

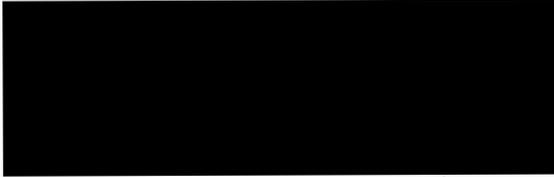
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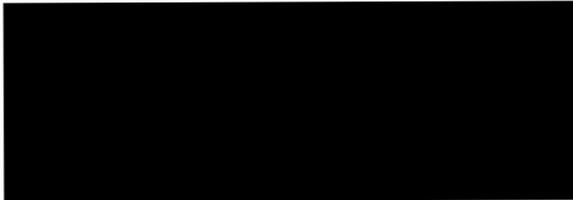


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: MAR 01 2007  
SRC 04 227 52178

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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The acting director of the Texas Service Center denied the preference visa petition on May 18, 2005 and a subsequent appeal was remanded by the Administrative Appeals Office (AAO) to the director. The director certified her subsequent decision dated December 29, 2006 to the AAO. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a Japanese 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 United States Department of Labor (DOL). As set forth in the director's December 29, 2006 decision, the director determined that the petitioner had not established that the beneficiary meets the minimum requirements of the Form ETA 750. The director also 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.

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 AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296.

The first issue to be discussed in this case is whether the petitioner has established that the beneficiary meets the minimum requirements of the Form ETA 750. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 19, 2001.

Counsel submitted a brief and evidence in connection with the Notice of Certification, including the first page of the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002, 2003, 2004 and 2005, and an undated letter from [REDACTED] regarding the beneficiary's prior employment experience. Counsel states in his brief that the petitioner had assets in excess of the proffered wage for all relevant years.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of foreign food specialty cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
- |                         |                |
|-------------------------|----------------|
| Grade School            | 0              |
| High School             | 0              |
| College                 | 0              |
| College Degree Required | none           |
| Major Field of Study    | not applicable |

The applicant must also have three years of experience in the job offered. The duties of the job offered are delineated at item 13 of the Form ETA 750A. Since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for Club T Restaurant from April 1990 to November 1991 as a specialty cook, Japanese cuisine, that he worked for Sharaku Japanese Restaurant from November 1991 to 1996 as a specialty cook, Japanese cuisine, that he worked for Club T Restaurant from July 1996 to October 2000 as a specialty cook, Japanese cuisine, and that he worked for the petitioner as a specialty cook, Japanese cuisine, from November 2000 to the date he signed the Form ETA 750B on April 17, 2001. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

With the petition, the petitioner submitted a letter from Sharaku, Inc. indicating that the beneficiary worked for [REDACTED] from November 1991 to 1996. As noted by our office in our September 29, 2006 decision, the letter does not list the beneficiary's job title or duties, does not specify whether the position was full or part-time and does not list the number of hours the beneficiary worked per week. Therefore, the AAO remanded the matter to the director for consideration of the issue of the beneficiary's qualifications. The director issued a notice of intent to deny (NOID) to the petitioner on October 24, 2006 and asked the petitioner to submit experience letter(s) for the 36 months required. The NOID stated that the "letter(s) must be from employers or trainers, written on company letterhead or stating the author's address, and give the dates and job duties of the employment or training, stating whether it was/is full or part-time. In response to the NOID, the petitioner submitted a letter dated November 10, 2006 from Sharaku, inc. confirming that the

beneficiary worked as a cook from November 1991 to June 1996. While the letter lists the beneficiary's job duties, it does not state whether the beneficiary's employment was full or part-time as requested by the director in the NOID. The director determined that this additional evidence does not establish that the beneficiary meets the minimum requirements of the proffered job. We agree. The AAO thus affirms the director's decision that the petitioner has not established that the beneficiary meets the minimum requirements of the Form ETA 750.<sup>1</sup>

The second issue to be discussed in this case is whether the petitioner has shown its continuing ability to pay the proffered wage beginning on the priority date. The regulation 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, 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 proffered wage as stated on the Form ETA 750 is \$25,417.60 per year. Relevant evidence in the record includes the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2002, 2003 and 2004; the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002 and 2003; the petitioner's monthly business checking statements from March 31, 2001 to March 31, 2005; the petitioner's IRS Forms 941, Employer's Quarterly federal tax Returns, for the first quarter of 2001 through the last quarter of 2003; the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2001, 2002, 2003 and 2004; and IRS Forms W-2 issued by the petitioner to its employees for 2001, 2002, 2003 and 2004. In connection with the Notice of Certification, counsel submits the first page of the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002, 2003, 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$126,404.00, to have a net annual income of \$2,801.00 and to currently employ 3 workers. According to the

