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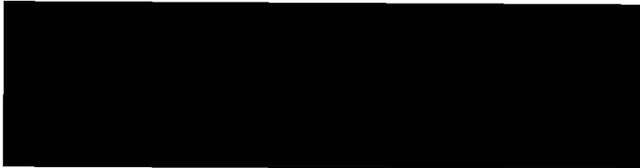
Date: NOV 25 2008

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner, Rayo Inc. dba Pizza Garden, Inc., is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. 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 demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly. The petitioner filed a motion to reopen which was granted by the director. The director subsequently found that the grounds for the denial of the petition had not been overcome and affirmed the denial.

On appeal, the petitioner, through counsel, maintains that it has had the continuing 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 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 or seasonal 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 that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 7, 2002. The proffered wage is set forth as \$13.50 per hour, which amounts to \$28,080 per annum. The beneficiary signed Part B of the Form ETA 750 on March 25, 2002, indicating that he had worked for the petitioner since September 1990 to the present (date of signing).

It is noted that Part 5 of the Immigrant Petition for Alien Worker (I-140) indicates that the petitioner claims that it was established in 1995, thus raising a question as to the commencement of the beneficiary's employment with the petitioner, which, as noted above, is claimed to have started in September 1990 as stated on the Form ETA 750B. Further, Part 3 of the I-140 states that the beneficiary's date of arrival in the U.S. was June 6, 2000. No lapses of employment with the petitioner was noted on the Form ETA 750B, which was signed on March 25, 2002 and claimed employment from September 1990 to the present. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It is additionally noted that the petitioner named on the I-140 is the same name as that given on ETA 750. The 2002-2006 tax returns submitted to the record, although containing the same tax identification number and address as is set forth on the I-140, indicate that the filing entity, "D & M Pizza Garden," was started on January 1, 2002 and is structured as a domestic general partnership. Neither of the corporate names appearing as the I-140 petitioner or the employer identified on the labor certification is mentioned in the tax returns. A complete explanation is needed as to why the financial documentation for D & M Pizza Garden, a general partnership started on January 1, 2002, should be considered as relevant to the ability to pay the proffered wage by the I-140 petitioner, [REDACTED] c. established in 1995 as claimed on the I-140. Such evidence should have included such documents as copies of the creation or dissolution of all of the corporate and partnership entities which have operated the restaurant as well as copies of any executed agreements of transfer, copies of the pertinent UCC, fictitious trade name and other state or municipal records that clearly establish the history and transfer of ownership of the restaurant by all of the entities contained in the record in order to determine whether a successor-in-interest to the ownership of the restaurant has occurred. Although the director's request for evidence did not articulate specific items of proof to be submitted related to this issue, it remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. See *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). The petitioner's failure to clarify these obvious inconsistencies renders the petition ineligible for approval on this 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). That said, this decision will also be rendered on a review of the financial documentation submitted in support of the petitioner's ability to pay the proffered wage.

On Part 5 of the I-140, which was filed on April 11, 2006, the petitioner also claims that it has a gross annual income of \$178,613 and has seven employees.

In support of the petitioner's ability to pay the proffered wage of \$28,080 per year and in response to the director's two requests for additional evidence issued on August 9, 2006 and on November 27, 2006, the petitioner provided copies of its 2002, 2003, 2004, 2005 and 2006 Form 1065, U.S. Return of Partnership Income filed by D & M Pizza Garden. They indicated that the D & M Pizza Garden filed the returns using a

standard calendar year. They also indicate that the tax return(s) for 2002, 2003, and 2004 represented amended returns, each dated September 29, 2005. The tax returns also contain the following information:

	2002	2003	2004	2005	2006
Net Income ¹	\$32,105	\$4,677	\$3,704	-\$ 5,649	\$29,170
Current Assets (Sched. L)	\$16,210	\$20,887	\$30,170	\$ 6,513	\$23,521
Current Liabilities (Sched. L)	\$ -0-	\$ -0-	\$ -0-	\$12,162	\$ -0-
Net Current Assets	\$16,210	\$20,887	\$30,170	-\$ 5,649	\$23,521

As noted in the above table, besides net income, 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.² It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year 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 petitioner additionally submitted a Form 1099, Miscellaneous Income for 2004, reflecting compensation of \$3,704 that D & M Pizza Garden paid to the beneficiary in that year. It further provided copies of Wage and Tax Statements for 2004 and 2005 in response to the director's request, but they contained no employee name. No forms W-2s issued to the beneficiary were provided for any year. A copy of the beneficiary's individual tax return for 2005 was supplied but it was not supported by either a Form 1099 or a W-2 issued by any entity to the named beneficiary.

