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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 03 2008
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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, Nebraska Service Center, denied the preference visa petition. The matter is presently 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 line chef/Chinese specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2004 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes 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 November 6, 2006 denial, 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 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Service].

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 U.S. Department of Labor. 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 as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant matter, the Form ETA 750 was accepted on December 29, 2004. The proffered wage as stated on the Form ETA 750 is \$22,850 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence submitted on appeal includes counsel's brief. Counsel also submits a copy of the petitioner's January 2005 bank statement from Business Enterprise Checking that indicates the petitioner had an ending balance of \$15,856.42. Counsel also submits copies of the petitioner's monthly bank statements from the same bank from January 2005 to December 2005. Finally counsel submits a letter dated November 29, 2006 from Mr. [REDACTED], C.P.A., C.V.A, K2S, PC, Erie, Pennsylvania. Mr. [REDACTED] identifies himself as the petitioner's accountant since March 1, 2001 and states that in his estimation, the petitioner has the financial ability to pay the proffered wage. [REDACTED] continues that the sole shareholder, [REDACTED] acquired 100 per cent of the common stock of the petitioner on March 1, 2001, and that previously the petitioner had had cumulative net losses totaling approximately \$210,000 and the liabilities of the petitioner exceeded its assets by approximately \$137,000. Mr. [REDACTED] points out that since [REDACTED] acquired the petitioner with gross receipts of \$622,676, the petitioner's gross receipts have been \$780,651 in 2002, \$829,344 in 2003, \$874,382 in 2004 and \$825,235 in 2005. He also notes that the employee compensation has remained relatively fixed from 2001 to 2005, despite the increase by more than approximately \$200,00 in gross receipts.

[REDACTED] states that since the acquisition of the petitioner on March 1, 2001, the petitioner's cumulative net losses total approximately \$179,000 with the loss from March 1, 2001 to December 31, 2001 being approximately \$135,000. Mr. [REDACTED] adds that the 2001 loss was attributed to numerous start-up costs to reopen the petitioner, and that the petitioner's depreciation for the period from 2002 to 2005 is approximately \$92,000 which is a non-cash expense. Mr. [REDACTED] also states that as of December 31, 2005, the petitioner's liabilities exceeded its assets by approximately \$40,000, a reduction of approximately \$97,000 since the 2001 date of acquisition. The petitioner's accountant finally states that the petitioner is current with respect to payment of all liabilities including wages and related payroll taxes, and that petitioner desires to hire a fulltime Asian specialty chef. Mr. [REDACTED] adds that in the past the petitioner was open only for dinner but is now open for lunch and dinner, which will increase gross receipts. Mr. [REDACTED] concludes by stating that in his estimation the petitioner's additional sales and gross profit will more than over the proffered wage of \$22,850. The record also contains the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2004 and 2005.

On appeal, counsel asserts that the petitioner only needs to show its ability to pay the beneficiary the proffered wage as of the date the ETA Form 750 was filed, namely December 29, 2004. Counsel states that based on three days work, the petitioner only has to establish its ability to pay \$187.81² in tax year 2004. Counsel states

¹ The submission of additional evidence on appeal is allowed by the instructions to the 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).

² Counsel calculated this figure by dividing the beneficiary's annual wage of \$22,850 by 365 calendar days and then multiplying by 3. The AAO would divide the beneficiary's annual wage by 2080 work hours, which produces an hourly wage of \$10.98. Based on the beneficiary's work schedule listed on the ETA Form 750, if

that the petitioner's depreciation for tax year 2004, even after considering the petitioner's \$16,835 ordinary business loss still leaves \$556 available to cover the \$187.81 salary for tax year 2004.

Counsel then reiterates [REDACTED] comments with regard to start-up costs in 2001, and the increase of the petitioner's gross receipts from 2001 to 2005. Counsel also notes that the director rather than relying solely on a comparison of the petitioner's assets and liabilities as shown on the petitioner's tax return which is done for tax purposes, should rather take into consideration the totality of the petitioner's financial circumstances.

