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U.S. Citizenship  
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Services

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FILE:

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Office: VERMONT SERVICE CENTER

Date:

OCT 24 2008

EAC 06 092 51285

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a pastry baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that the petitioner has had the continuing ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(i) of the Immigration and Nationality 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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Immigrant Petition for Alien Worker (I-140) was filed on February 8, 2006. The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 12, 2002. The proffered wage is set forth as \$12.59 per hour based on a 35 hour week, which amounts to \$22,913.80 per year. The ETA 750B, signed by the beneficiary on February 22, 2002, does not indicate that he has worked for the petitioner.

With the petition and in response to the director's request for additional evidence in support of the ability to pay the certified wage of \$22,913.80, the petitioner provided copies of its Form 1065, U.S. Return of Partnership Income, for 2002, 2003, 2004, and 2005. They indicate that the petitioner files its tax returns using a standard calendar year. The tax returns also contain the following information:

	2002	2003	2004	2005
Net Income <sup>1</sup>	\$ 3,735	\$22,560	\$ 8,046	\$10,570
Current Assets (Sched. L)	\$ 12,368	\$13,334	\$19,746	\$47,976
Current Liabilities (Sched. L)	\$ 39,586	\$ 2,057	\$ 1,749	\$ 1,259
Net Current Assets <sup>2</sup>	-\$ 27,218	\$11,277	\$17,997	\$46,717

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on September 22, 2006. Upon review of the petitioner's net income<sup>4</sup> and net current assets as set forth on the petitioner's tax returns, the director determined that the petitioner had either

<sup>1</sup> It is noted that a limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship ) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of Guam is considered as a partnership for tax reporting purposes. In this case, it reports additional income or additional deductions and credits on Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner's net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

<sup>2</sup> The director's calculation of the 2005 net current assets omitted \$4,800 in current assets that are shown on line 6 of Schedule L.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>4</sup>The director erroneously used the figure reflected on line 22, ordinary income, as the calculation for net

sufficient net income or net current assets in 2003 and 2005 to cover the proffered wage, but did not report sufficient net income or net current assets in 2002 and 2004 to establish its ability to pay. He concluded that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage as of the priority date.

On appeal, counsel asserts that the petitioner has demonstrated sufficient net current assets in 2002 to cover the proffered wage, and by combining net income with net current assets it has demonstrated its ability to pay the proffered wage in 2004. Counsel also contends that the increase of its net current assets during the relevant years justifies approval under the totality of the petitioner's circumstances as expressed in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's assertions are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the record does not indicate that the petitioner has employed the beneficiary.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income or net current assets to pay the proffered wage. It is also noted that 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. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary

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income.

to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, 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. (Original emphasis.) *Chi-Feng Chang* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. Counsel suggests that the petitioner's net income can be added to its net current assets to show the total amount of funds available to pay the wage. Counsel wants to combine the petitioner's taxable income with the cash also received by the business for that year as part of the Schedule "L" current assets. As noted above, CIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year.

In 2003 and 2005, the petitioner has demonstrated its ability to pay the proffered wage of \$22,913.80. In 2003, the petitioner's net income was \$22,560, or approximately \$353.80 less than the proffered wage. This office will accept that this figure is sufficiently close to the proffered salary to demonstrate the petitioner's ability to pay in this year.

Similarly in 2005, the petitioner's net current assets of \$46,717 were enough to pay the proffered wage and demonstrate the petitioner's ability to pay during this year.

However in 2002 and 2004, neither the petitioner's net income or its net current assets was enough to cover the certified salary. The petitioner's net income in 2002 was \$3,735. Its net current assets were -\$27,218, not \$27,218 as stated by counsel on appeal. Neither amount could cover the proffered wage or establish the petitioner's ability to pay in this year.

In 2004, neither the petitioner's net income of \$8,046 nor its net current assets of \$17,997 was sufficient to cover the proffered wage of \$22,913.80.

A petitioner's other overall financial circumstances may sometimes be applicable in approving a petition where factors such as the expectations of increasing business and profits overcome evidence of small profits.

*Sonegawa*, 12 I&N Dec. 612. In *Sonegawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the four and one-half years that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonegawa* had been in business for eleven years and had shown substantial potential for growth. It is noted that this case according to the petitioner's tax returns, was filed less than one year after the business was started. Although the petitioner's 2003 and 2005 tax returns reflect its ability to pay the proffered wage they do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. While counsel is correct that the petitioner's net current assets have increased from 2002 to 2005, its net income has been modest, reaching its highest level of \$22,560 in 2003 and declining to \$8,046 in 2004 and \$10,570 in 2005. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) and based upon a review of the underlying record and the argument submitted on appeal, the AAO finds that the petitioner has not established its continuing financial ability to pay the certified wage.

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.