U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-02-009-54019 Office: VERMONT SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
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 an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulations 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. 204.5(d). The petition's priority date in this instance is August 8, 1997. The beneficiary's salary as stated on the labor certification is $18.89 per hour or $34,380 per year.

With the petition, counsel submitted copies of the petitioner's1997 through 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for 1997 reflected gross receipts of $25,024; gross profit of $13,210; compensation of officers of $4,800; salaries and wages paid of $9,828; and an ordinary income of -$10,776. Part III reflected current assets of -$5,063, current liabilities of $37,575 and net current assets of -$42,620. The tax return for 1998 reflected gross receipts of $230,497; gross profit of $160,705; compensation of officers of $29,200; salaries and wages paid of $62,014; and an ordinary income of $2,334. Schedule L reflected current assets of $10,677, current liabilities of $5,275 and net current assets of $5,402.

The tax return for 1999 reflected gross receipts of $301,512; gross profit of $200,668; compensation of officers of $22,800; salaries and wages paid of $72,156; and an ordinary income of $3,879. Schedule L reflected current assets of $18,591, current liabilities of $47,694 and net current assets of -$29,103. The tax return for 2000 reflected gross receipts of $365,562; gross profit of $218,094; compensation of officers of $37,200; salaries and wages paid of $74,748; and an ordinary income of $7,796. Schedule L reflected assets of $39,997, liabilities of $13,673 and net current assets of $26,304.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), November 26, 2001, the director required additional evidence to establish the

petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE specified the petitioner should submit Form W-2 Wage and Tax Statement for the beneficiary for 2000, establishing how much the petitioner paid the beneficiary during each of those respective years.

Counsel submitted a letter from the petitioner's president indicating that the beneficiary's employment with the petitioner ceased in September 1997.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel states that the petitioner's tax returns reveal sufficient assets to pay the proffered wage. The Schedules L show that net current assets (current assets less current liabilities) for 1997 through 2000 were $42,620, $5,402, $29,103, and $26,304, respectively, less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO will next examine the petitioner's net income figure as 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. *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. Tex. 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). After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The proffered wage in this matter is $34,380. The petitioner's ordinary income for the years 1997 through 2000 is -$10,776, $2,334, $3,879, and, $7,796, respectively. The petitioner's net current assets for the years 1997 through 2000 were -$42,620, $5,402, $29,103, and, $26,304, respectively. The petitioner could not pay the proffered wage out of these amounts.

Counsel's reliance on *Matter of Sonegawa* 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 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, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 1997 through 2000 were uncharacteristically unprofitable years for the petitioner.

After a review of the evidence it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.