U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 21 20
WAC 04 042 52095

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian gourmet restaurant and catering company. It seeks to employ the beneficiary permanently in the United States as a Tandori chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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 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.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $15.25 per hour ($31,720.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001, 2002, and 2003, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on February 9, 2004, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

> Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 (with appropriate signature(s)), or audited financial statements.
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> The petitioner is requested to provide this evidence from 2001 to 2003.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years 2001, 2002, and 2003.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $31,720.00 per year from the priority date.

- In 2003, the Form 1120 stated taxable income[1] of $4,325.00.
- In 2002, the Form 1120 stated taxable income of $5,320.00.
- In 2001, the Form 1120 stated taxable income of $7,965.00.

On appeal, counsel asserts in pertinent part:

> The prospective employer has in fact the ability to pay the beneficiary an annual salary of $29,280 [sic $31,720.00] during the year he filed for labor certification (2001) and until now.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. The petitioner has employed the beneficiary since January 1998, but no wage statements or information were submitted.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS,

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[1] IRS Form 1120, Line 28.

should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage at any time between the years 2001 through 2003 for which petitioner's tax returns are offered for evidence.

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.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the three Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2003, petitioner's Form 1120 return stated current assets of $4,284.00 and $50,759.00 in current liabilities. Therefore, the petitioner had <$46,475.00> in current net assets for 2003. Since the proffered wage was $31,720.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of $667.00 and $34,082.00[3] in current liabilities. Therefore, the petitioner had a <$33,415.00> in current net assets for 2002. Since the proffered wage was $31,720.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of $5256.00 and $60,944.00 in current liabilities. Therefore, the petitioner had a <$55,688.00> in current net assets for 2001. Since the proffered wage was $31,720.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an additive calculation proposed by its accounting service. The elements of this additive calculation are, according to counsel's brief in the matter,

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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.

[3] Line 18 was expressed as <$2,599.00> under current liabilities and presumed to be a negative figure and not an asset such as an overpayment.

"Depreciation and amortization"[4] and "cost of labor."[5] Counsel cites no legal precedent for the additive calculation, and, according to regulation,[6] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. In his calculations, counsel is selecting and combining data from various schedules of petitioner's tax return and adding them to reach a result.

Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Petitioner's counsel cited no legal precedent for his position. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg,* 719 F. Supp. 532 (N.D. Tex. 1989) noted:

> "Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537."

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date.

Counsel asserts that it would be a hardship for petitioner if the beneficiary cannot be continued to be employed. No detail or documentation has been provided to explain how the beneficiary's employment as a Tandori cook will significantly increase profits for petitioner. Since the beneficiary has been in the employ of the business since 1998, his contribution as a Tandori cook is already a factor in petitioner's business, that for the years examined, has made scant profits. Petitioner has not provided the beneficiary's wage statements that would enable CIS to properly evaluate petitioner's ability to pay the proffered wage. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The cost of labor, mentioned above, as an expense cannot also be considered an asset available to pay the proffered wage. We believe that counsel through the financial analyst is making the assertion that in the future the petitioner will either adjust its work force to accommodate the beneficiary in its employ, or adjust the work forces wages to meet the proffered wage. Since the beneficiary has already been working for the petitioner, his wages are already part of the petitioner's expenses used to determine taxable income. The ability to pay the proffered wage has been evaluated with the data found in the tax returns mentioned above. However, since counsel has not provided wage statements (either W-2 or form 1099) there is no way to properly evaluate the cost of labor in this case. . The record does not, however, name these workers, state their

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[4] Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

[5] As already noted, the petitioner has employed the beneficiary since January 1998, but no wage statements or information were submitted.

[6] 8 C.F.R. § 204.5(g)(2), *Supra.*

wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of these workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.[7]

Petitioner's financial analyst seeks to include another item included on the balance sheet as an asset available to pay the proffered wage. This is the "cost of labor." Correlating the amounts stated in counsel's additive calculation with the petitioner's tax return for each year, it is clear that counsel is combining petitioner's taxable income each year with an expense item by the business as stated on Schedule "L" and declaring that the expense is a current assets. Since it has already been expended, cost of labor cannot be included in taxable income.

Regarding "Loans to Shareholders," also considered by petitioner as a current asset, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders (i.e. money received by loans to shareholder) or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." If the petitioner had wanted to include these loans as current assets, it could have designated them as such on Schedule "L" of the tax returns submitted, but since it did not, they cannot be included now.

Counsel asserts, "... the overall circumstances of the employer shall be considered when assessing its ability to pay wages." *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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 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 couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that tax years 2001 through 2003 were an uncharacteristically unprofitable period for the petitioner.

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[7] It is difficult to understand the point that counsel raises that the beneficiary will replace "temporary" workers since counsel asserts that the beneficiary has been working in petitioner's employ since 1998.

Counsel's additive calculation cannot be concluded to outweigh the evidence presented in the five corporate tax returns as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.