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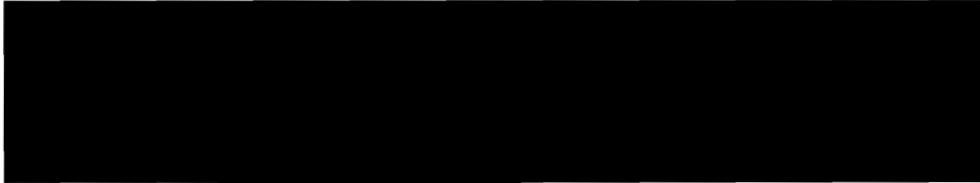
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

MAR 26 2008

EAC 06 065 51603

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 preference visa petition was denied by the Director, Vermont Service Center, and 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 specialty cook. As required by statute, an ETA Form 9089, Application for Permanent 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.

On appeal, the petitioner through counsel¹ submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

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).

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 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 ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on October 28, 2005. The proffered wage as stated on the ETA Form 9089 is from \$12.00 per hour to \$13.00 per hour, which, at \$13.00 per hour amounts to \$27,040 per year. Part K of the ETA Form 9089, signed by the beneficiary on December 22, 2005, does not indicate that he has worked for the petitioner.

¹ The petitioner signed the notice of appeal. Counsel subsequently submitted additional evidence and correspondence. Counsel will be viewed as representing the petitioner on appeal.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on December 27, 2005, it is claimed that the petitioner was established on November 6, 2004 and currently employs four workers.

In support of its continuing financial ability to pay the certified wage of \$27,040 per year the petitioner provided a letter from its bookkeeper vouching for the petitioner's ability to pay the certified salary of \$27,040 and a copy of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2005. It indicates that the petitioner uses a standard calendar year to file its taxes. The return contains the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

	2005
Net Income ² (Form 1120-A)	-\$ 3,320
Current Assets (Part III)	\$ 15,688
Current Liabilities (Part III)	\$ 13,213
Net Current Assets	\$ 2,475

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Part III of its Form 1120-A. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 13 and 14. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on August 18, 2006, determining that the petitioner's 2005 federal tax return did not demonstrate its continuing ability to pay the proffered wage.³

On appeal, counsel submitted a copy of the petitioner's 2006 federal income tax return. It reflects the following:

	2006
Net Income (Form 1120-A)	-\$ 1,653
Current Assets (Part III)	\$24,411
Current Liabilities (Part III)	\$14,550
Net Current Assets	\$ 9,861

² For the purpose of this review, net income refers to the amount claimed on line 24 (taxable income before net operating loss deduction and special deductions) on Form 1120-A.

³ The director erred in his calculation of the petitioner's net current assets.

The argument provided on appeal consists of an assertion that the petitioner will be able to pay the proffered wage and that the beneficiary has the skill and experience that the petitioner needs. In support of the petitioner's ability to pay the proffered wage, counsel provides a letter, dated August 6, 2007, from [REDACTED] the petitioner's president. [REDACTED] states that the restaurant business is gradually growing but is able to pay the proffered wage. He expresses the hope that the progression will continue with the addition of the beneficiary's skill as a cook. Besides the petitioner's 2006 federal tax return, counsel also provides a copy of the petitioner's state and local quarterly sales and use tax return for the first two quarters of 2007. They show that the petitioner reported gross sales of \$59,854 and in the first quarter and \$62,426 in the second quarter.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and to evaluate the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record does not indicate that the petitioner has employed 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 the relevant period, CIS will next examine the net income (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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 or gross sales as set forth on quarterly sales and use tax returns as is advocated here. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In some cases, a petition's approval may be based on the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the approximately one year that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonogawa* had been in business for eleven years and had shown substantial potential for growth. In this case, the petitioner's two tax returns contained in the record each reflect very modest figures for net income and net current assets and do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The petitioner also suggests that the beneficiary's proposed employment may support the petitioner's increased revenue. No specific documentation has been provided to explain how the beneficiary's employment as a specialty cook will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. 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)).

In this matter, in 2005, neither the petitioner's net income of -\$3,320, nor its net current assets of \$2,475 demonstrates its ability to pay the proffered wage of \$24,960.

Similarly, in 2006, neither petitioner's \$1,653 reported as net income, nor its \$9,861 in net current assets could cover the certified salary and demonstrate the petitioner's ability to pay during that year. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.