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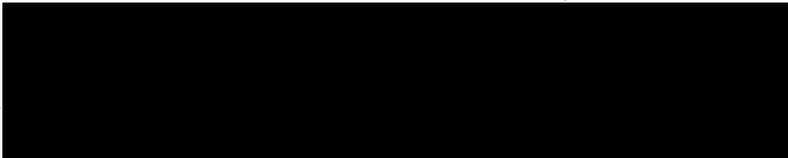
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 03 055 53821

Date: APR 14 2005

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 states that the petitioner does have the ability to pay the proffered wage. Counsel submits additional documentation.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$17.28, or an annual salary of \$35,942. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to have three employees, and to have a gross annual income of \$341,000. In support of the petition, the petitioner submitted documentation on the beneficiary's educational credentials and previous employment, as well as its 2001 federal income tax form, IRS Form 1120S.

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 February 18, 2003, the director requested additional evidence pertinent to that ability. The director noted that the petitioner had a negative net income in 2001, and requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as the priority date and continuing to the present. The director also stated that if the petitioner had employed the beneficiary in 2001, that the petitioner could submit copies of the beneficiary's Form W-2 Wage and Tax Statements to establish how much the beneficiary had been paid by the beneficiary.

In response, counsel contrasts the finances of the petitioner with those of the petitioners in the precedent decisions, *Matter of Sonogawa* 12 I & N Dec. 612, (BIA 1967), and *Matter of Great Wall*, 16 I& N Dec. 2566, (BIA 1977). Counsel states that the petitioner can afford to pay the proffered wage as its 2002 tax return shows gross income of more than \$331,000 with \$45,000 paid in wages. Counsel submits the petitioner's IRS Form 1120S for the tax year 2002, and also a bank letter that states the average bank balance for the account identified in the letter was more than \$19,000. Counsel asserts that the court by sustaining *Sonogawa* and dismissing *Great Wall*, recognized that the economic reality of the situation must be reviewed to determine if the petitioner can afford to pay the proffered wage. Counsel stated that if a business such as *Sonogawa* is shown to be a strong business with adequate cash flow to actually pay substantially more than the proffered wage, this business situation could support an immigrant petition. Counsel states that the evidence submitted to the center shows that the petitioner is in much better financial position than the petitioner in *Sonogawa*. Counsel states that the petitioner has not had a bad year, it is a well-established business in the community for almost four years in 2003, and it grossed more than \$331,000 in 2002 and paid more than \$45,000 towards salaries and \$32,000 toward one officer's compensation. Counsel submits the petitioner's 2002 IRS Form 1120S, as well as a letter dated March 19, 2003, [REDACTED] Branch Officer, The Milford National Bank, Milford, Connecticut that identified an account number and then stated that the identified account had an average balance of \$19,515 for the last twelve months. Counsel also stated that the owner of the petitioner had more than \$100,000 available to support of the business needs of the petitioner, but provided no further evidentiary documentation of this assertion.

In his denial of the petition, the director stated that the petitioner's 2001 tax return showed a negative income of \$17,522, and that the 2002 tax return indicated a negative net income of \$2,461. Based on these net incomes, the director determined that the petitioner did not have the ability to pay the proffered wage of \$35,942 as of the priority date and onward.

On appeal, counsel reiterates his comparison of two precedent decisions that examined issues the petitioner's ability to pay a wage, with the petitioner's financial resources. Counsel states that the petitioner, in business for over five years, can afford to pay the proffered salary based on its net gross income of more than \$331,000 and a net useable amount of \$36,000 towards salaries. Counsel states that the evidence submitted to the service center and in its brief shows that the petitioner is in a much better financial position than the petitioner in *Sonogawa*. According to counsel, the petitioner did not have a bad year and was a well-established business in its community for over eight years in 2001. Counsel also asserts that the petitioner's owner has more than \$100,000 available for the petitioner's business needs.

Finally, counsel submits a letter from [REDACTED] CPA, Auerr, [REDACTED] and [REDACTED] LLP, Franklin, Massachusetts. In this letter, [REDACTED] states that Mr. Bhatia, of Mahal Enterprises, Inc., asked him to respond to Citizenship and Immigration Services (CIS) with regard to the I-140 petition. [REDACTED] states that his firm had been the CPA for Mahal Enterprises since its inception in 1999, and that the restaurant has seen its revenues increase every year. The accountant further states that [REDACTED] intends to replace [REDACTED] who has been the primary manager of the petitioner's restaurant, in order to allow her to assist in the petitioner's second business that began in the beginning of 2003. The accountant then states that based on the 2002 corporate return which shows a loss of \$2,461, a non cash item of depreciation of \$4,662, as well as [REDACTED] salary of \$32,920, the petitioner would have \$35,171 available to pay the beneficiary's salary. [REDACTED] also states that with the beneficiary's skills and expertise, the petitioner believes that its revenues will increase even more rapidly after the beneficiary is employed with the petitioner.

While the accountant's letter submitted on appeal is legitimate, the petitioner submits the information with regard to the replacement of one compensated employee by the beneficiary for the first time on appeal. It is also noted that the petitioner checked "yes" on the I-140 petition to the question "Is this a new position?" The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

In addition, counsel's reliance on the letter submitted in response to the director's request that states an identified account has an average balance of \$19,000 is similarly misplaced. First, there is no information in the record that correlates the document and its description of an account's average balance with the petitioner. The letter from the bank merely identifies the account, but not the account holder. Second, 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not claim nor establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, and contrary to the petitioner's accountant, 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). Contrary to counsel's assertions with regard to the petitioner's gross income, 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001 and 2002 shows the following amounts of ordinary income: -\$17,522 in 2001 and -\$2,461. As correctly noted by the director, these figures fail to establish the ability of the petitioner to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered 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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation'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 provided the following information for tax years 2001 and 2002:

¹ 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.



	2001	2002
Ordinary Income	\$ -17,522	\$ -2,461
Current Assets	\$ 10,956	\$ 8,418
Current Liabilities	\$ 6,283	\$ 2,214
Net current assets	\$ 3,673	\$ 6,204

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$17,522 and net current assets of only \$3,673, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. With regard to tax year 2002, the petitioner shows a net income of -\$2,461 and net current assets of \$6,204. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage in 2002 out of its net income or net current assets.

Furthermore although the counsel states the petitioner is an even stronger business than the petitioner in *Sonegawa*, the AAO does not find the petitioner's financial status and business operations to be analogous to the petitioner in *Sonegawa*. For example, although counsel appears to state on appeal that the petitioner has been in business for either five or eight years, the I-140 petition indicates that the petitioner was established in 1999 and was in operation for three years at the time the petition was filed. Therefore it is a much younger company than the petitioner in *Sonegawa*. Furthermore although the *Sonegawa* case findings were predicated on one unprofitable year of business sandwiched between other profitable years, the petitioner has not established any similar pattern in terms of its business operations. The record only contains documentation on two consecutive years of negative net income.

Although counsel asserted both in the petitioner's response to the director's request for further evidence and on appeal, that the petitioner's owner had \$100,000 with which to cover the petitioner's business needs, no further information was submitted to record to establish any additional financial resources with which the proffered wage could be paid. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it 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.