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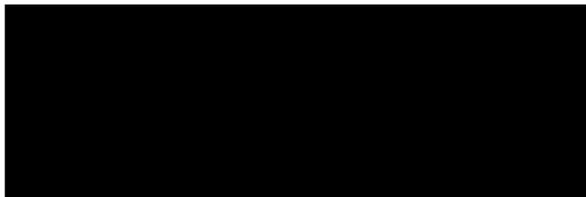
FILE: [REDACTED]
SRC 06 087 52253

Office: TEXAS SERVICE CENTER Date: SEP 28 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, Texas 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 cafeteria/restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant 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 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 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 March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.25 per hour, which equals \$33,800 per year.

The Form I-140 petition in this matter was submitted on January 24, 2006. On the petition, the petitioner stated that it was established on April 1, 2001 and that it employs 27 workers. On the Form ETA 750, Part B, signed by the beneficiary on March 19, 2001, the beneficiary claimed to have worked for the petitioner since February 2000. The visa petition indicates that the petitioner would employ the beneficiary in Houston, Texas and the Form ETA 750 indicates that the petitioner would employ the beneficiary in Pasadena, Texas.¹

¹ Because Houston and Pasadena are both in Harris County, Texas the labor certification issued for employment in Pasadena is valid for employment in Houston.

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.²

In the instant case the record contains (1) the 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns of [REDACTED] (2) unaudited balance sheets and income statements for 2001, 2002, 2003, and 2004 for La Bell Cafeteria Inc, and (3) monthly statements pertinent to a bank account in the name of [REDACTED]. 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 tax returns of [REDACTED] show the address of the petitioner, [REDACTED]. An April 26, 2006 letter from counsel refers to them as the tax returns of [REDACTED] without commenting on the name discrepancy. Although no evidence addresses this proposition explicitly, this office believes that La [REDACTED] Inc operates the petitioning business, doing business as [REDACTED]. This office believes that the tax returns submitted are the returns of the petitioner.

The petitioner's tax returns show that it is a corporation, that it incorporated on March 29, 2001, and that it reports taxes pursuant to the calendar year. The 2001 return covers the period from March 29, 2001 to December 31, 2001.

During 2001 the petitioner declared a loss of \$10,998 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$23,087 and current liabilities of \$20,000, which yields net current assets of \$3,087.

During 2002 the petitioner declared a loss of \$37,570 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 declared a loss of \$8,835 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 2004 the petitioner declared a loss of \$30,009 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.

The director denied the petition on May 31, 2006.

On appeal, counsel noted, correctly, that the petitioner is not obliged to show that it has employed the beneficiary. Counsel further stated that, therefore, pursuant to 8 C.F.R. § 204.5(g)(2), evidence pertinent to

² 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).

wages the petitioner has previously paid to the beneficiary is irrelevant to the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Later in the same brief counsel stated that the wages paid to the beneficiary are relevant, but not the sole indicator of ability to pay the proffered wage. This office concurs with the latter position espoused by counsel, as is explained below.

Counsel noted that a company might be able to pay additional wages notwithstanding that it reported a loss for tax purposes. Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petition may be approved notwithstanding that the petitioner had low profits or declared a loss during a given year. Counsel also cited non-precedent decisions of this office for the proposition that Citizenship and Immigration Services (CIS) must review a company's gross receipts, assets, cash on hand, and deposits in the determination of its ability to pay the proffered wage.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that 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, in this matter counsel has made no reference to the reasoning of that case and counsel's citation of a non-precedent decision is therefore of no effect. The relevant statistics from the petitioner's tax returns are addressed below.

Counsel is correct that the petitioner is not obliged to show that it has employed the beneficiary. Whether the petitioner has employed the beneficiary during the salient years is nevertheless relevant to the petitioner's ability to pay the proffered wage during those years. If the petitioner can show that it paid the beneficiary the proffered wage during a given year then it has demonstrated the ability to pay it during that year. If it can show that it paid some portion of the proffered wage during a given year then it has shown the ability to pay that portion of the proffered wage. This principle was correctly stated in the decision of denial.

Counsel's reliance on unaudited financial records 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. Unaudited financial statements are the representations of management. 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.

Counsel's reliance on the bank statements in this case 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.³

³ 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

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel asserts that the petitioner's tax returns do not show the true financial condition of the corporation. That assertion, however, neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612, is misplaced. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years and only 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 also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, 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 *Sonogawa* 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 record contains no evidence that the petitioner has ever posted a profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001, 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.

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.

§ 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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, although the beneficiary claims to have worked for the petitioner since February 2000, the record contains no evidence that the petitioner paid any wages to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). *See also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that 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.

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 found at lines 1(d) through 6(d). Year-end current liabilities are

typically⁴ 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 \$33,800 per year. The priority date is March 27, 2001.

During 2001 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 \$3,087 in net current assets. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

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 submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 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 submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 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 submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 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 record suggests additional issues that were not addressed in the decision of denial.

The petition in this matter was submitted on January 24, 2006. On that date the petitioner's 2005 tax return may have been unavailable. On February 1, 2006 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

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

beginning on the priority date, including its 2005 tax return. The petitioner responded to that request for evidence on April 27, 2006, and the record is deemed to have closed then. On that date the petitioner's 2005 tax return was due and should have been available, absent an extension. The petitioner did not provide that return, nor a reason for that omission, notwithstanding that the request for evidence specifically requested it.

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). The petition should have been denied on this additional basis.

Further, the petitioner stated on the Form I-140 visa petition that it was established on April 1, 2001. Its Form 1120, U.S. Corporation Income Tax Returns state that it incorporated on March 29, 2001. It submitted Form ETA 750 to DOL on March 27, 2001, however, and the beneficiary claims to have worked for the petitioner since February 2000.

The petitioner could not, of course, have employed the beneficiary or anyone else prior to its existence. Further, prior to its existence it would clearly not have qualified as an employer within the meaning of 8 C.F.R. § 204.5(l) and would not have been entitled to file a Form ETA 750 Application for Alien Employment Certification.

The possibility exists that the statement on the Form I-140 that the petitioner was established April 1, 2001 indicates that on that date the newly-created instant petitioner, [REDACTED] took over operation of the petitioning business from some other entity. This possibility is supported by the fact that bank accounts prior to that date were held in the name, "[REDACTED]" which suggests that the petitioning business was previously held as a sole proprietorship.

If the petitioning business changed hands since the initial submission of the Form ETA 750, then the substituted employer must show that it is entitled to rely on the labor certification approved for use by the previous owner of the business. The substituted employer must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

The substituted petitioner is further obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Because the evidence does not demonstrate that the instant petitioner is entitled to rely on the approved labor certification in this case, the decision should have been denied on this additional basis.

Further still, in the February 1, 2006 request for evidence the director requested copies of W-2 forms showing the wages the petitioner paid to all of its employees during the salient years. In a letter dated April 21, 2006 the petitioner's owner stated that, pursuant to the advice of his accountant, he declined to provide those forms.

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). The advice of the petitioner's accountant does not excuse the petitioner's failure to provide the requested evidence. The petition should have been denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also 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 petition will be denied for all four of the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.