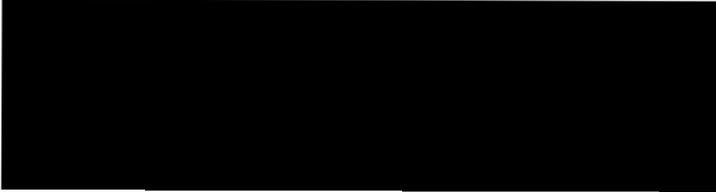


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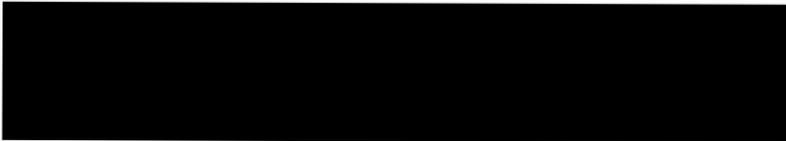
FILE: LIN 06 010 52867 Office: NEBRASKA SERVICE CENTER Date: JUL 25 2007

IN RE: 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center, denied the preference visa petition that 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 food service manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

The record shows that the appeal 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 acting 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.

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 7, 2002. The proffered wage as stated on the Form ETA 750 is \$1,000 per week, which equals \$52,000 per year.

The Form I-140 petition in this matter was submitted on October 14, 2005. On the petition, the petitioner stated that it was established on August 2002 and that it employs two workers. The petition states that the petitioner's gross annual income is \$203,559 and that its net annual income is \$45,896. On the Form ETA 750, Part B, signed by the beneficiary on September 23, 2002, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Normandy Park, Washington.

The AAO reviews *de novo* issues raised 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.¹

In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's Form 941 Quarterly Federal Tax Returns for the first and second quarters of 2005, (3) the petitioner's Washington State Quarterly Wage Detail Reports for the first and second quarters of 2005, (4) unaudited financial statements, (5) letters from the petitioner's accountant dated September 27, 2005 and October 4, 2005, and (6) a letter dated December 29, 2005 from another accountant. 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 petitioner's tax returns show that it is a corporation, that it incorporated on August 1, 2002, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared a loss of \$13,314 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2003 the petitioner reported taxable income before net operating loss deduction and special deductions of \$29,185. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner reported taxable income before net operating loss deduction and special deductions of \$45,896. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's first and second quarter 2005 quarterly returns show that it paid total wages of \$15,900 during those quarters. The quarterly wage detail reports for the same quarters show that the petitioner paid \$12,000 of that amount to the beneficiary during both quarters.

The petitioner's accountant's October 7, 2005 letter was to explain the difference between the petitioner's Line 28, Taxable Income Before Net Operating Loss Deduction and Special Deductions and its Line 30, Taxable Income on its 2003 tax return.

The petitioner's accountant's September 27, 2005 letter attempts to explain an entry on one of the petitioner's tax returns. Specifically, the accountant stated that a loan to a stockholder in the amount of \$26,135 is listed as a current asset on its 2004 Schedule L because it is due on demand. The accountant also stated that the loan was made during 2004 and that no legal document has been executed to evidence the transaction.

¹ 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).

However, that specific amount, \$26,135, is listed as an outstanding loan to a shareholder at the end of 2003 (Schedule L, Line 7(d), and at the beginning of 2004 (Schedule L, Line 7(b)). That notation indicates that the loan was not made during 2004 as the accountant asserted. Further, that loan is not listed as a current asset.²

The other accountant's December 29, 2005 letter states that loans to shareholders, if they are demand notes, should be counted as current assets.

The acting director denied the petition on March 4, 2006.

On appeal, counsel noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) allows a petition to be approved in some circumstances notwithstanding that the petitioner may not be able to demonstrate its ability to pay the proffered wage during a given year with copies of annual reports, federal tax returns, or audited financial statements. Counsel cited a non-precedent decision of this office for the proposition that a company's early years may be considered uncharacteristic and losses or low profits during those years discounted. Counsel urged that the petitioner's loss during 2002 was due to its being a start-up company. Counsel cited other non-precedent decisions for various other propositions.

Counsel further asserted that (1) the petitioner's net income as shown on its tax returns is its Line 28 taxable income before net operating loss deduction and special deductions rather than its Line 30 taxable income, is an index of its net profit during a given year, (2) that the sum of the petitioner's net income and net current assets represents a fund available to pay additional wages, and (3) that a corporation's loans to shareholders should be considered a net current asset because they create a demand loan, repayment of which the corporation is entitled to upon demand.

Counsel cited non-precedent cases of this office for various propositions. Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that Citizenship and Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of non-precedent decisions is of no precedential effect.

Counsel's reliance on the unaudited financial statements submitted in this case is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Although the accountant's report that should have accompanied the financial statements was not provided, a notation on the financial statements themselves indicates that they were produced pursuant to a compilation rather than an audit. As the accountant's report would have made clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

² The location of current assets on a Schedule L is addressed below.

Counsel suggested that the petitioner's end-of-year net current assets should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. The petitioner's end-of-year net current assets include its end-of-year cash on hand. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would be duplicative, at least in part.³ Further, this office notes that counsel miscalculated the petitioner's net current assets. That calculation is addressed in detail below.

The assertions in the accountant's December 29, 2005 letter are not entirely clear. Whether the accountant meant to state that loans to shareholders, by their very nature, create demand loans, or whether he meant to state that the specific loans to shareholders in the instant case created a demand loan, is unknown to this office. Although this office would have preferred that the accountant state his position clearly, this office will address those two possibilities in the alternative.

