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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: LIN 05 264 51288 Office: NEBRASKA SERVICE CENTER Date: OCT 01 2007

IN RE: [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, Nebraska Service Center, denied the preference visa petition. The matter presently is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a strategic management analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's March 4, 2006 denial, the single issue in this case is whether or not 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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is $49,322 per year. The Form ETA 750 states that the position requires four years of college and a bachelor's degree in business administration with two years of work experience in the proffered position or in the related occupation of Bar and Food Beverage Manager. The Form ETA 750 also states that the petitioner would accept three years of study plus three years of related work experience in lieu of a degree.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[1] Relevant evidence submitted on appeal includes counsel's brief, and an excerpt from *Bender's Immigration Bulletin*, September 15, 2003, page 1528. This excerpt contains a synopsis of an unpublished AAO decision in which a medical corporation petitioner minimized its taxation of income by withdrawing its profits as officer compensation.

The petitioner had previously submitted the petitioner's Forms 1120S for tax years 2001, 2002, 2003, and 2004; copies of the petitioner's Forms IL-941, Illinois Employer's Quarterly Withholding Tax returns, including Employer's Contribution and Wage Report, and check registers from the first quarter to 2001 to the third quarter of 2004. The petitioner also submitted copies of bank statements from its American Chartered Bank account for periods from April 2005 to November 2005.

The petitioner also submitted with the initial petition pages 58 through 69 of a document titled "AILA Liaison Teleconference 11/7/01." Page 68 contains a question with regard to losses reported on IRS Form 1120 tax returns and the impact of such losses on the petitioner's ability to pay the proffered wage. The questioner, according to the minutes, asked whether legacy INS also considered items such as payroll obligations being met, assets (plus good will for household names like IBM), non-out of pocket deductions, cash on hand and accounts receivable in its consideration of such a petitioner's ability to pay the proffered wage. In the response to the question, the Vermont Service Center is reported as stating that a loss on a Form 1120 corporate return raises questions as to the petitioner's ability to pay the proffered wage, and then states that a loss does not automatically make the petition deniable, and the service center would consider all the items mentioned by the questioner in examining the petitioner's ability to pay the proffered wage. The record contains no further relevant evidence with regard to the petitioner's ability to pay the proffered wage.

On appeal, counsel refers to the *Bender* excerpt and states that the instant petitioner has valid business accounting reasons for declaring a loss on its tax returns. Counsel states that based on the case discussed in the *Bender* bulletin, Citizenship and Immigration Services (CIS) must consider the normal accounting practices of the company even if the ability to pay is not reflected in the petitioner's s tax returns. Counsel states that the petitioner's tax returns demonstrate the petitioner has assets over and beyond the funds needed to pay the proffered wage, gross receipts that demonstrate the petitioner has over $1 million in salaries each year, and loans issued to shareholders that are substantial in nature. Counsel further states that such loans to shareholders constitute a discretionary fund that the petitioner has available. Counsel reiterates that the posting of a loss on the petitioner's tax returns should not make the I-140 petition automatically deniable as the tax returns were prepared based on specific accounting methods.

Counsel then states that the petitioner's net assets for tax years 2001 to 2004 establish that the petitioner has the ability to pay the proffered wage. Counsel identifies the petitioner's net assets as follows: $68,249 in 2001, $69,114 for 2002, $65,332 for 2003 and $78,941 for 2004. Counsel requests that the petitioner's net assets be considered as demonstrating that the petitioner has the ability to pay the proffered wage. Counsel refers to several unpublished AAO decisions for the proposition that as long as the petitioner can pay the proffered salary out of its net assets, CIS must consider the petitioner's net assets as demonstrating its ability to pay the proffered wage.

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[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 the instant 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).

Counsel then notes that in the three unpublished AAO decisions referenced, the AAO held that the petitioner's proffered wage could be paid out of its *net current assets*. (Emphasis added.)

Counsel also asserts that CIS completely discounted the petitioner's assertion that it had grown in size over the years, which speaks to the petitioner's continued ability to pay the proffered salary. Counsel cites *Matter of Sonegawa*, 12 I &N Dec. 612 (Regional Commissioner 1967) and requests that the AAO consider that the petitioner has been in business for ten years and has grown in size over the years.

