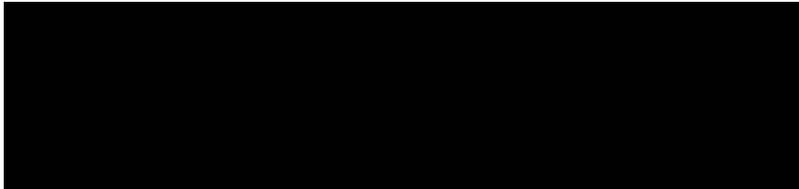




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



BU

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: APR 03 2007
EAC 02 186 51944

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:



PUBLIC COPY

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a specialty cook. The director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

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

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable 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 2, 2001. The ETA 750 was originally submitted by K.T. Indian Restaurant, Incorporated dba New Delhi Indian Restaurant of the same address as the instant petitioner. The instant petitioner was substituted on that Form ETA 750. The proffered wage as stated on the Form ETA 750 is \$11.46 per hour, which equals \$23,836.80 per year.

The Form I-140 petition was submitted on May 9, 2002. On the petition, the petitioner stated that it was established during October 2001 and that it employs four workers. The petition states that the petitioner's gross annual income is "\$336,000 (projected)."¹ In the space reserved for the petitioner to state its net annual income the petitioner entered, "see attached." Although this office is unable to find an attachment that could have been submitted contemporaneously with that petition, the record contains a letter dated November 13, 2003 from the petitioner's accountant. That letter states that the petitioner "expects a profit between \$12,000 and \$13,000 for the year ended [sic] December 31, 2003."²

On the Form ETA 750, Part B, signed by the beneficiary on February 23, 2001, the beneficiary claimed to have worked for the original petitioner since May 2000. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Plainsboro, New Jersey.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

In the instant case the record contains (1) the original petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) the instant petitioner's 2001 and 2002 Form 1120-A U.S. Corporation Short-Form Income Tax Returns, (3) the instant petitioner's 2003 and 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (4) the instant petitioner's compiled year-to-date financial statements as of October 31, 2003, (5) a letter dated April 30, 2002 from an accountant, (6) a letter dated November 13, 2003 from another accountant, (7) 2003 and 2004 Form W-2 Wage and Tax Statements, (8) pay statements, (9) a

¹ The petitioner's 2002 tax return, subsequently submitted, showed gross receipts of \$226,752, indicating that the petitioner's projection was optimistic, although it was made more than four months into the subject year.

² The petitioner's 2003 tax return, subsequently submitted, showed ordinary income of \$5,061, indicating that the petitioner's projection was optimistic, although it was made more than ten months into the subject year.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

computer printout of payroll records, and (10) photocopies of nine cancelled checks. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains a September 26, 2001 contract for sale of the petitioning restaurant by the original petitioner to the instant petitioner and a bill of sale dated October 7, 2001 evincing the consummation of the sale.

The original petitioner's tax returns shows that it was a corporation, that it incorporated on January 6, 1997, and that it reported taxes pursuant to accrual convention accounting and the calendar year. The 2001 return indicates that it was the original petitioner's final return.

During 2000 the original petitioner declared ordinary income of \$4,293. At the end of that year the original petitioner had current assets of \$72,308 and current liabilities of \$57,241, which yields net current assets of \$15,067. This office notes that because the priority date of the instant visa petition is April 2, 2001, however, that evidence pertinent to finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2001 the original petitioner declared a loss of \$26,982 as its ordinary income. At the end of that year the original petitioner had \$23,437 in current assets and current liabilities of \$12,498, which yields net current assets of \$10,939.

The instant petitioner's tax returns show that it is a corporation, that it incorporated on October 11, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The 2001 return indicates that it is the instant petitioner's initial return. The petitioner declared a loss of \$334 as its taxable income before net operating loss deductions and special deductions during 2001. This office notes that the petitioner's operations during that year encompassed the period from approximately October 7 or October 11, 2001 to December 31, 2001. At the end of that year the petitioner had current assets of \$39,474 and no current liabilities, which yields net current assets of \$39,474.

During 2002 the petitioner declared a loss of \$16,751 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner declared no current assets and no current liabilities, which yields net current assets of \$0.

During 2003 the petitioner declared ordinary income of \$5,061. At the end of that year the petitioner declared current assets of \$18,667 and \$3,549 in current liabilities, which yields net current assets of \$15,118.

During 2004 the petitioner declared ordinary income of \$13,533. At the end of that year the petitioner had \$19,868 in current assets and \$2,643 in current liabilities, which yields \$17,225 in net current assets.

The April 30, 2002 accountant's letter states that the instant petitioner purchased the restaurant on October 10, 2001 from the original petitioner.

The November 13, 2003 accountant's letter states that the instant petitioner purchased the restaurant on October 10, 2001 from the original petitioner in this matter. The accountant further stated that the instant petitioner suffered losses during 2002 but that business is rapidly improving. The accountant stated that the petitioner had year-to-date net profit through October 31, 2003 of \$10,360.⁴ The accountant observed that the petitioner reports taxes pursuant to cash convention accounting. The accountant stated that, in his opinion, the petitioner is able to pay the proffered wage. Finally, the accountant stated that the beneficiary has worked for the instant petitioner since February 2003.⁵

The 2003 and 2004 W-2 forms show that the instant petitioner paid the beneficiary total wages of \$23,400 and \$25,650 during those years, respectively.

The pay statements were issued between February 15, 2003 and October 20, 2003 at irregular intervals ranging from 12 to 35 days and in irregular amounts ranging from \$450 to \$1,800. The hourly rate at which the beneficiary was remunerated is not shown on those pay statements, nor is the number of hours he worked. The total of the wages shown on all 12 of those pay statements is \$18,000.

