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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 04 202 51133 Office: VERMONT SERVICE CENTER Date: AUG 16 2006

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that 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 cook. 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 submitted 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 C.F.R. § 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 $10.14 per hour, which equals $21,091.20 per year.

On the petition, the petitioner stated that it was established during 1999 and that it employs 14 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1998. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Lancaster, Pennsylvania.

In support of the petition, counsel submitted (1) 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation. (2) two semi-weekly payroll records, and (3) a letter dated May 12, 2004 from the petitioner's manager.

The tax returns submitted are those of [redacted] Those returns indicate that [redacted] is the petitioner in this case, that it is a corporation, that it

incorporated on November 23, 1999, and that it reports taxes pursuant to cash basis accounting and the calendar year.

The petitioner's 2001 tax return shows that it declared a loss of $33,409 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $7,002 and current liabilities of $5,530, which yields net current assets of $1,472.

The petitioner's 2002 tax return shows that it declared a loss of $18,742 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $6,100 and current liabilities of $1,933, which yields net current assets of $4,167.

The petitioner's manager's May 12, 2004 letter states that the petitioner has been in business since 1999 and that its business has increased each year. He also states that the beneficiary will replace [redacted] who has left the petitioner's employ, and that [redacted] wages will, therefore, be available to pay the proffered wage.

The payroll records submitted show that the petitioner hired [redacted] on January 1, 2000, that the petitioner paid him $737.18 for the two-week period from April 19, 2003 to May 2, 2003, and $737.18 for the two-week period from June 14, 2003 to June 27, 2003. Finally, that report shows that [redacted] had received year-to-date gross salary of $7,814.36 as of June 27, 2003.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 15, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested the petitioner's 2003 tax return and, if the petitioner had employed the beneficiary, Form W-2 Wage and Tax Statements showing amounts the petitioner paid to the beneficiary.

In response, counsel submitted (1) the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) 2001, 2002, and 2003 W-2 forms the petitioner issued to [redacted] (3) a letter dated December 4, 2004 from the petitioner's accountant, and (4) a letter from counsel dated December 2, 2004.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of $13,200 during that year. At the end of that year the petitioner had current assets of $7,163 and current liabilities of $1,933, which yields net current assets of $5,230.

The W-2 forms issued to [redacted] show that the petitioner paid him $16,380, $17,160, and $7,814.36 during 2001, 2002, and 2003, respectively.

Counsel did not submit the beneficiary's W-2 forms. In his December 2, 2004 letter counsel stated that the beneficiary was not paid by check and that no W-2 forms were issued to him.

The December 4, 2004 accountant's letter states that the petitioner "is finally showing a steady and progressive upward increase in the direction of making profits for the business." The accountant further states that "based on all these facts, the projection I can predict [sic] for the year 2004 is that [the petitioner]

will show a net profit of $25,000." The accountant further stated that his projection demonstrates the petitioner's ability to pay the proffered wage.

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 January 30, 2005, denied the petition. In that decision the director stated that the petitioner had failed to demonstrate that it no longer employed [redacted]

On appeal, counsel submitted (1) evidence pertinent to the petitioner's formation, (2) evidence pertinent to the identity of the petitioner's landlord, (3) a copy of the petitioner's lease, (4) a letter dated February 15, 2005 from the petitioner's payroll service, and (5) a brief.

The February 15, 2005 letter from the payroll service states that their records do not indicate that the petitioner employed [redacted] during 2004 or issued a 2004 W-2 form to him.

In his brief counsel states that the petitioner's owners also own a limited liability company that owns the building in which the petitioner is located. Counsel states that they therefore control the rent they will collect from the petitioner.

Counsel argues that the petitioner's depreciation deduction should be added to its net income, as a depreciation deduction is merely a "paper loss." Counsel further states that although the petitioner listed its retained earnings as a negative on its tax returns the petitioner actually has retained earnings of $54,755 and that this amount, too, should be considered a fund available to pay the proffered wage.

Further, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a net profit less than the annual amount of the proffered wage does not preclude approval of the petition, if the petitioner has a reasonable expectation of increase profits. Counsel asserts, "The petitioner has shown a reasonable expectation of increased business and profits . . . "

The accountant estimated that the petitioner will make a profit of about $25,000 during 2004, but does not specify what evidence he relied upon in reaching that conclusion. This office makes an independent judgment, based on the reliable, credible evidence in the record, of whether the petitioner has demonstrated its ability to pay the proffered wage. Whether the evidence that the accountant relied upon would be sufficient to convince this office is unknown. Although this office would consider the accountant's argument in conjunction with the evidence that led him to it, absent that evidence the accountant's opinion is unconvincing.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders they are not obliged to pay the debts of the corporation and the assets of its shareholders or of other enterprises or corporations cannot, therefore, 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). Nothing in the governing regulation, 8 C.F.R. § 204.5,

permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

Counsel asserts that the petitioner's owners might forego rent as necessary to permit the petitioner to pay the proffered wage. That is correct. The petitioner's owners would be under no obligation to do so, however. Absent any indication in the record that the petitioner's owners could, and would, forego collecting rent from the petitioner, instead electing to pay the proffered wage, even though it might not be in their own best financial interest, counsel's assertion is insufficient to show the petitioner's ability to pay the proffered wage.

In the absence of any such evidence the petitioner is obliged to demonstrate the ability to pay the proffered wage out of its own funds, without the addition of any rebate of rent that the petitioner's owners might or might not grant, depending upon the circumstances. The income and assets of the petitioner's owners, including rent paid by the petitioner to them or to a company under their control, cannot be used to show the petitioner's ability to pay the proffered wage.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed, but incorrect that it is merely a "paper deduction." It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[1] Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel recommends the use of retained earnings to pay the proffered wage, states that the petitioner's retained earnings are $54,755, and appears to urge that they be added to net profit.