Counsel further states that the petitioner has two locations, the restaurant in Schaumburg, Illinois, and a second restaurant located in the River North area of downtown Chicago. Counsel states that each location employs over 20 people, and that from 2001 to 2004, the number of employees increased. Counsel notes that the petitioner's business paid over $186,900 in wages during 2001, the priority year, and its gross receipts that year were more than $1.29 million dollars. Counsel states that from an historical perspective, the petitioner's business has expanded, and the sales receipts and number of employees has increased. Counsel asserts that based on these facts, the petitioner has established the ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to currently employ 22 workers, and to have a gross annual income of $1,335,483. On the Form ETA 750, signed by the beneficiary on April 26, 2001, the beneficiary claimed that he had worked for the petitioner from October 2000 to the date he signed the From ETA, 750B, on March 20, 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, Citizenship and Immigration Services (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).

On appeal, counsel appears to state that the petitioner has issued loans to shareholders and that these loans may be considered as evidence of the petitioner's ability to pay the proffered wage. The Schedules L of the petitioner's tax returns for the relevant years reflect no loans to shareholders, but rather loans *from* shareholders. While the AAO realizes that a sole shareholder in corporations does have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income, counsel's statement with regard to loans from shareholders appears apposite to this authority. Contrary to counsel's assertion, loans from shareholders are not considered part of the petitioner's current assets, but rather part of the petitioner's current liabilities. Such loans are not considered assets readily available to pay the proffered wage

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 the instant case, the petitioner has submitted state of Illinois Employer's Contribution and Wage Reports that

indicated the beneficiary received wages of $19,200 in tax years 2001 and 2002, wages of $20,420 in tax year 2004 and wages of $15,650 for the first three quarters of tax year 2005. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the 2001 priority date and through 2005.[2] Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage for the years 2001 through 2004. Since the petitioner provided no evidence of any wages paid to the beneficiary in tax year 2003, the petitioner has to establish its ability to pay the entire salary of $49,322 in tax year 2003.

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). Contrary to counsel's assertion, reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

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

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

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $49,322 per year from the priority date:

- In 2001, the Form 1120S stated a net income[3] of -$70,467.

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[2] The record closed as of the date of the director's decision dated March 6, 2006, and thus the petitioner did not submit its 2005 tax return to the record. The AAO will not comment further on the petitioner's ability to pay the proffered wage during tax year 2005.

[3] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business,

- In 2002, the Form 1120S stated a net income of -$112,332.
- In 2003, the Form 1120S stated a net income of -$175,761.
- In 2004, the Form 1120S stated a net income of $101,270.

Therefore, for the years 2001 to 2004, 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. On appeal, counsel describes the figures described on the petitioner's Schedules L as total assets on line 15 of Schedule L as the petitioner's total assets. Counsel considers the petitioner's total assets to support the petitioner's ability to pay the proffered wage during the relevant period of time. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.

The AAO notes that on appeal counsel refers to several unpublished AAO decisions concerning the analysis of petitioner's assets to determine whether a petitioner had the ability to pay proffered wages, but provides no published citations. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO further notes that the unpublished AAO decisions cited by counsel also reference the petitioner's net current assets rather than petitioner's net assets.

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.

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they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the instant petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for tax years 2001-2004, the petitioner's net income is found on line 21 of its tax return tax returns.

[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.

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- -$212,811.
- The petitioner's net current assets during 2002 were -$301,224.
- The petitioner's net current assets during 2003 were -$263,140.
- The petitioner's net current assets during 2004 were -$299,236.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form 9089 was filed with CIS, the petitioner identified on the instant I-140 petition had 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.

On appeal, counsel cites *Matter of Sonegawa,* and states that the petitioner's continued growth should be taken into consideration when considering the petitioner's ability to pay the proffered wage.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Furthermore, counsel's assertion that the petitioner has continuously grown throughout the years and had two restaurant locations, is not viewed as persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence as to the business relationship between the petitioner in Schaumburg, Illinois and the second restaurant in downtown Chicago. Nor does the record contains any evidence as to when the downtown Chicago restaurant opened and whether it is, as claimed, evidence of the petitioner's continued growth. The AAO also notes that the petitioner's tax returns are submitted by [redacted] Chicago, Illinois. As such, the instant petitioner's tax returns may already represent the assets of both businesses. Furthermore the AAO notes that the petitioner's gross receipts during the years 2001 to 2004 do not continually increase, as counsel suggests, but rather fluctuate. Thus in tax years 2001, 2002, and 2003, the

petitioner's gross receipts declined, while in tax year 2004, they increased by over $100,000. This pattern does not suggest continued growth on the part of the petitioner.

On appeal, counsel also refers to an unpublished AAO decision discussed in Bender's *Immigration Bulletin* that primarily examined the ability of a medical corporation, with a sole shareholder, to use officer compensation as a gauge of the petitioner's ability to pay the proffered wage. As previously stated, 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the instant petitioner's tax returns reflect no significant amounts of officer compensation that could be considered as an additional source of funds with which to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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

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.