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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 24 2008
SRC 03 008 52141

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

The nature of the petitioner's business is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese style food cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated October 26, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either 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, accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification certified by 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 13, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2001, 2002, 2003 and 2004; a Citizenship and Immigration Services (CIS) form G-325A prepared by the beneficiary as dated October 1, 2002; a letter dated April 24, 2006, from [REDACTED] president of Sushi Japan Inc. of Austin, Texas, offering the beneficiary employment;³ a letter dated July 11, 2006, from [REDACTED], president of the petitioning corporation, offering the beneficiary employment; a copy of the beneficiary's biographic page from his People's Republic of China passport; the beneficiary's CIS Form I-94; a letter dated August 21, 2006 from prior counsel; an explanatory letter from the petitioner's accountant dated August 21, 2006 with an attachment; Employers Quarterly Federal Tax Form (Form-941) statements for 2001, 2002, 2003, 2004 and 2005; a Form TWC-3 (Texas Workforce Commission Employers Quarterly Report) for the petitioner dated April 27, 2006 with employee listings; Wage and Tax Statements (W-2) for the beneficiary for 2003, 2004, 2005 and copies of hand written pay statements; the petitioner's Article of Incorporation and its assumed name certificate; the petitioner's Yellow Pages listing; the petitioner's lease for its business premises; an invoice from a newspaper, the Austin Chronicle, to the petitioner; the petitioner's restaurant menu; and an employment reference letter dated August 1, 2002, made on behalf of the beneficiary.

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. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$417.00 and \$1,302,473.00 respectively. On the Form ETA 750, signed by the beneficiary on April 9, 2001, the beneficiary did claim to have worked for the petitioner as of December 2000.

On appeal, the petitioner asserts that the beneficiary's actual wage was above the proffered wage. The petitioner claims to have posted marginal revenues in its first year and a loss for the second but it has posted

¹ It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ This is not the petitioner.

profits for the past four years. Finally, the petitioner claims to require the services of the beneficiary because he has contributed to the petitioner's success.

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, 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 (BIA 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. Counsel submitted W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2001, 2002, 2003, 2004 and 2005 in the amounts of \$10,200.00, \$19,254.00, \$20,709.00, \$14,818.00 and \$16,500.00 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$20,800.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, \$10,600.00, \$1,546.00, \$91.00, \$5,982.00, \$4,300.00 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered yearly wage from the priority date.

The petitioner asserts that the beneficiary's actual wage was above the proffered wage. According to an August 17, 2006 letter from the petitioner, the W-2 statement for 2001 does not reflect the actual wages paid the beneficiary since in that year the beneficiary was partly paid in cash, and, from 2004 to June 2006 the beneficiary only worked part-time and he did not earn a full year's wages. Although copies of pay stubs for 2001 were submitted, there is no explanation why these wages were not included on the beneficiary's 2001 W-2 statement. The cash payments are not amendable to verification since their total is according to the petitioner not included on the 2001 W-2 statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, while part-time employment may explain why the beneficiary was earning less than the prevailing wage, the fact that the beneficiary was working part-time does not suggest other funds were available to pay the difference between wages paid and the proffered wage for full-time employment.

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. *See Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir.

1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's attorney/accountant's contention (in his letter dated August 21, 2006), that the petitioner's depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

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

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S⁴ stated net income (Line 21) of \$417.00.
- In 2002, the Form 1120S stated net income of <\$112,859.00>⁵.
- In 2003, the Form 1120S stated net income of <\$1,458.00>.
- In 2004, the Form 1120S stated net income of \$88,612.00.

⁴ 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. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Since the proffered wage is \$20,800.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, and 2003, but it did have sufficient net income to pay the proffered wage in 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. 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. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 net current assets during 2001, 2002, 2003, and 2004 were <\$5,236.00>, <\$20,786.00>, <\$28,112.00>, and <\$61,661.00> respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, 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 through 2001, 2002 and 2003. As the beneficiary has been working for the petitioner since 2001, it cannot be considered that the beneficiary's employment might increase the petitioner's income.

The petitioner's attorney/accountant stated in his letter dated August 21, 2006, that one unprofitable year will not cause the "petition to fail." However the period 2001 through 2003 was an unprofitable period for the petitioner. According to the petitioner's tax returns in 2001, 2002 and 2003, the petitioner had losses or a marginal profit during this period. During this time, the petitioner's nominal net income or net losses were insufficient to pay the proffered wage even with the addition of the wages paid to the beneficiary. Also according to petitioner's attorney/accountant, depreciation should not be deducted as it is on the tax returns submitted, but instead depreciation should be considered an asset and source of cash. As already stated, this is an erroneous contention.

Matter of Sonogawa, 12 I&N Dec. at 612, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. 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

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the period 2001 through 2003 was an uncharacteristically unprofitable period for the petitioner.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for the years 2001, 2002 and 2003.

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 appeal is dismissed.