U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 30 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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 submits a brief and additional evidence.

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 granting 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 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 August 2, 1996. The petitioner named on that Form ETA 750 is Dong Won Korean Restaurant. The proffered wage as stated on the Form ETA 750 is $369.95 per week, which equals $19,237.40 per year.

The instant case is the third petition submitted for the beneficiary. The other petitions were denied for abandonment. The evidence submitted in support of that petition, however, shall be considered.

The first petition for this beneficiary was submitted on May 11, 2000. With that petition, the petitioner submitted the 1996, 1997, and 1998 Schedules C, Profit or Loss from Business (Sole Proprietorship) of Nam H. Chung, the owner of East Garden Korean Restaurant. Those schedules show that Nam Chung received $13,105, $13,983, and $11,336, the profit of East Garden Korean Restaurant, during those years, respectively.

The address shown on those Schedules C for East Garden Korean Restaurant is the same as that of the petitioner, both of that first petition and of the current petition. The IRS employer identification number shown on those schedules is the same as that shown for the petitioner on the first petition, but not the same as

the IRS employer identification number shown on the current petition. The petitioner also submitted two of East Garden Korean Restaurant's unendorsed blank checks.

On August 28, 2000, the Vermont Service Center requested additional evidence of the petitioner's ability to pay the proffered wage. The petitioner did not respond and, on January 8, 2001, the petition was denied for abandonment.

The second petition by this named petitioner for the beneficiary was filed on April 2, 2001. On August 27, 2001, the Vermont Service Center issued a request for evidence in this matter. The Service Center requested that the petitioner provide additional evidence of its ability to pay the proffered wage. The petitioner was accorded 12 weeks during which to respond. According to the record of proceeding, no response was received within the allotted time. On January 8, 2002, the petition was again denied for abandonment.

The current petition was submitted on January 28, 2002. With that petition, counsel submitted the current petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $5,320 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $7,338 and current liabilities of $4,496, which yields net current assets of $2,842.

On May 28, 2002, the Service Center again requested additional evidence of the petitioner's ability to pay the proffered wage. The director requested evidence pertinent to 1996, 1997, 1998, 1999, 2000, and 2001, and copies of the petitioner's federal income tax returns for 1996, 1997, 1998, 1999, and 2001. That notice observed that although the 2000 return was previously submitted, it did not demonstrate the petitioner's ability to pay the proffered wage during that year. The Service Center requested that the petitioner provide additional evidence of its ability to pay the proffered wage during that year.

The petitioner was, again, accorded 12 weeks to respond. Again, no response was received within the allotted time.[1] Subsequently, on August 24, 2002, a response was received, apparently from counsel. The response states:

> Please be advised that the current Petitioner purchased all the assets of the Dong Won Restaurant Corporation as of November 14, 2000. 2000 corporate tax return shows wages paid $33,550. Since beneficiary's salary yearly is $19,237.00 and restaurant has three other employees, the Petitioner has sufficient funds to pay the proffered salary. The current petitioner was not in existence prior to November 14, 2000.

Counsel also submitted the 1996, 1997, 1998, 1999, 2000, and 2001 Form 1040 joint individual tax returns of the beneficiary and his spouse. Those returns show that the beneficiary received non-wage business income of between $19,100 and $20,800 during those years, but do not reveal the source of that income.

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[1] The petitioner's response was due on August 22, 2002.

On March 7, 2003, the Director, Vermont Service Center, denied the petition, finding that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.[2]

The instant appeal was submitted on April 7, 2003. In a brief filed to supplement that appeal, counsel stated that the petitioner's payroll expenses demonstrate its ability to pay the proffered wage. Counsel submits additional copies of the 1996 and 1997 Schedules C, Profit or Loss from Business, from Nam H Chung's individual tax return.

Counsel submits the 2001 Form 1120 U.S. Corporation Income Tax Return of Dong Won Restaurant Corp. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $2,458 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel argues that, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner need not necessarily demonstrate its ability to pay the proffered wage with profits.

Matter of Sonegawa, however, relates to petitions 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. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits might be overlooked in determining ability to pay the proffered wage. Here, the petitioner is a new business, and has never posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel also argued that the director failed to specifically identify the reason for denying the petition. The decision of denial, however, stated that the petitioner had failed to demonstrate its ability to pay the proffered wage in accordance with the requirements of 8 C.F.R. § 204.5(g)(2). The decision identified the reason for the decision of denial with sufficient specificity.

