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U.S. Citizenship  
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FILE: [REDACTED]  
EAC-03-009-52539

Office: VERMONT SERVICE CENTER

Date: JUN 22 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

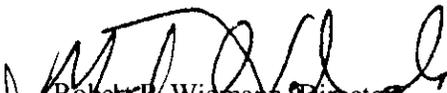
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 B. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The acting 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.

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 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 \$916.80 per week, which amounts to \$47,673.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner and instead stated to be doing "odd jobs and visiting."

On the petition, the petitioner claimed to have been established on February 7, 1995, to have a gross annual income of \$836,051, and to currently employ 15 workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2001.

The tax return reflects the following information:

	<u>2001</u>
Net income <sup>1</sup>	\$23,744
Current Assets	\$35,433
Current Liabilities	\$8,940
Net current assets	\$26,493

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<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 September 16, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's net income and net current assets were less than the proffered wage in 2001 and requested additional evidence for that year as well as 2002.

In response, the petitioner submitted a letter from its certified public accountant, [REDACTED] (Mr. [REDACTED]), which stated that using a petitioning entity's net income and net current assets "is inadequate because it doesn't take into account the overall financial condition of a company and revenue the company will generate in the coming years." Additionally, Mr. [REDACTED] referenced the petitioner's retained earnings and depreciation expenses. In addition, counsel submitted copies of paystubs. The paystubs reflect that the petitioner paid wages \$800 per week to the beneficiary from April 2003 to December 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 9, 2004, denied the petition. The director noted that the beneficiary was actually paid an amount less than the proffered wage in 2003 and that depreciation expenses cannot be added back to net income.

On appeal, counsel asserts that the director failed to consider Mr. [REDACTED] professional opinion, overpayment of taxes, and depreciation. Counsel also asserts that the director erred by failing to consider the totality of circumstances as set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) as well as considering the petitioner's liabilities when assessing its financial situation. The petitioner does not submit any additional evidence on appeal.

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 establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002 and paid partial wages in 2003.

Contrary to counsel's assertions, 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.

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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$23,744 and net current assets of only \$26,493, which are both less than the proffered wage, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

No evidence was submitted pertaining to 2002. Although the petitioner showed evidence of wages actually paid to the beneficiary in 2003, no corresponding regulatory-prescribed evidence was presented so an analysis of whether or not the petitioner could demonstrate an ability to pay the difference between wages actually paid and the proffered wage could be made.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel recommended the use of retained earnings to pay the proffered wage in response to the director's request for evidence. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on a corporate tax return on Schedule L and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Likewise, adding back its overpayment in taxes of \$15,851 to the petitioner's net income would still not increase the petitioner's net income or net current assets to an amount greater than the proffered wage in 2001.

Counsel asserts that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applies to this case; however, *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 2001, 2002, or 2003 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the 2001 or subsequently during 2002 or 2003. 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.