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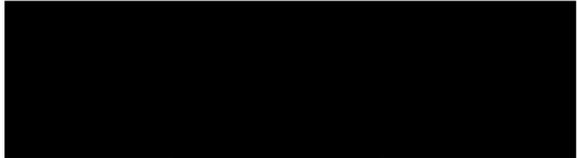
U.S. Department of Homeland Security
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Washington, DC 20529



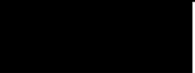
U.S. Citizenship
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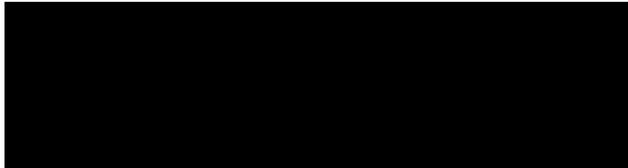
Petitioner:



Beneficiary:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food, specialty 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 (DOL). 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

According to the director's February 13, 2006 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, 40 hours per week, or \$24, 689.60 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage: a pay stub which indicates that for the period of September 21, 2005 through October 20, 2005, the petitioner paid the beneficiary a gross salary of \$1,900, and that on October 20, 2005, the beneficiary's total year-to-date income from the petitioner was \$1,900; pay stubs which indicate that during the four months which followed, October 21, 2005 through February 20, 2006, the petitioner paid the beneficiary a gross salary of \$1,900 each month; a Bangkok One d/b/a China Café checking account statement for the period of December 30, 2005 through January 31, 2006; Bangkok One/China Café checking account statements which cover the months in 2000, all of which fall before the April 30, 2001 priority date; the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 1999, 2000, 2001, 2002 and 2003, together with certain attachments filed with these forms; memoranda indicating that construction workers plan to renovate the façade of the building in which the petitioner's restaurant is located during October 2003 and the months which follow; a letter from counsel dated April 25, 2005 submitted with the Form I-140; a motion to reopen dated March 16, 2006 filed with the director, and an appeal brief dated May 30, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a Subchapter C corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ five workers. The petitioner listed a gross annual income of \$327,187 on the petition. According to the tax returns in the record, the petitioner's fiscal year runs August 1 through July 31. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner. However, pay stubs submitted into the record indicate that subsequent to the signing of the Form ETA 750B, from September 19, 2005 through February 20, 2006, the petitioner did employ the beneficiary.

In the appeal and in various other submissions, counsel asserts that the petitioner does have the ability to pay the proffered wage. He indicates that because gross receipts and gross profits exceed the proffered wage, the petitioner has shown the ability to pay the wage. He states that this is especially true given that, according to counsel, the beneficiary will likely decrease costs and improve production for the petitioner once she is employed. Counsel believes that because petitioner has managed to cover its employees' wages in the past, it has shown an ability to pay the proffered wage from the priority date onwards. Counsel further recommends that Citizenship and Immigration Services (CIS) view the petitioner as a "start up" business because it was not acquired by its present owner until 1999. He also suggests that officer compensation, depreciation and "cash-on-hand" be regarded as funds available to pay the wage. Counsel indicates: that any reduction in the petitioner's accounts payable or in certain other liabilities; that any advertising costs; that certain repair costs; and, that any inventory costs or increase in inventory costs represent "discretionary" expenses and as such, any funds used to cover such expenses may be considered funds available to pay the wage. He also suggests that any increase in "additional paid-in capital", such as the \$41,850 end of year "increase", compared to the beginning of the 2000 tax year, listed under "Liabilities and Shareholder's Equity" on line 23 of the Schedule L, attached to the 2000 Form 1120, should be considered in isolation from other assets and liabilities, as representing funds available to pay the wage. Counsel indicates further that the petitioner has shown an ability to pay the wage by documenting that there has been an increase in its net income during the relevant period of analysis. Counsel also indicates that the petitioner's bank statements in the record demonstrate an ability to pay the proffered wage. Counsel suggests that CIS regard the petitioner's deduction of \$18,258 due to fire damage in 2000 as funds available to pay the wage, and that petitioner's net income for 2000 be considered one-twelfth higher as the petitioner had to close its restaurant for one month during 2000 due to fire and as such lost one month's income or one-twelfth net income. Finally, counsel suggests that in keeping with the reasoning in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS should consider the overall

provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

magnitude of the petitioner's business and other evidence beyond net income or net current assets and find that the petitioner has demonstrated an ability to pay the proffered wage.