The payroll record printout confirms that the petitioner paid the beneficiary gross pay \$18,000 in 12 checks. That printout indicates that the beneficiary's wage was \$450 per week. That printout also lists net pay. The cancelled checks confirm some of the net pay amounts shown on the printout.

The director denied the petition on March 25, 2004. The AAO dismissed a subsequent appeal on August 30, 2005, and counsel timely filed the instant motion.

In the brief submitted with the instant motion counsel argued that the evidence in the record demonstrates the original petitioner's ability to pay the proffered wage from the April 2, 2001 priority date to the October 2001 sale of the restaurant. Counsel also argues that the evidence demonstrates the instant petitioner's ability to pay the proffered wage from the October 2001 sale of the restaurant to the present. Counsel further notes that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) found that a petitioner's poor performance during a given year does not preclude approval of the petition.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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).

⁴ The petitioner's 2003 tax return, as was noted above, shows ordinary income of 5,061 for that entire year.

⁵ No discrepancy exists between the beneficiary's statement on the Form ETA 750B that he began working for the original petitioner during May of 2000 and the accountant's statement that the beneficiary began working for the instant petitioner during February of 2003.

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 evidence establishes that the instant petitioner paid the beneficiary \$23,400 during 2003 and \$25,650 during 2004. The evidence does not establish that the instant petitioner paid the beneficiary wages during any other year.

Further, although the beneficiary stated on the Form ETA 750 that he worked for the original petitioner from May 2000 until at least February 23, 2001 the evidence contains no evidence of wages the original petitioner paid to the beneficiary.

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 a petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages 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. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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

typically⁶ 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.

The proffered wage is \$23,836.80. The priority date is April 2, 2001. The original petitioner sold the restaurant to the instant petitioner on or about October 7 – 11, 2001.⁷ A substituted petitioner, such as the instant petitioner, must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. This office is convinced by the evidence in the record that the instant petitioner is the true successor of the original petitioner within the meaning of *Matter of Dial Auto Repair Shop*.

The substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has, itself, had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481.

The period of time during which the original petitioner must show the ability to pay the proffered wage is not affected by the fact that the priority date of the visa petition is April 2, 2001. This office will not consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. This office will not prorate the amount the original petitioner must show the ability to pay to reflect that some portion of the year had passed before the priority date.

That the original petitioner sold the restaurant prior to the end of 2001, however, does affect the portion of the proffered wage that it must show the ability to pay. During the final months of 2001 the original petitioner no longer owned the restaurant. The instant petitioner, not the original petitioner, must show the ability to pay the proffered wage during that period. The period from January 1, 2001 to October 7 – 11, 2001 includes approximately 280 days and represents, therefore, approximately 77% of 2001. The original petitioner must show the ability to pay 77% of the \$23,836.80 annual amount of the proffered wage, or \$18,354.34, during 2001.

During 2001 the original petitioner declared a loss of \$26,982 as its ordinary income. The original petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during 2001. At the end of that year the original petitioner had net current assets of \$10,939. That amount is insufficient to pay the appropriate portion of the proffered wage.

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁷ The record contains minor discrepancies pertinent to the date on which the instant petitioner acquired the restaurant from the original petitioner. The bill of sale is dated October 7, 2001. Both accountants stated that the petitioner purchased the business on October 10, 2001. The petitioner's tax returns state that it incorporated on October 11, 2001. This office does not find these differences significant or material.

The instant petitioner must demonstrate its own ability to pay the proffered wage from the date it purchased the restaurant in early October to the end of that year, and during subsequent years. On the priority date, approximately 23% of 2001 remained. The petitioner must show the ability to pay 23% of the proffered wage during that remaining portion of 2001, or \$5,482.46.

During the portion of 2001 when it owned the restaurant the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had net current assets of \$39,474. That amount is greater than the portion of the proffered wage the petitioner is obliged to show the ability to pay during the portion of 2001 when it owned the restaurant, and the petitioner has shown the ability to pay the proffered wage during that period.

The petitioner must show the ability to pay the entire proffered wage during 2002. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had no 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 year. The petitioner submitted no reliable evidence of any other funds that were available to it during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$23,400 during 2003 and must show the ability to pay the \$436.80 balance of the proffered wage. During 2003 the petitioner declared ordinary income of \$5,061. That amount is sufficient to pay the balance of the proffered wage. The petitioner demonstrated the ability to pay the proffered wage during 2003.

The petitioner paid the beneficiary \$25,650 during 2004. That amount is greater than the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on May 9, 2002. On that date the petitioner's 2005 tax return was unavailable. On September 13, 2003 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. Evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date was not requested after that date. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

Counsel argues, however, that, notwithstanding that its tax returns do not demonstrate its continuing ability to pay the proffered wage beginning on the priority date, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 its losses or low profits during a given year do not preclude approval of the instant petition. Counsel is correct.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 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 it was unable to do regular business.

In *Sonegawa*, 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 *Sonegawa* 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 petitioner is a new business, and the record contains no evidence that it has ever posted a large profit.

Counsel and the petitioner's accountant urge that the petitioner's poor performance is a result of it being a recent start-up business and that the petitioner's profit will rise. Previous projections by the petitioner and its accountants, however, have not been demonstrated to be accurate. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The instant petitioner failed to demonstrate that the original petitioner had the ability to pay the proffered wage during the portion of 2001 before it sold the restaurant. The instant petitioner failed to show that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it and its predecessor had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

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 motion is granted. The AAO's decision of August 30, 2005 is affirmed. The petition is denied.