Counsel then states that the petitioner's accountant stated that depreciation is not a cash expense, and that such monies are available and may be reflected in a business's cash flow. Counsel then states that the petitioner in fact had sufficient cash on hand throughout 2005 to pay the proffered wage every pay period. Counsel notes that the petitioner's banking account statements submitted to the record show that the petitioner's lowest checking account balance was never less than \$8,501.08 and that the lowest balance in the entire year on any one day was never less than \$2,399.32. Such cash was more than sufficient to cover the beneficiary's monthly wage, which counsel describes as \$1,904.17.³

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$900,000, and to currently employ twenty-five workers. On the Form ETA 750, signed by the beneficiary on December 24, 2004, the beneficiary did not claim to have worked for the petitioner.

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 (Reg. Comm. 1967).

With the initial I-140 petition and on appeal, the petitioner submitted its bank checking account statements for two accounts to the record. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the

the beneficiary worked Thursday, December 29, 2004, Friday, December 30, 2004, and Saturday, December 31, or 23.5 hours, the beneficiary would have earned \$258.03 in those three days.

³ Counsel divided the beneficiary's annual salary of \$22,850 by twelve months to arrive at this monthly wage.

petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertion that the petitioner's depreciation and cash on hand can be utilized to establish the petitioner's ability to pay the proffered wage is also misplaced. The AAO will discuss the role of depreciation when it analyzes the petitioner's net income and will examine cash on hand when it analyzes the petitioner's net current assets.

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. Neither the petitioner nor the beneficiary claimed that the petitioner employed the beneficiary. Therefore the petitioner cannot establish its ability to pay the proffered wage based on the beneficiary's wages. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$22,850 from either its net income or net current assets.

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, contrary to counsel's assertion, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 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 the 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date:

- In 2004, the Form 1120S stated a net income⁴ of -\$17,335.
- In 2005, the Form 1120S stated a net income of \$7,876.

Therefore, for the years 2004 to 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$22,850. On appeal, counsel suggests that the petitioner only has to establish its ability to pay the proffered wage for the last three days of the tax year. The AAO notes that on appeal counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Further, even if the AAO only considered the last three days of the 2004 priority year as the period of time for which the petitioner has to establish its ability to pay the proffered wage, based on its federal tax return, the petitioner did not have sufficient net income to pay this three day wage.

If the net income the petitioner demonstrates it had available during that 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, including real property that counsel asserts should be considered. 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.⁵ 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.

⁴Where 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 IRS 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, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its Schedule K for tax years 2004 and 2005, the petitioner's net income is found on Schedule K, line 17 for tax years 2004 and 2005.

⁵According 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.

- The petitioner's net current assets during 2004 were -\$67,779.
- The petitioner's net current assets during 2005 were -\$53,296.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner identified on the instant I-140 petition 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. On appeal, counsel refers to the petitioner's depreciation expenses as reflected in the petitioner's cash flow; however, as stated previously, the AAO does not consider the petitioner's depreciation as part of the petitioner's net income. Nor does the AAO consider the petitioner's monthly bank balances as evidence of the petitioner's ability to pay the beneficiary's monthly wage.

On appeal, counsel asks that the petitioner's totality of circumstances be examined in determining the petitioner's ability to pay the proffered wage. As stated previously, 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).

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. In *Sonogawa*, the petitioner had additional costs during the year the petition was filed, while the instant petitioner experienced additional costs in 2001 when the petitioner's current owner acquired the petitioner. The AAO also notes that although the petitioner's accountant provides figures for the petitioner's gross receipts from 2001 to 2005, and states that the petitioner's employee compensation has remained fixed from 2001 to 2005, the petitioner provides no further evidentiary documentation to further substantiate the petitioner's accountant's statements. 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)). While the petitioner's accountant also

states that the petitioner's liabilities have decreased over the period of time in question, this issue would not be sufficient to establish the petitioner's ability to pay an additional salary of \$22,850.

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

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.