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

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the beneficiary indicated on the Form ETA 750 that she had not been working for the petitioner. However, the petitioner did provide evidence to establish that it employed and paid the beneficiary \$9,500 during its 2005 tax year, August 2005 through July 2006. That is, the petitioner paid the beneficiary \$15,189.60 less than the proffered wage during its 2005 tax year. The petitioner has submitted no Form W-2, Wage and Tax Statement, for the beneficiary or other documentation to establish that it employed and paid the beneficiary any amount during any other length of time during the relevant period of analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to counsel's assertions.² 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient, contrary to counsel's assertions. It is also not sufficient for the petitioner to show that it paid wages in excess of the proffered wage.

²Counsel cites unpublished AAO decisions and certain DOL Bureau of Alien Labor Certification Appeals (BALCA) decisions in support of the premise that net income and net current assets should not control the determination of the petitioner's ability to pay the proffered wage, and that depreciation and other expenses or liabilities should also be considered as funds available to pay the wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Immigration and Naturalization Service (INS) or the Service, are binding on all CIS employees in the administration of the Act, unpublished AAO decisions and BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).

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* stated:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of \$24,689.60 from the priority date of April 30, 2001 onwards:

- Petitioner's 2000 Form 1120 states a net income or loss³ of -\$31,970.
- Petitioner's 2001 Form 1120 states a net income or loss of \$5,240.
- Petitioner's 2002 Form 1120 states a net income or loss of \$30,757.
- Petitioner's 2003 Form 1120 states a net income or loss of -\$6,924.

Therefore, for the tax years 2000, (which includes the period through July 31, 2001), 2001 and 2003 the petitioner did not have sufficient net income to pay the proffered wage.⁴ During tax year 2002, the petitioner did have sufficient net income to cover the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage, contrary to counsel's assertions. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage, contrary to counsel's assertions that CIS consider certain assets or liabilities in isolation as funds available to pay the wage. Rather, 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. Its year-end current

³For purposes of this analysis, net income is equal to the ordinary income or loss from trade or business activities as reported on Line 28 of the Form 1120.

⁴Petitioner's 1999 tax year, August 1999 through July 2000, covers a period before the priority date, and as such is not directly relevant to the present analysis. Information on the 1999 Form 1120 submitted into the record will not be considered in this analysis.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2000 were -\$19,673.
- The petitioner's net current assets during 2001 were -\$3,408.
- The petitioner's net current assets during 2002 were \$11,663.
- The petitioner's net current assets during 2003 were \$481.

Thus, for the tax years 2000, 2001, 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner provided evidence that it paid the beneficiary \$9,500, or \$15,189.60 less than the proffered wage during its 2005 tax year, August 2005 through July 2006. The petitioner provided no evidence to indicate that it had funds available to pay the remainder of the proffered wage during the 2005 tax year. The record closed during June 2006 with the filing of the appeal. The petitioner's Form 1120 for tax year 2005 would not have been available at that time. Thus, the petitioner is excused from any obligation to demonstrate an ability to pay the proffered wage during the 2005 tax year.

In sum, the petitioner has demonstrated an ability to pay the wage, (based on its net income,) during only one year in the relevant period of analysis, the 2002 tax year. It has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel urges that CIS consider the overall magnitude of the petitioner's business, expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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. Also, 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. No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in the instant case, nor has it been established that 2000, 2001 and 2003 were uncharacteristically unprofitable tax years for the petitioner.