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[2] The Service Center might also have denied the petition based on the petitioner's failure to submit a timely response to the request for evidence.

In the August 24, 2002 response to the request for evidence, the petitioner stated that it did not come into existence until November 14, 2000, having purchased all of the assets of the restaurant from the previous owner. To demonstrate that it is a true successor-at-interest, Dong Won Restaurant Corporation must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the East Garden Korean Restaurant and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop,* 19 I&N Dec. 481 (Comm. 1981).

in its August 24, 2002 response, stated that it purchased all the assets of did not demonstrate, nor even allege, that it assumed all of s duties and obligations when ownership of the restaurant was transferred. As such rporation has not demonstrated that it is the original petitioner's successor-in-interest within the meaning of *Dial Repair Shop,* 19 I&N Dec. at 481.

Even if the had demonstrated that it was the true successor-in-interest, it would still have been obliged to demonstrate its predecessor's ability to pay the proffered wage beginning on the priority date and its own ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop,* 19 I&N Dec. at 481.

In determining a petitioner's ability to pay the proffered wage during a given period, CIS examines whether the petitioner employed 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. In the instant case, Corporation has not established that either it or its purported predecessor employed and paid the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). 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.

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, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is August 2, 1996. During 1996, the East Garden Korean Restaurant posted a profit of $13,105. That amount is insufficient to pay the proffered wage. Because the East Garden Korean Restaurant was then owned as a sole proprietorship, its owner was obliged to pay its debts and obligations out of his own

income and assets if necessary. Therefore, the income and assets of its owner may be counted as funds available to pay the proffered wage.[3] No evidence was submitted, however, that the owner of the restaurant had any other income or any assets with which to pay the proffered wage during 1996. The petitioner has submitted no evidence of any other funds available to pay the proffered wage during 1996. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1996.

During 1997, the made a profit of $13,983. That amount is insufficient to pay the proffered wage. No evidence was submitted that the owner of the restaurant had any other income or any assets with which to pay the proffered wage during 1997. The petitioner has submitted no evidence of any other funds available to pay the proffered wage during 1997. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998, made a profit of $11,336. That amount is insufficient to pay the proffered wage. No evidence was submitted that the owner of the restaurant had any other income or any assets with which to pay the proffered wage during 1998. The petitioner has submitted no evidence of any other funds available to pay the proffered wage during 1998. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1998.

No evidence was submitted pertinent to the ability of the petitioner or its purported predecessor-in-interest to pay the proffered wage during 1999. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The response to the May 28, 2002 Notice of Action stated that the petitioner acquired the East Garden Korean Restaurant on November 14, 2000. No evidence was submitted pertinent to the ability of the petitioner's purported predecessor-in-interest to pay the proffered wage during the portion of 2000 before the petitioner acquired the restaurant. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during that portion of 2000.

The petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return, its initial return, shows that it declared a taxable income before net operating loss deduction and special deductions of $5,320. Because the petitioner acquired the restaurant on November 14, 2000, that profit is attributable to the last half of November and the month of January, approximately one-eighth of the total year. During that period, the petitioner would have been obliged to pay only approximately one-eighth of the beneficiary's salary, if it had then employed him. That amount of net income is sufficient to pay the proffered wage during the portion of 2000 that the petitioner owned the restaurant. The petitioner has demonstrated the ability to pay the proffered wage during that portion of 2000 that it owned the restaurant.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of $2,458. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage during that year out of its net current assets. The petitioner has not demonstrated that any

[3] The availability of a sole proprietor's income and assets to pay a wage proffered to a prospective employee, however, is subject to the owner's ability to also support himself and his family out of what would remain of his income and assets in the event he was personally obliged to pay the prospective employee's wages.

other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that its purported predecessor-in-interest was able to pay the proffered wage during 1996, 1997, 1998, 1999, or that portion of 2000 before the petitioner acquired the restaurant. The petitioner has not established that it was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it and its predecessor had the continuing ability to pay the proffered wage beginning on the priority date. For that reason, and because the current petitioner failed to demonstrate that it is th[redacted] successor-in-interest within the meaning of *Dial Repair Shop,* the petition may not be approved.

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.