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<sup>1</sup> In connection with the Notice of Certification, counsel submits an undated letter from the President of Sharaku, Inc. regarding the beneficiary's prior employment experience. The letter states: "Mr. Emiliano Torres was working full-time at Sharaku Restaurant." The letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3), as it does not give a description of the beneficiary's experience. Further, the petitioner failed to submit the requested employment letter in response to the director's NOID. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). If the petitioner had wanted evidence of the beneficiary's prior full-time employment experience to be considered, it should have submitted a proper employment letter in response to the director's NOID. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner from November 2000 to the date he signed the Form ETA 750B.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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 Sonegawa*, 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 the instant case, the beneficiary's IRS Forms W-2 for 2002, 2003 and 2004 show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form W-2 stated compensation of \$7,800.00.
- In 2003, the Form W-2 stated compensation of \$12,480.00.
- In 2004, the Form W-2 stated compensation of \$12,480.00.

Therefore, for the years 2001, 2002, 2003 and 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2002, 2003 and 2004. Since the proffered wage is \$25,417.60 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$17,617.60, \$12,937.00 and \$12,937.60 in 2002, 2003 and 2004, respectively.<sup>2</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that 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. 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).

The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004 and 2005 as shown in the table below.

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<sup>2</sup> The record lacks a copy of an IRS Form W-2 showing wages paid to the beneficiary in 2001 or 2005, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner in 2001 or 2005. The AAO therefore must evaluate the petitioner's ability to pay the entire proffered wage in 2001 and 2005.

- In 2001, the Form 1120S stated net income of \$4,051.00.<sup>3</sup>
- In 2002, the Form 1120S stated net income of \$4,023.00.
- In 2003, the Form 1120S stated net income of \$2,801.00.<sup>4</sup>
- In 2004, the Form 1120S stated net income of -\$6,509.00.<sup>5</sup>
- In 2005, the Form 1120S stated net income of -\$2,576.00.

Therefore, for the years 2001 and 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$25,417.60. For the years 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets.<sup>6</sup> Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on 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 tax returns demonstrate its end-of-year net current assets for 2001, 2002 and 2003, as shown in the table below.<sup>8</sup>

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional deductions shown on its Schedule K for 2001 and 2002, the petitioner's net income is found on line 23 of Schedule K of its tax returns.

<sup>4</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>5</sup> The petitioner did not submit Schedule K to its IRS Forms 1120S for 2004 and 2005. Therefore, the figures for the petitioner's net income are based on Line 21 of its IRS Forms 1120S for 2004 and 2005.

<sup>6</sup> We reject counsel's assertion that the petitioner's total assets should have been considered in the determination of the petitioner's ability to pay the proffered wage. 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. 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.

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>8</sup> The petitioner did not submit Schedule L to its IRS Forms 1120S for 2004 and 2005. Therefore, the petitioner's net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2004, and against the proffered wage in 2005.

- In 2001, the Form 1120S stated net current assets of \$21,570.00.
- In 2002, the Form 1120S stated net current assets of \$24,692.00.
- In 2003, the Form 1120S stated net current assets of \$25,899.00.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$25,417.60. For the years 2002 and 2003, the petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 2002 and 2003.<sup>9</sup>

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<sup>9</sup> The director determined that the petitioner's bank statements are not reliable evidence of a petitioner's ability to pay where income tax returns are available. This office agreed, stating in our September 29, 2006 decision that the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. However, this office considered the totality of the circumstances under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in our determination of the petitioner's ability to pay the proffered wage. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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 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 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. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. In our previous decision, we considered the number of years the petitioner has been in business, that the petitioner has demonstrated its ability to pay the proffered wage for two years, that it is not significantly below the wage in the third year, that the petitioner demonstrated partial payment to the beneficiary, that the petitioner's federal tax returns do not exhibit substantial liabilities, and that the petitioner's bank statements showed monthly balances ranging from \$4,834.00 to \$13,454.00. However, the petitioner has not established the historical growth of its business since 2000, the occurrence of any uncharacteristic business expenditures or losses in 2001, or the petitioner's reputation within its industry. In fact, the petitioner's gross receipts declined between 2001 and 2004. We note that the petitioner paid minimal salaries of \$10,083.00 in 2001, \$12,630.00 in 2002, \$14,487.00 in 2003, \$13,299.00 in 2004 and \$8,386.00 in 2005, and that it employed only 6 employees in 2001, 4 employees in 2002, and 3 employees in 2003 and 2004. Further, the petitioner did not submit Schedule L to its IRS Forms 1120S for 2004 and 2005, which would have further established its ability to pay the proffered wage. Thus, upon reassessment of the totality

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The director's decision on December 29, 2006 is affirmed. The petition remains denied.

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of the circumstances in this individual case, and in light of the evidence submitted by the petitioner in connection with the Notice of Certification, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.