U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 13 2006

EAC 03 188 52086

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 Acting Director, Vermont Service Center, denied the instant preference visa petition. The Administrative Appeals Office (AAO) denied the appeal. The matter is now before the AAO pursuant to a motion. The motion will be granted. The previous decisions of the acting director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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. The AAO upheld the acting director's decision on appeal.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the acting director incorrectly applied the pertinent law.

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 18, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which equals $24,689.60 per year.

The Form I-140 petition in this matter was submitted on May 29, 2003. On the petition, the petitioner stated that it was established during 1946 and that it employs 10 workers. The spaces on the petition reserved for the petitioner to report its gross annual income and net annual income were left blank. On the Form ETA 750, Part B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner since January 1999. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Washington, D.C.

In support of the petition, counsel submitted the petitioner's 1999, 2000, 2001, and 2002 Form 1120, U.S. Corporation Income Tax Returns. The petitioner's tax returns show that it is a corporation, that it incorporated on October 1, 1946, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 1999 the petitioner declared taxable income before net operating loss deductions and special deductions of $19,540. At the end of that year the petitioner had current assets of $28,892 and current liabilities of $24,616, which yields net current assets of $4,276.

During 2000 the petitioner declared taxable income before net operating loss deductions and special deductions of $24,001. At the end of that year the petitioner had current assets of $52,522 and current liabilities of $24,548, which yields net current assets of $27,974.[1]

During 2001 the petitioner declared a loss of $33,582 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $27,242. At the end of that year the petitioner's current liabilities exceeded its current assets.

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 April 16, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested that, if it employed the beneficiary during 2001, 2002, or 2003, that it submit copies of the W-2 Wage and Tax Statements showing wages it paid to the beneficiary during those years.

In response, counsel submitted (1) the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) a 2003 W-2 form, (3) a printout of web-content from alexicon.org, and (4) a letter dated July 9, 2004.

The petitioner's 2003 tax return shows that it declared taxable income before net operating loss deductions and special deductions of $15,666 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets.

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[1] Because the priority date of the instant petition is April 18, 2001 the petitioner's 1999 and 2000 tax returns are not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date.

The 2003 W-2 form shows that the petitioner paid the beneficiary $3,138 during that year. Counsel submitted no 2001 or 2002 W-2 forms or Form 1099 Miscellaneous Income statements.

In his July 9, 2004 letter counsel characterized the web content submitted as a press release from the City of Alexandria, Virginia. Counsel stated,

> Unfortunately, during 2001 the economy was affected nationwide by the 9/11 terrorist attacks on America and especially in the Washington Metropolitan area where the [petitioner's] business is located.

Counsel thus implied that the petitioner's poor performance during 2001, and possibly during subsequent years, was due to the events of September 11, 2001. Counsel cited the web content as evidence in support of his assertion.

Although the web content submitted was issued by an Alexandria organization, that organization characterizes itself as "a public/private partnership," rather than as an office of the municipality of Alexandria. Nothing in that web content indicates that it is a news release from that municipality. That web content shows the results of a study of businesses in Alexandria, Virginia following the events of September 11, 2001. The results of that study and their relevance to the instant matter will be addressed further below.

Counsel cited the length of time the petitioner has been in business as evidence of its ability to pay the proffered wage. Counsel also stated that the petitioner has always been able to meet its payroll obligations.

Counsel asserted that the W-2 form shows wages the petitioner paid to the beneficiary from November 17, 2003 through the end of that year. Counsel provided no evidence that the W-2 form covered only that portion of 2003, but states that the W-2 form establishes that the petitioner is paying the beneficiary the proffered wage.

Counsel cites a decision of the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) for the proposition that the petitioner is not obliged to pay the proffered wage until after the beneficiary receives his visa and enters the United States.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that if the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date then to deny the petition on the grounds that it failed to do so would be an abuse of discretion.

Counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petition need not necessarily be denied merely because the petitioner incurred a loss in a given year.

The acting 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 September 1, 2004, denied the petition.

On appeal, counsel argued that the evidence submitted demonstrates the petitioner's ability to pay the proffered wage.

Subsequently counsel submitted a brief to supplement the appeal. In that brief counsel reiterated the arguments previously made in response to the request for evidence.

Later still counsel submitted a copy of the decision in *Masonry Masters, Inc. v. Thornburgh*, to supplement the appeal.

