003 W-2 form was submitted.

In the brief counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that factors other than the petitioner's income and assets may be considered.

Counsel noted that the decision of denial did not consider the petitioner's depreciation deduction or the beneficiary's W-2 forms² and asserted that this constituted error. Counsel notes that a depreciation deduction does not require a cash outlay during the year taken. Counsel stated that the proposition that depreciation may be considered in determining a petitioner's ability to pay the proffered wage, but cited no authority in support of that proposition.

Finally, counsel asserted that, during a given year, the sum of the petitioner's net income, its depreciation deduction, its net current assets, and the amount it paid the beneficiary during that same year, combined, is a correct calculation of the funds available to the petitioner to pay additional wages. Counsel provided no authority in support of that assertion.

¹ Wage and Tax Statements showing amounts the petitioner paid to another person were also included with the submissions on appeal. The asserted relevance of those documents to the instant case, if any, is unclear. Those additional W-2 forms will not be further considered.

² The record indicates that no W-2 forms had been submitted previously.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.³ 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 reported on its tax returns.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁴ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's assertion that that the sum of the petitioner's net income, depreciation, net current assets, and amount paid to beneficiary during a given year should be considered in determining the proffered wage is unconvincing. The sum of petitioner's net income and the amount it paid to the beneficiary are both factors

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

showing the petitioner's ability to pay the proffered wage, as if further explained below. The petitioner's depreciation is not a fund available for paying additional wages, as is explained above. Current assets may be considered in the determination of the petitioner's ability to pay the proffered wage, but are not cumulative with income. The treatment of net current assets is explained below.

Counsel's citation of *Matter of Sonogawa, supra*, is similarly unconvincing. *Sonogawa* does, as counsel notes, indicate that factors other than net income may be considered, in certain cases, in the determination of a petitioner's ability to pay the proffered wage. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence to demonstrate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that its 2001 and 2002 fiscal years were uncharacteristically unprofitable. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary \$21,040.63 during 2001, \$20,538.95 during 2002, and \$26,645.26 during 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

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 the petitioner's net income and the 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; 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.

The proffered wage is \$53,313 per year. The priority date is April 30, 2001.

Calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date are complicated by the fact that the petitioner reports taxes pursuant to a fiscal year running from

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

November 1 of the nominal year to October 31 of the following year, whereas W-2 forms show amounts paid during calendar years.

Of the \$21,040.63 the petitioner paid to the beneficiary during 2001, five-sixths, or \$17,536.36 is attributable to the petitioner's 2000 fiscal year. That amount is insufficient to pay the portion of the proffered wage that would have been due from the priority date to October 31, 2001, the last day of the petitioner's 2000 fiscal year.⁶ The petitioner submitted no other evidence of its ability to pay the proffered wage from the priority date to the end of the petitioner's 2000 fiscal year. The petitioner has not shown the ability to pay the proffered wage from April 30, 2001 to October 31, 2001.

The petitioner's 2001 tax return covers the fiscal year from November 1, 2001 to October 31, 2002. The only portion of the 2001 calendar year wages paid to the beneficiary that are attributable to the petitioner's 2001 calendar year are those wages paid during the last two months of that calendar year, which amount would be approximately one-sixth of the total annual wages. That amount is \$3,506.77. Five-sixths of the wages shown on the 2002 W-2 form, or \$17,116.79, are also attributable to the petitioner's 2001 fiscal year. The total wages attributable to the petitioner's 2001 calendar year, then, are \$20,622.56.

Having shown that it paid the beneficiary approximately \$20,622.56 during its 2001 fiscal year the petitioner is obliged to show the ability to pay the remaining \$32,690.44 balance of the proffered wage. During that fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$6,295. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during its 2001 fiscal year. The petitioner has not shown the ability to pay the proffered wage during its 2001 fiscal year.

The remaining one-sixth of the wages the petitioner paid to the beneficiary during the 2002 calendar year, or \$3,423.16, are attributable to the petitioner's 2002 fiscal year. Further, had the petitioner demonstrated that it paid any wages to the beneficiary during the 2003 calendar year five-sixths of that amount would also have been attributable to the petitioner's 2002 fiscal year. No evidence of wages the petitioner paid the beneficiary during 2003, however, was submitted.

Having shown that it paid the beneficiary approximately \$3,423.16 during its 2002 fiscal year the petitioner is obliged to show the ability to pay the remaining \$49,889.84 balance of the proffered wage. During that fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$9,148. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner had net current assets of \$11,640. That amount is also insufficient to pay the balance of the proffered wage. The petitioner submitted no other reliable evidence of its ability to pay the proffered wage during its 2002 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

⁶ That is, the period from the priority date to the last day of the petitioner's 2000 fiscal year was approximately six months, which is half a year. One-half of the annual amount of the proffered wage is \$26,656.50. The \$17,536.36 attributable to the petitioner's 2000 fiscal year is insufficient to cover even that portion of the fiscal year.

The petition in this matter was submitted on September 2, 2004. On that date the petitioner's 2003 tax return, which would have covered the fiscal year from November 1, 2003 to October 31, 2004, was unavailable. Further, evidence pertinent to the petitioner's ability to pay the proffered wage during its 2003 fiscal year was never requested. The petitioner is excused from demonstrating its ability to pay the proffered wage during its 2003 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during the last six months of its 2000 fiscal year. The petitioner has also failed to show the ability to pay the proffered wage during its 2001 and 2002 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.