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[1] Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

First, this office is able to find no support in the record for counsel's statement that the petitioner's retained earnings are $54,755. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Second, retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income is therefore duplicative, at least in part.

Third, even if considered separately from net income, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer to pay to its employees in cash while continuing in business. They are not, therefore, an index of a company's ability to pay additional wages.

Counsel's citation of *Matter of Sonegawa, supra*, for the proposition that the instant petition should be approved is unconvincing. Counsel is correct that, pursuant to *Matter of Sonegawa*, a petition may, under some circumstances, be approved notwithstanding that the petitioner's profit during a given year was less than the annual amount of the prospective wage of the beneficiary.

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in *Sonegawa* the petitioning entity 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 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.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the evidence does not demonstrate that the petitioner has ever posted profit sufficient to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, and 2003 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In assessing the petitioner's ability to pay the proffered wage during a given period, CIS will examine 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. Although the beneficiary has asserted that he has been working for the petitioner since January 1998 no evidence of wages paid to the beneficiary was submitted. The petitioner did not establish that it employed and paid the beneficiary.

Counsel urges, however, that if the beneficiary had been available to work for the petitioner[2] he would have replaced [redacted] a cook who ceased working for the petitioner during 2003. In declining to consider [redacted] salary the director stated that the evidence of record does not demonstrate that Anthony [redacted] left the petitioner's employ.

The reasoning behind considering wages paid to a named employee whom the petitioner would replace with the beneficiary does not hinge on demonstrating that the named employee no longer works for the petitioner.[3] The petitioner is not obliged to demonstrate that it no longer employs the named employee.[4] The consideration of the wages of the named employee is based on the assertion that, at any time since the priority date, the petitioner could have replaced the named employee with the beneficiary,[5] and the named employee's wages since the priority date would then have been paid to the beneficiary. The amounts paid to [redacted] may correctly be considered in the determination of the petitioner's ability to pay the proffered wage.[6] The record shows that the petitioner paid [redacted] $16,380 during 2001, $17,160 during 2002, and $7,814.36 during 2003.

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[2] As the petitioner states that it did actually employ the beneficiary during that period this argument is apparently in the alternative.

[3] In his argument on appeal counsel appeared to share this misconception.

[4] Although it is not essential to the case, this office notes that the petitioner did, in any event, demonstrate that [redacted] no longer works for it. The W-2 forms and the pay statements provided show that the petitioner had paid [redacted] year-to-date wages of $7,814.36 as of June 27, 2003. [redacted] 2003 W-2 form shows that the petitioner paid him $7,814.36 during all of 2003. Taken together these amounts demonstrate that no longer worked for the petitioner during 2003 after June 27. Further, the letter from the petitioner's tax service, submitted on appeal, indicates that the petitioner did not employ [redacted] during 2004. All of that evidence, taken together, indicates that the petitioner ceased to employ [redacted] on June 27, 2003 or slightly earlier.

[5] The petitioner did not explicitly assert that it could have replaced [redacted] with the beneficiary at any time since the priority date, but implied it by saying that [redacted] wages were available to pay the proffered wage. The director could appropriately have insisted that the petitioner state this explicitly and provide evidence in support of the statement. Further, the purpose of the instant visa category is to provide U.S. employers with alien workers for positions for which U.S. workers are unavailable. The director could also have requested evidence that substituting an alien for the named employee is not contrary to the purpose of this visa category.

[6] Another issue is suggested by the record. The petitioner did not demonstrate, or even allege, that [redacted] worked for it as a cook, rather than in some other position. Unless [redacted] worked as a cook the beneficiary, who is a cook, could not have replaced him. In that event the wages paid to [redacted] would not be viewed as having been available to pay the proffered wage. Because this issue was not raised in the decision of denial, and the petitioner has not been accorded an opportunity to respond to it, this office declines to rely on it, even in part, as a basis for today's decision. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The petitioner appears to argue, however, that the wages previously paid to [redacted] somehow show that it continued to be able to pay the proffered wage after it ceased to employ him. The wages actually paid to [redacted] will be considered in the determination of the petitioner's ability to pay the proffered wage, as noted above. That the petitioner previously employed [redacted] provides no evidence of additional funds to pay the proffered wage after he left the petitioner's employ. The petitioner is unable to show prospectively that it could pay the proffered wage because it employed [redacted] previously. Only the funds that the evidence demonstrates were actually paid to [redacted] will be considered.

If the petitioner does not establish that it employed and paid the beneficiary, or a named employee whom the beneficiary would have replaced, an amount at least equal to the proffered wage during a given period, the AAO will, in addition, 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). *See also* 8 C.F.R. **§ 204.5(g)(2).**

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[7] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

[7] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The proffered wage is $21,091.20 per year. The priority date is April 30, 2001.

During 2001 the petitioner paid the [redacted] $16,380. It is obliged to show the ability to pay the $4,711.20 balance of the proffered wage. During 2001, however, the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had net current assets of $1,472. That amount is insufficient to pay the balance of the proffered wage. The petitioner has submitted no reliable evidence to demonstrate that any other funds were at the petitioner's disposal during 2001 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid [redacted] $17,160. It is obliged to show the ability to pay the $3,931.20 balance of the proffered wage. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year, however, the petitioner had net current assets of $4,167. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid [redacted] $7,814.36. It is obliged to show the ability to pay the $13,276.84 balance of the proffered wage. During 2003 the petitioner declared ordinary income of $13,200. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of $4,230. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has submitted no reliable evidence to demonstrate that any other funds were at the petitioner's disposal during 2003 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.