On February 3, 2006 the AAO found that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and denied the petition.

With the instant motion, counsel submitted a brief. In the brief counsel again stated that the 2003 W-2 form submitted shows wages for the period from November 17, 2003 to December 31, 2003 but, again, provided no evidence in support of that assertion. Counsel, once again, reiterated various arguments previously made.

Counsel also stated,

> Courts have found that it is appropriate to consider the ability of the beneficiary to generate income for the petitioner as well as the evidence of the petitioner's long-standing business acumen and profitability.

Although counsel cited only to *Sonegawa, supra*, in making that assertion, this office observes that dictum in *Masonry Masters, supra*, indicates that CIS may consider the amount by which hiring the beneficiary will improve the petitioner's profits.

Counsel stated:

> The petitioner in *Re Senegawa* [sic] did not post extraordinarily large profits in the years other than the year in which her business moved, and had yet to earn a net profit that would have sustained the beneficiary's prevailing wage when the petition was granted. *Id* at 614.

Contrary to counsel's assertions, the decision in *Sonegawa, supra* does not state what the petitioner's profits were during the years prior to 1966, the year in which its profits were less than the annual amount of the proffered wage. They may have been high or they may not. Further, nothing in that decision indicates that the petitioner had never in any given year earned an amount sufficient to pay the proffered wage.[2]

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[2] This office reads counsel's statement, "[The petitioner] had yet to earn a net profit that would have sustained the beneficiary's prevailing wage when the petition was granted" to mean that the petitioner had not during any year made a net profit greater than the annual amount of the proffered wage. No such statement appears in *Sonegawa*. *Sonegawa* at 614 does state that "the petitioner from January 1, 1967 to May 31, 1967 . . . made a net profit of $4,774." If counsel intended to indicate that during that five-month period the petitioner in *Sonegawa* made a net profit of less than the annual amount of the proffered wage then counsel's statement, thus interpreted, was correct. However, the amount it made during that period, annualized, would have been greater than $6,240, the annual amount of the proffered wage in that case.

The article submitted into the record, Alexandria Businesses Adjusting to Post-9/11 Economy pertinent to a survey of Alexandria, Virginia businesses is of little value in showing that the petitioner's recent poor performance was due to the events of September 11, 2001. See http://www.alexcon.org/cgi-bin/aedpnews.pl?viewtnr_1011130085734+11/30/2001. First, the petitioner is located in Washington, D.C., whereas that study pertains to Alexandria, Virginia. Alexandria is located very close to Arlington, Virginia, where the Pentagon is located. Thus, this office takes administrative notice that a terrorist attack occurred very near Alexandria Virginia, the city surveyed in the article, but no attack occurred in Washington, D.C. on September 11, 2001. Reliance on the assertion that the results of that study may be generalized to the entire Washington Metropolitan Area, as counsel asserts without further evidence, is misplaced. Further, almost a third of the businesses surveyed in Alexandria, Virginia reported no diminution in revenue due to the events of September 11, 2001.

The survey cited by counsel does not appear to have been conducted by the City of Alexandria, as counsel implied. Counsel has not established that it is disinterested, authoritative, or reliable in any other way. As it was conducted in Alexandria, rather than in Washington, it is of little value in showing that businesses in Washington, D.C. lost business as a result of the events of September 11, 2001. More concretely, it is of very little value in showing that businesses, or more specifically, restaurants and catering services, in Upper Northwest Washington, where the petitioner is located, a considerable distance from the **Pentagon,**[3] suffered economically from those events. In sum, it is of virtually no value in showing that the petitioner's profits suffered from those events.

Other than the web content relied upon by counsel the record contains no evidence to demonstrate that the petitioner's business suffered as a result of the events of September 11, 2001. That proposition has not been demonstrated to be true.

Counsel cited *Masonry Masters, supra*, for the proposition that the "denial of [a] visa [is] an abuse of discretion where [a petitioner has shown] its ability to pay the prevailing wage." This office does not dispute that, if the petitioner had shown its continuing ability to pay the proffered wage beginning on the priority date, then to deny the visa for failure to demonstrate that ability would be an abuse of discretion. The analysis which follows, however, demonstrates that the petitioner failed to show the continuing ability to pay the proffered wage beginning on the priority date.

Counsel cited *Masonry Masters* in support of an additional proposition. Counsel stated that, based on *Masonry Masters*, the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds.