Loans are governed by their terms, which are negotiated between the lender and borrower. A loan may be repayable on demand or pursuant to any other terms, at the election of the parties. A loan to a shareholder does not necessarily create a demand note or the equivalent. In fact, especially in small corporations, an agreement or understanding, explicit or implicit, may exist that the loan will not be repaid. In such a case, the loan may be a vehicle to place property; cash, equipment, or additional stock, in the hands of one of the stockholders while minimizing or deferring tax consequences.

That accountant may, as was noted above, have meant to state that the specific loans to shareholders now under discussion created a demand loan, rather than that loans to stockholders inherently, by their nature, are demand loans. The September 27, 2005 letter from counsel's own accountant states that the petitioner "has a legal right to demand payment . . . at any time," which would identify the loan as a demand note.

Both accountants failed to identify the basis for their insistence that the loan is due on demand, or will ever become due at all, and no other evidence in the record supports their 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)). One of the accountants stated that the loan is not evidenced by a note or other instrument.

This office will not assume, absent any such evidence, that the loans to stockholders in the instant case demand loans, and will not assume that they are current assets, especially in view of the fact that they are not, contrary to the assertion of an accountant in his September 27, 2005 letter, identified as such on the petitioner's tax return.

This office entirely agrees with counsel's argument pertinent to taxable income before net operating loss deduction and special deductions and taxable income. Net operating loss deductions are a carry-forward of losses suffered during previous years.⁴ The petitioner's net income during a given year is more appropriately

³ Addition of other components of net current assets to income would also be inappropriate for various reasons.

⁴ Conceptually, net operating loss deductions might be viewed as an acknowledgement in tax law that taxing

represented by its taxable income before net operating loss deduction and special deductions than by its taxable income. The petitioner's taxable income before net operating loss deduction and special deductions during the salient years will be considered below.

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, Id.*

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 \$24,000 during 2005, but no wages during any of the other salient 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).

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. 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.

a corporation that has not, during its entire existence viewed as a whole, turned a profit is fundamentally unfair.

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 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, as in the instant case, 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.

The proffered wage is \$52,000 per year. The priority date is October 7, 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 profit 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 provided no other reliable evidence of its ability to pay the proffered wage during 2002. The petitioner's tax returns do not demonstrate the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$29,185. That amount is insufficient to pay the proffered wage. 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 provided no other reliable evidence of its ability to pay the proffered wage during 2003. The petitioner's tax returns do not demonstrate the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$45,896. That amount is insufficient to pay the proffered wage. 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 provided no other reliable evidence of its ability to pay the proffered wage during 2004. The petitioner's tax returns do not demonstrate the ability to pay the proffered wage during 2004.

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

During 2005 the petitioner paid the beneficiary \$24,000.⁶ Ordinarily the petitioner would be obliged to show the ability to pay the \$28,000 balance of the proffered wage during that year.

The petition in this matter was submitted on October 14, 2005. On that date the petitioner's 2005 tax return was unavailable. On November 4, 2005 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. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

Counsel asserted that pursuant to the doctrine of *Matter of Sonegawa, Id.* the petition might be approved notwithstanding that the tax returns, in themselves, failed to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel is correct that according to *Sonegawa* a petition may be approved even though the petitioner had low profits or losses during a given year.

Sonegawa, 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 *Sonegawa* 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 also 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 relatively new business, and the record contains no evidence that it has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner.⁷ Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

⁶ The quarterly returns submitted show that the petitioner paid the beneficiary \$12,000 during both of the first two quarters of 2005, for a total of \$24,000. Because those returns were submitted with the visa petition, during 2005, when evidence for the balance of 2005 was unavailable, those payments might have been deemed to demonstrate the ability to pay the beneficiary at that same rate for the entire year, showing the ability to pay a total of \$48,000 per year. Because the petitioner will not ultimately be required to show the ability to pay the proffered wage during 2005, however, this office need not reach that issue.

⁷ Had the evidence been insufficient to show the petitioner's ability to pay the proffered wage during 2002, but sufficient during 2003 and 2004, this office might have considered the fact that 2002 was the petitioner's

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that ground, which has not been overcome on appeal.

The record suggests an additional issue that was not raised in the decision of denial.

The Form ETA 750 states that the proffered position requires three years of experience in the job offered, restaurant manager. As evidence that he has the requisite experience, the beneficiary submitted a letter dated September 15, 2005 in which he self-certified that he was owner and manager of the [REDACTED] in Federal Way, Washington from October 1997 to February 2001. A Form 941 quarterly tax return in the record shows that the petitioner, [REDACTED], does business under the name [REDACTED].

Pursuant to 20 C.F.R. §656.20(c) (8) the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship.” *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

Whether the similarity between the name of the restaurant formerly owned and managed by the beneficiary and the name the petitioner does business under is purely coincidence, or the result of some relationship between the two entities is unknown to this office. The similarity is sufficient, however, that the relationship between the two restaurants, and the relationship between the beneficiary and the petitioner should have been investigated.

Because the decision of denial did not raise this issue, and the petitioner has not been accorded the opportunity to address it, today’s decision does not rely upon that issue even in part. If the petitioner continues to pursue the instant petition, however, it should explain the relationship between the petitioner and the beneficiary’s former employer, and between the petitioner and the beneficiary, and be prepared for relevant investigation.

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.

initial year in business, and that start-up might, in itself, be considered an unusual circumstance which might cause losses or low profits during a given year. Because the evidence submitted does not demonstrate the petitioner’s ability to pay the proffered wage during any of the salient years, however, this office declines to reach that issue.