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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 0 9 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 a Spanish Mediterranean restaurant. It seeks to employ the beneficiary permanently in the United States as a Spanish cuisine chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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, counsel asserts that the director failed to consider all the evidence in concluding that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered salary.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $12.90 per hour, which amounts to $26,832 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since November 2000.

Within the petition, filed on October 29, 2002, the petitioner claims to have been established in 1995 and to currently employ nineteen workers. It is noted that the record contains a previous preference visa petition and supporting documentation filed by the petitioner in March 2002, on behalf of the same beneficiary.[1] In the instant case, in support of the petitioner's ability to pay the beneficiary's proposed wage offer, the petitioner initially submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2000. It shows that the petitioner paid $2,450 in wages to him. The petitioner also submitted copies of unaudited financial statements

[1] The record shows that the director denied it on August 14, 2002. No appeal was taken.

under the name of " as well as two copies of the petitioner's commercial checking account statements from Hudson United Bank, dated April 30, 2001 and December 31, 2001, respectively. Accompanying these documents is a letter, dated October 12, 2002, from , identified as a partner on the ETA 750B. Referencing the petitioner's income tax returns previously submitted in support of its earlier petition on behalf of the beneficiary, ates that if depreciation and amortization were considered, as well as amounts due to LLC members, the petitioner's cash flow in 2000 and 2001 would show substantial increases.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 10, 2003, the director requested additional evidence pertinent to that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that evidence of its ability to pay the proffered wage shall be either annual reports, federal tax returns, or audited financial statements. The director advised the petitioner that non-cash expenses, such as amortization or depreciation would not be considered.

In response, the petitioner, through counsel, provided copies of its commercial checking account statements from Hudson United Bank, covering the period as of April 30, 2001 through November 30, 2003. The petitioner also submitted copies of its Form 1065, U.S. Return of Partnership Income for 2001 and 2002. The 2001 tax return shows that the petitioner declared a net income of -$96,357. Schedule L of the tax return shows that the petitioner had $12,928 in current assets and $145,145 in current liabilities, resulting in -$132,217 in net current assets. The 2002 tax return shows that the petitioner reported -$68,646 in net income. Schedule L reflects that the petitioner had $9,644 in current assets and $195,639 in current liabilities, yielding -$185,995 in net current assets. Besides net income, Citizenship and Immigration Services (CIS) will consider a petitioner's net current assets as an alternative method of demonstrating a petitioner's ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] The year-end current assets and current liabilities are shown on Schedule L. If a 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.

In addition, counsel provided a copy of a W-2, issued to an unrelated employee, showing that the petitioner paid approximately $20,000 in wages to him in 2001. Counsel's transmittal letter, submitted with the petitioner's response to the director's request for additional evidence, states that this employee, a former chef, had agreed to remain until a new chef could be located, but has since left the petitioner's employ. Counsel suggests that these funds would have been used to pay the beneficiary.

The director denied the petition on March 31, 2004, following consideration of the petitioner's relevant tax returns, bank statements, and the claim of using a departing chef's salary. The director concluded that the evidence failed to demonstrate the petitioner's continuing ability to pay the proffered wage.

On appeal, counsel asserts that the director failed to consider all relevant factors and failed to follow the principles set forth in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). The notice of appeal, filed April 16, 2004, indicates that counsel will be submitting a brief and/or evidence to the AAO within thirty days. Nothing further has been received to the record.

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[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

At the outset, it is noted that the various unaudited financial statements submitted under the name of DBA Legend Pizza will not be considered, as the petitioner has provided no competent independent evidence establishing that this entity is connected to the petitioner or to resolve the discrepancy in names. *See Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

AAO further notes that counsel's reliance on the petitioner's bank account statements is misplaced. 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. Bank statements show the amount in an account on a given date and do not reflect a complete accounting of other encumbrances that may affect a petitioner's ability to pay a proposed wage. It is also noted that to the extent the bank statements cover the same period as the information contained in the tax returns, there is no proof that they somehow represent additional funds beyond those reflected in the tax returns.

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. To the extent that a petitioner has paid wages to a beneficiary, consideration will be given to the amount of wages paid. If the petitioner has failed to pay the full proffered wage to a beneficiary, but the difference between the actual wages paid and the proffered wage can be covered by either the petitioner's net income or net current assets, the petitioner's ability to pay the full proffered wage may be demonstrated for a given period. For example, in this case, as noted by the director, the documentation filed in support of the petitioner's March 2002 petition included a 2001 W-2 issued to the beneficiary. It shows that the petitioner paid $18,650 in wages to him, or $8,182 less than the proffered wage. This shortfall could not be covered by either the petitioner's net income of -$96,357 or its net current assets of -$132,217, as set forth in its 2001 tax return.

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. *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). 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.

In this case, as noted above, neither the petitioner's net income, nor its net current assets in either 2001 or 2002, provided sufficient funds to cover the shortfall between the proffered wage and the actual wages paid to the beneficiary.

Counsel's claim that the beneficiary was intended to replace the departed chef making $20,000 per annum, is also not persuasive in view of that the W-2s show that the beneficiary began working for the petitioner in 2000 and,

according to the records provided, both apparently continued working for the petitioner through 2001. Moreover, counsel's assertions in this regard cannot constitute evidence.[3] *See Matter of Obaigbena,* 19 I&N N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

Counsel is correct that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. *Sonegawa,* however, relates 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 *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, two tax returns have been submitted as evidence of the petitioner's ability to pay the beneficiary's proffered annual salary of $26,832. The evidence does not show that unusual circumstances exist in this case, which parallel those in *Sonegawa,* or that a framework of profitable years has been established by two tax returns showing net income of -$96,357 and -$68,646, respectively.

Accordingly, based on the evidence contained in the record and the foregoing discussion, the AAO cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition. As such, the petitioner's appeal does not overcome the director's denial as set forth in his decision of March 19, 2004.

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.

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[3] It is also noted that CIS electronic records reveal that the petitioner had filed another petition for a different beneficiary in April 2002, with the same priority date as the instant case. This petition was approved on July 24, 2002.