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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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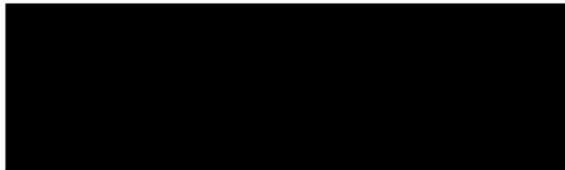
Office: VERMONT SERVICE CENTER

Date: JAN 08 2007

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 sustained. The petition will be approved.

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, 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 \$14.75 per hour, which equals \$30,680 per year.

The Form I-140 petition in this matter was submitted on October 2, 2003. On the petition, the petitioner stated that it was established during 1990 and that it employs two part-time workers. The petition states that the petitioner's gross annual income is \$612,525 and that its net annual income is \$7,704. On the Form ETA 750, Part B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Trenton, New Jersey.

In support of the petition, counsel submitted a letter dated September 29, 2003. In her letter counsel stated that the petitioner's net profit, together with its depreciation deduction, total assets, and bank balance shows that the petitioner was able to pay the proffered wage during 2001. Counsel stated that the sum of those amounts greatly exceeds the proffered wage. Other than that letter, however, the record as then constituted

contained no evidence of the amount of the petitioner's depreciation deduction, its total assets, or its bank balance at the end of 2001.

Counsel also asserted in that letter that accounting principles mandate treating the petitioner's depreciation deduction as additional income, but provided no citation in support of that assertion. Counsel asserted, yet further, that the petitioner had \$36,529 in its checking account at the end of 2001, but provided no evidence in support of that assertion. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

That letter further stated that the petitioner, [REDACTED] is actually organized as a corporation under the name [REDACTED] Corporation. Counsel also stated that she was providing the petitioner's 2001 tax return. No such tax return was provided with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 31, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted (1) the 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation of [REDACTED] Corporation, (2) 2001, 2002, and 2003 Form W-2 Wage and Tax Statements, and (3) a letter dated March 24, 2004.

The W-2 forms submitted show that the petitioner paid the beneficiary gross wages of \$12,600, \$3,200, and \$11,100 during 2001, 2002, and 2003, respectively.

The tax returns submitted show that [REDACTED] Corporation is, in fact, a corporation, that it incorporated on February 14, 1990, and that it reports taxes pursuant to accrual accounting and the calendar year. The tax returns also show that [REDACTED] Corporation has the same mailing address as the petitioner, [REDACTED], to whom the labor certification was issued. This office finds that the petitioner and [REDACTED] are the same entity.

The 2001 return shows that during that year the petitioner reported a loss of \$12,744 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 return shows that during that year the petitioner earned ordinary income of \$33,521. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In the March 24, 2004 letter counsel argued that the sum of the petitioner's depreciation deductions, its average bank balance, its ordinary income, and the amounts it paid to the beneficiary during the salient years shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 January 24, 2005, denied the petition.

On appeal, counsel submitted (1) a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) a letter dated February 11, 2005 from the petitioner's owner, and (3) a brief.

The petitioner's 2003 tax return shows that during that year it declared ordinary income of \$50,302. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In his February 11, 2005 letter the petitioner's owner stated that (1) the events of September 11, 2001 caused his business to suffer during 2001, (2) that the stock market crash occasioned by those events also adversely affected either the petitioning restaurant or its owner in some unspecified way, and (3) that the petitioner's owner "had damages" at the restaurant.

The petitioner's owner further stated that because the beneficiary did not have a valid social security number the petitioner was unable to put him on the payroll during 2001 and 2002. The petitioner's owner stated that the beneficiary now has a valid social security number and that the petitioner issued him a 2004 W-2 form. The petitioner's owner did not provide a copy of that W-2 form or indicate the amount shown on that form.

The petitioner's owner stated that the beneficiary is paid \$1,200 every two weeks, which equals an annual salary of \$31,200, and that he also receives holiday bonuses.

In the brief counsel argued that the evidence, considered in light of the totality of circumstances test urged in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) mandates approval of the instant petition.

Counsel's reliance on the petitioner's end-of-year account balance 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.¹ Third, no evidence was submitted to demonstrate that the funds in the petitioner's bank account somehow reflect additional available funds that were not reported on its tax returns. Finally, other than counsel's assertion, the record contains no evidence of the amount in the petitioner's bank account at any time.

¹ 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.

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. This office is aware 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 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 are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See 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, she does not offer any alternative allocation of those costs.² 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 to pay additional wages. Such a scenario is unacceptable.

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 \$12,600 during 2001, \$3,200 during 2002, and \$11,100 during 2003. Having demonstrated that it paid the beneficiary those amounts the petitioner is obliged to show that it was able to pay the balance of the proffered wage during each of those years.

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).

² Counsel did 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, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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.

Contrary to counsel's assertion, however, the petitioner's total assets 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 minus 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 typically³ 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 \$30,680 per year. The priority date is April 30, 2001.

The petitioner has demonstrated that it paid the beneficiary \$12,600 during 2001 and must show that it was able to pay him the \$18,080 balance of the proffered wage during that year. During 2001 the petitioner reported 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 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 year. The petitioner has provided no evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary \$3,200 during 2002 and must show that it was able to pay him the \$27,480 balance of the proffered wage during that year. During 2002 the petitioner

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

earned ordinary income of \$33,521. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary \$11,100 during 2003. The balance of the proffered wage is \$19,580. During 2003 the petitioner declared ordinary income of \$50,302. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

Counsel urges that notwithstanding that its 2001 income and net current assets are insufficient in themselves to cover the proffered wage, the petitioner has demonstrated its ability to pay the proffered wage pursuant to the totality of circumstances test from *Matter of Sonogawa, supra*. Counsel is correct that *Sonogawa* held that a loss or low profits during a given year do not preclude a petitioner from demonstrating its ability to pay the proffered wage if enough factors in its favor counterbalance those low profits.

Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years and 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 it was unable to do regular business.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

The petitioner's owner has alleged, but provided no evidence to demonstrate, that his business during 2001 was depressed due to the events of September 11 of that year. Counsel has not, however, demonstrated that this was so. Neither has the petitioner demonstrated that restaurants in Trenton, New Jersey were, in general, affected by those events.

The petitioner's owner has alleged that depressed stock prices that followed the events of September 11, 2001 adversely affected him or his business, but without specifying how or providing evidence in support of that assertion.

The petitioner's owner has alleged that he "had damages" at his restaurant, but without describing those damages more specifically, or providing evidence in support of that assertion or in support of the proposition that those damages are unlikely to recur.

In the instant case, however, the petitioner has been in business since 1990. Although the petitioner did not show that it was able to pay the balance of the proffered wage out of its profits or net current assets during 2001, neither did it suffer any apparent difficulty in meeting its payroll during that year. Further, it demonstrated its ability to pay the proffered wage during the remaining salient years, 2002 and 2003. Under these circumstances this office need not find, based on a loss during a single year, that the petitioner has failed to show its continuing ability to pay the proffered wage beginning on the priority date. On the balance this

office finds that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date consistent with the decision of *Sonegawa, supra*.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.