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

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 11 2006

EAC 03 120 51388

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, Chief
Administrative Appeals Office

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

The petitioner is a pizzeria/café. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

According to the director's January 14, 2005 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on May 25, 2001. The proffered wage as stated on the Form ETA 750 is $12.57 per hour, 40 hours per week, or $26,145.60 annually. The Form ETA 750 states that the position requires two years of experience in an unspecified related occupation to the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis.) The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage: a document that lists the petitioner's profits and losses for the six-month period of January 2002 through June 2002; the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 and 2002; a statement from [redacted] Inc. which indicates that the beneficiary will assume some of the responsibilities of [redacted] the petitioner's president and corporate officer, and that, therefore, an unspecified portion of Mr. [redacted] salary will shift to the beneficiary; this statement also indicates that Citizenship and Immigration Services (CIS) should add depreciation expenses to net income when determining the petitioner's ability to pay the beneficiary the proffered wage; the petitioner's Form 4562, Depreciation and Amortization (Including Information on Listed Property), for 2001 and 2002; and a document that defines the terms depreciation and amortization. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1984 and to currently employ five to eight workers. The petitioner failed to list its gross annual income on the petition. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on December 20, 2001, the beneficiary claimed to have worked for the petitioner from February 2000 until the date on which he signed the Form 750B.

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage. He indicates that the director erred when he failed to add depreciation and amortization expense deductions to net income when determining the petitioner's ability to pay the proffered wage. Counsel also indicates that the fact that the petitioner currently pays over $35,000 annually in wages and salaries demonstrates that it has the ability to pay the proffered wage. Finally, counsel indicates that in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the Commissioner held that it was appropriate to consider expectations for future growth and other evidence beyond net income or net current assets when determining a petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 this case, the beneficiary indicated on the Form ETA 750 that he has been working for the petitioner since February 2000. However, the petitioner has not provided evidence to establish that it employed and paid the beneficiary the full proffered wage from the priority date of May 25, 2001. The petitioner has submitted no Form W-2, Wage and Tax Statement, for the beneficiary or other documentation to establish that it employed and paid the beneficiary any amount for any length of time during the relevant period of analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation/amortization or other expenses, contrary to counsel's assertions.[2] 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient, also contrary to counsel's assertions.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the 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*

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[2]Counsel cites three unpublished AAO decisions in support of the premise that net income and net current assets should not control the determination of the petitioner's ability to pay the proffered wage, and that depreciation/amortization expenses should also be considered. Counsel does not provide a published citation for these cases. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).

> *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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered annual wage of $26,145.60 from the priority date:

- In 2001, the Form 1120 stated a net income[3] of $41.
- In 2002, the Form 1120 stated a net income of $2,012.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the 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.[4] 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were $6,667.
- The petitioner's net current assets during 2002 were $8,328.

Thus, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets in 2001 and 2002.

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[3]Ordinary income (loss) from trade or business activities as reported on Line 28 of the Form 1120.

[4]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.

It is noted that the petitioner also submitted profit/loss statements which have not been audited for the period covering January 2002 through June 2002. Reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these profit/loss statements, the AAO cannot conclude that they represent audited **statements. Unaudited financial statements are the representations of management. The unsupported** representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. He suggests that CIS consider expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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 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. Also, 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, parallel to those in *Sonegawa,* have been shown to exist in the instant case, nor has it been established that 2001 or 2002 were uncharacteristically unprofitable years for the petitioner.

Finally, the president of [redacted]. indicated in a statement submitted in response to the director's request for further evidence that the beneficiary would be assuming some of the duties of Franco [redacted] the petitioner's president and corporate officer, and that Mr. [redacted] would, in turn, be giving up a portion of his salary to go toward the beneficiary's salary. However, Mr [redacted] did not submit any signed or sworn statement which specified the amount of compensation he would forego to apply to the beneficiary's wage, nor did he otherwise document this shifting of expenses. Further, Mr. [redacted] has not explained how much time he spends performing the duties of the proffered position and how much of his compensation is allocated for those duties. Going on record with assertions that are not supported by 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)).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record fails to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center or District Office does not

identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of its filing date, which as noted above, is May 25, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the Form ETA 750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of restaurant cook. Item 14 indicates that there are no educational requirements for the proffered position, and that the applicant must have two years of experience in an unspecified occupation that is related to the proffered position. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A as follows:

> Prepare[s], [s]easons, and cooks soups, meats, vegetables, desserts, and other foodstuff for consumption in eating establishments[.] Reads menu to estimate food requirement[s] and orders food from supplier or procures food from storage. Adds seasoning to foods [during] mixing or cooking according to personal [judgment] and experience. May supervise other cooks and kitchen employees.

Item 15 of Form ETA 750A does not list any other special requirements for the proffered position.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Item 15, eliciting information of the beneficiary's work experience, he represented that he performed all the duties listed at Item 13 of the Form ETA 750A on a full-time basis: while employed by the petitioner from February 2000 through December 2001; and while employed by [redacted] **in Bogota, Colombia from January 1995 through March 1999. He does not** provide any additional information concerning his employment background on that form.

In response to the director's request for evidence regarding the beneficiary's qualifications for the proffered position, the petitioner submitted a copy of a Spanish-language certificate which indicates that the beneficiary worked for "five years" as a "qualified chef" at a restaurant-bar in Bogota, Colombia. The document does not specify any of the beneficiary's duties at this position. It does not specify whether the beneficiary was employed full-time or part-time. The document is not signed, nor is it an original. The petitioner did include a translation of this certificate. Yet, on the English translation, the interpreter indicates that the administrator of the restaurant-bar in Bogota had signed the certificate. However, as noted above, the Spanish-language certificate is not signed. The interpreter also includes a statement certifying that she is proficient in English and in Portuguese. Yet, this certificate which was purportedly issued by the administrator of a restaurant-bar in Bogota, Columbia is in Spanish, not Portuguese.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The unsigned certificate submitted by the petitioner fails to demonstrate that the beneficiary has two years of experience ordering food from suppliers, seasoning food according to his personal judgment and experience, and carrying out the other specific duties of restaurant cook or a related occupation as described on the individual labor certification attached to the instant petition.

Thus, the preponderance of the evidence does not demonstrate that, as of the priority date, the beneficiary had acquired two years of experience in an unspecified occupation related to restaurant cook with duties as set forth on the Form ETA 750A. As such, the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.