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[3] This office takes administrative notice that he petitioner's location is closer to Maryland than to any part of Virginia including Arlington and the Pentagon.

The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. The petitioner has submitted no evidence that the beneficiary will generate additional income to offset the beneficiary's wages and to contribute to the petitioner's profits. Absent any such evidence, this office will make no such assumption.

Finally, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during the salient years, the petitioner would have enjoyed greater profits. In fact, the beneficiary stated that the petitioner employed him during all of those years. In light of that statement, counsel's assertion does not apply to the facts of the instant case.

Counsel states that a BALCA case is applicable to the instant petition before the Department of Homeland Security's AAO. Counsel does not state why DOL precedent should be considered binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding.

The proposition for which that BALCA decision was cited, however, is that the petitioner is not obliged to pay the proffered wage to the beneficiary until the beneficiary enters the country pursuant to the visa obtained pursuant to the approved petition. Counsel is correct in that assertion, notwithstanding that the precedent he cited is not binding on CIS. The petitioner is not obliged to actually pay the beneficiary that amount, or any amount, prior to his entry or employment pursuant to that visa.

Pursuant to 8 C.F.R. § 204.5(g)(2), however, although not required to pay the wage until after approval of the petition, the petitioner is obliged to **show** its continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(g)(2).

Counsel, in citing *Sonegawa* for the proposition that the petition may be approved notwithstanding losses or low earnings during a given year notes that the petitioner has been in business since 1946. Counsel is correct that this factor should be considered in the assessment of the petitioner's ability to pay the proffered wage. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months.[4] The petitioner suffered large moving costs and a period of time during which it 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.

[4] In *Sonegawa*, the truth of this proposition had apparently been demonstrated by evidence, rather than merely alleged.

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 that petitioner's sound business reputation and outstanding reputation as a couturière.

In the instant case, rather than performing poorly during a single year for a reason that the record demonstrates is unlikely to recur the petitioner's profit was sufficient to pay the annual amount of the proffered wage during only one of those five years for which returns were submitted, as shown in the analysis that follows.

Counsel 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 record contains no such evidence. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the salient years were uncharacteristically unprofitable.

The assertion that the petitioner has documented that its reputation demonstrates its ability to pay the proffered wage is incorrect. To support this assertion, counsel submitted into the record: a printout of an undated, flattering review of the petitioner's restaurant posted at washingtonpost.com; a copy a 1996 *National Geographic* article that refers to the petitioner's restaurant as having "great food" and to "local folklore" which indicates that during the 1960's Kennedy administration operatives planned the "Bay of Pigs" invasion at the petitioner's restaurant; and a copy of a *New York Times* article that mentions that the 1962 talk which is said to have ended the Cuban missile crisis is thought to have occurred at the petitioner's restaurant. Such evidence may not be seen as comparable to the evidence presented in *Sonegawa* which documents, for instance, that that petitioner's dress design business had a strong *national* reputation, it created dresses for Miss Universe contestants, movie stars, and recipients of the best dressed women in California awards. Also, CIS may not view such evidence as sufficient to demonstrate that the petitioner had the ability to pay the proffered wage from the priority date onwards.

Likewise, the fact that the petitioner has been in business over fifty years does not on its own demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards. In addition, counsel's unsupported assertions that the beneficiary is talented and skilled and, thereby, will contribute to the petitioner's profits such that the petitioner will have the ability to pay the wage is misplaced. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining 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. In the instant case, although the petitioner and the beneficiary have asserted that the petitioner has employed the beneficiary since January 1999, the only evidence in support of that proposition, or the proposition that it paid wages to him, is a 2003 W-2 form showing that the petitioner paid the beneficiary $3,138 during that year.

The petitioner is obliged to show the ability to pay the balance of the proffered wage during 2003 and the entire annual amount of the proffered wage during each of the other salient years.

If the petitioner does not establish that it employed and paid the beneficiary 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 wages. 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 minus 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[5] 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.

The proffered wage is $24,689.60 per year. The priority date is April 18, 2001.

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

During 2001 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 profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds that were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of $27,242. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary $3,138 during 2003 and must show the ability to pay the remaining $21,551.60 balance of the proffered wage. During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of $15,666. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds that were available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able 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 motion is granted. The AAO's decision of February 3, 2006 is affirmed. The petition is denied.