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.

Counsel does make reference to a fire at the petitioner's business, but he failed to provide evidence that such a fire occurred and if it did occur, whether it occurred during the relevant period of analysis. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).⁶ Counsel's claim that CIS needs to consider that the petitioner's net income and overall financial position has steadily improved over the relevant period of analysis is misplaced. The petitioner's net income fell well below the proffered wage, usually in negative figures, during the entire period of analysis, 2000 through 2003, except for 2002, when the net income was only about six-thousand dollars more than the proffered wage. Finally, memoranda in the record indicate that the façade in front of petitioner's restaurant was refurbished during the relevant period of analysis. However, there is no evidence in the record, nor is it even asserted, that such refurbishing negatively impacted the petitioner's business.

Counsel's suggestion that CIS treat the petitioner as a "start up" restaurant would not alter the present analysis. The petitioner, whether it is an established business or a "start up" company, must demonstrate an ability to pay the proffered wage from the priority date onwards. *See* 8 C.F.R. § 204.5(g)(2).

Counsel's claim that the petitioner could avoid its advertising expenses or other so-called "discretionary" costs as necessary to pay the proffered wage is not convincing. Before CIS might accept such a claim, counsel would need to show that the petitioner could decline to incur those expenses without negatively affecting its profits and other aspects of its business. Having already spent those amounts on various expenses, the burden remains on the petitioner to show that it had other funds available to pay the proffered wage.

Counsel also suggests that once employed the beneficiary will increase the petitioner's net income. Yet, no details of how and to what extent the beneficiary will increase income were provided. Counsel provided no form of evidence to show how the beneficiary's employment as a foreign food, specialty cook will significantly increase profits for the petitioner. Counsel's unsupported assertion cannot outweigh the evidence presented in the petitioner's corporate tax returns. Further, regarding the projection of future earnings, the Acting Regional Commissioner specifically states in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977):

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel indicates that funds used for officer compensation may be used to pay the proffered wage. However, he provided no evidence that the beneficiary would be assuming some of the duties of the petitioner's corporate officer(s), such that an officer might agree to give up a portion of his or her salary to go toward the beneficiary's salary. Moreover, no corporate officer submitted a sworn statement which specified the amount of compensation he or she would forego to apply to the beneficiary's wage, nor did an officer otherwise document this shifting of

⁶ Further, even if one were to add to net income the \$18,258 that counsel indicates the petitioner lost due to a fire in 2000, the net income for tax year 2000 would still be negative. If one were to increase the petitioner's 2000 net income by one-twelfth to compensate for the period that counsel suggests the petitioner was closed during that tax year because of fire, the petitioner's net income would remain a negative amount.

expenses. There is no documentation in the record that the petitioner's officer(s) could forego compensation and remain able to cover their own household expenses. Finally, no corporate officer explained how much time he or she spends performing the duties of the proffered position and how much of his or her compensation is allocated for those duties. Going on record with assertions that are not supported by documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).⁷

Finally, the bank statements submitted do not help demonstrate that the petitioner had the ability to pay the proffered wage from the priority date onwards. First, the bank statements from 2000 cover a period before the priority date and as such fall outside the relevant period of analysis. The record also includes a bank statement for the petitioner which covers the first month of 2006. However, 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, the 2006 bank statement submitted into the record shows the amount in the petitioner's account on a given date. This statement standing alone cannot show an ability to pay the proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's 2006 bank statement or the 2000 bank statements somehow reflect additional available funds that were not listed on its tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁷ This office would again note that the petitioner has failed to show an ability to pay the wage in each year of the relevant period of analysis, other than the 2002 tax year. Even if the petitioner had sufficiently documented that its officer(s) were willing to forego and could afford to forego the entirety of their compensation, adding the officer compensation amount to net income or net current assets for each remaining year in the relevant period still would not demonstrate an ability to pay the wage during those years.