The director denied the petition on January 18, 2007. Based on his review of the petitioner's net income and net current assets as set forth on the petitioner's tax returns, as well as the petitioner's reported net income, the director determined that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage as of the priority date.

¹For a partnership, where a partnership's income is exclusively from a trade or business, Citizenship and Immigration Services (CIS) considers net income to be the figure shown on Line 22 of the Form 1065. However, where a partnership 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 page 4 of the Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. In the instant case, the petitioner's Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

² 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.

The petitioner filed a motion to reopen the director's denial of the petition, asserting that the director had issued the denial before the allotted time to submit additional evidence had expired in response to the director's second request for evidence. The director granted the motion and issued a decision on April 17, 2007. The director noted that the petitioner had responded to the request for the beneficiary's W-2s by stating that the 2004 and 2005 W-2s had been submitted but no 2002 or 2003 W-2s were available because the beneficiary had not filed his individual tax returns in 2002 or 2003. The director found that this explanation for the lack of W-2s to be inadequate and concluded that the motion to reopen failed to overcome the grounds for his initial denial of the petition and affirmed his previous decision.

On appeal, counsel resubmits copies of the tax returns and W-2s previously provided to the record. Counsel asserts that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), supports the approval of the petition. Counsel states that the petitioner had the ability to pay the proffered wage in 2002, 2004, and 2006. Counsel also asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and three other AAO cases from 2003, 2004 and 2005, supports the proposition that the petitioner's other circumstances may be considered to support its eligibility. He claims that as a small business, the petitioner's owners write off personal profits as business expenses and that the tax returns do not accurately reflect the petitioner's ability to pay the proffered wage. Counsel also relies on the fact that the petitioner has reported gross revenues exceeding \$150,000 for the 2002-2006 years and has been successfully run since 1995.

Even assuming that the tax returns and W-2s issued by the partnership of D & M Pizza Garden should be considered as those of the I-140 corporate petitioner, counsel's assertions are not persuasive. 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 stated above, the W-2s submitted to establish that the petitioner paid the beneficiary wages in 2004 and 2005 will not be considered as they contain no name. The only evidence relevant to payment of compensation is the Form 1099 issued to the beneficiary in 2004, reflecting that the \$3,704 paid was \$24,376 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, CIS will next examine the net income figure (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)); *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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, *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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, counsel is correct that the ability to pay the proffered wage of \$28,080 was established in 2002, 2004 and 2006 by the submitted tax returns. In 2002, as set forth above, the net income of \$32,105 was sufficient to cover the proposed wage offer. In 2004, the net current assets of \$30,170 was enough to pay the certified wage of \$28,080. Similarly, in 2006, the reported net income of \$29,170 was sufficient to pay the proffered wage.

However, in 2003, the proposed wage of \$28,080 could not be covered by either the \$20,887 shown as net current assets or the declared net income of \$4,677.

In 2005, neither the -\$5,649 was enough to cover the proffered wage, nor the reported -\$5,649 in net income.

Relevant to the petitioner's other financial circumstances as asserted by counsel, it is noted that the three AAO decisions cited by counsel are not shown to be precedent decisions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Similarly, with regard to the *Yates Memorandum*, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.³ It does not supersede the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time. As explained above, the payment of wages by the petitioner to the beneficiary has not been credibly established.

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* 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 petitioner had 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. In this case, 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). The application of *Matter of Sonegawa* is not applicable in this case where no unique business circumstances or other reputational factors are present in this case such as those discussed in *Sonegawa*. Counsel's reliance on the petitioner's gross revenue as reflected by the submitted tax returns as exceeding \$150,000 in each of the 2002 through 2006 years is not sufficient in light of the reported net income of the business, which reached a high of \$32,105 in 2002 and failed to exceed \$6,000 in the next three years, only recovering to \$29,170 in 2006. A general assertion that small business owners write off profits as expenses in order to avoid excessive taxation is also not sufficient. If the petitioner sought to avoid reliance on tax returns, it could have elected to submit audited financial statements or annual reports as provided in the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not demonstrated that such unusual circumstances exist in this case, which is analogous to the facts set forth in *Matter of Sonegawa*.

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. The petition will be denied for 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.

ORDER: The appeal is dismissed.