

Identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

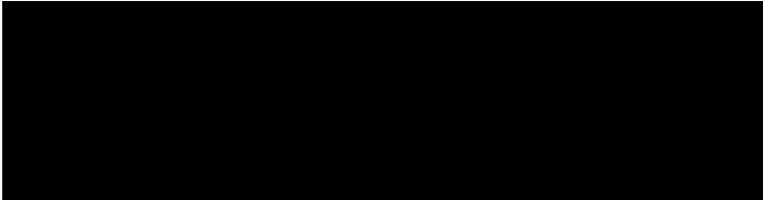
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B7c



FILE: [REDACTED]
EAC 00 135 50617

Office: VERMONT SERVICE CENTER

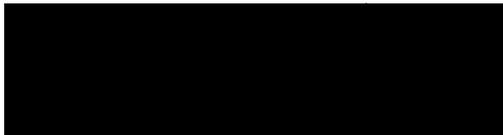
Date: AUG 19 2005

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

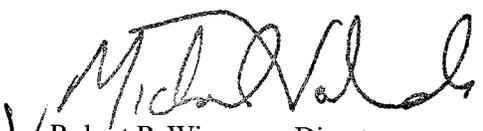
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition approval was revoked by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted. The petition will be revoked.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a cook, Portuguese style. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and revoked approval of the petition accordingly. The AAO affirmed that decision, dismissing petitioner's appeal of the director's decision.

In support of the motion, counsel submits the following documents not previously considered by the Service: petitioner's 2002 and 2003 federal Form 1120 U.S. Individual Tax Returns; and a copy of a beneficiary's W-2 Wage and Tax Statement for 2002. There was a brief submitted with the documents noted above.

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 motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal based upon the record of proceedings not already considered by the director and AAO.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen. There are new facts presented here by counsel that relate to his initial evidence accompanying the petition, and, to the issue of whether or not on the priority date of the Alien Employment Certification the petitioner had the ability to pay the beneficiary the proffered wage.

On appeal, the counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for 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. 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 October 25, 1999. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour or \$23,857.60 per year. The Form ETA 750 states that the position requires two years experience.

The director issued a Notice of Intent to Revoke the approval of the petition finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director properly notified the petitioner that it could submit evidence to demonstrate this ability but on August 13, 2000, the director found that the petitioner had not availed itself of this opportunity to present evidence, and therefore, the director, Vermont Service Center revoked approval of the petition.

On appeal of the director's evocation, counsel submitted evidence that the evidence sent in response to the Notice of Intent to Revoke was submitted in a timely fashion, and, therefore, the AAO heard the petitioner's appeal of the revocation that included that evidence. The AAO then dismissed the appeal on the same grounds as the director, citing the lack of probative evidence submitted that would have demonstrated the ability to pay the proffered wage on the priority date.

Counsel has submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for years 1998, 1999, 2000, 2001, 2002 and 2003. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,857.00 per year from the priority date.

- In 2003, the Form 1120 stated taxable income¹ of \$14,600.00.
- In 2002, the Form 1120 stated taxable income of \$8,783.00.
- In 2001, the Form 1120 stated taxable income of \$4,195.00.
- In 2000, the Form 1120 stated taxable income loss of <\$1,142.00>.²
- In 1999, the Form 1120 stated taxable income loss of <\$851.00>.
- In 1998, the Form 1120 stated taxable income loss of <\$7,122.00>.³

¹ IRS Form 1120, Line 28.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

³ The 1998 tax return submitted stated an income loss received before the before the priority date of the Alien Employment Certification. It is not probative as to the ability to pay the proffered wage from the priority date but it does have value in viewing the petitioner's progress into profitability.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence was submitted to show that the petitioner employed the beneficiary from October 2001. Petitioner paid the beneficiary \$5,184.00 in 2001 and \$21,600.00 in 2002. There is no evidence submitted to show that the petitioner paid the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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.

- In 2001, the Form 1120 stated taxable income of \$4,195.00. The petitioner employed the beneficiary from October 2001, and, petitioner paid the beneficiary \$5,184.00 in 2001. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour or \$23,857.00 per year. The sum of the wages paid and the taxable income is less than the proffered wage.
- In 2002, the Form 1120 stated taxable income of \$8,783.00. The petitioner employed the beneficiary from October 2001, and, petitioner paid the beneficiary \$21,600.00 in 2002. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour or \$23,857.00 per year. The sum of the wages paid and the taxable income is more than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time between the years 1999 (from the priority date) through 2003 for which petitioner's tax returns are offered for evidence.

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

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

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation'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.

Examining the five⁵ Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following.

- In 2003, petitioner's Form 1120 return stated current assets of \$33,807.00 and \$3,950.00 in current liabilities. Therefore, the petitioner had \$29,857.00 in net current assets for 2002. Since the proffered wage was \$23,857.00 per year, this sum is more than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$15,496.00 and \$1,198.00 in current liabilities. Therefore, the petitioner had \$14,298.00 in net current assets for 2002. Since the proffered wage was \$23,857.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$17,764.00 and \$5,065.00 in current liabilities. Therefore, the petitioner had a \$12,699.00 in net current assets for 2001. Since the proffered wage was \$23,857.00 per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of \$12,281.00 and \$5,356.00 in current liabilities. Therefore, the petitioner had a \$6,925.00 in net current assets for 2000. Since the proffered wage was \$23,857.00 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120 return stated current assets of a \$15,888.00 and \$4,907.00 in current liabilities. Therefore, the petitioner had a \$10,981.00 in net current assets for 1999. Since the proffered wage was \$23,857.00 per year, this sum is less than the proffered wage.

Therefore, for the period 1999 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets. In 2003, the petitioner could pay the proffered wage.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an examination of the gross revenues of the petitioner since it began business in 1998 through year 2003 (that is the last tax return submitted by counsel). However, according to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Matter of Sonogawa, 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 *Sonogawa* 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

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.

⁵ The 1998 tax return submitted was before the priority date.

⁶ 8 C.F.R. § 204.5(g)(2).

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.

Petitioner has never paid the beneficiary the proffered wage for the period under examination.⁷ In the five years under examination, since the priority date, despite increasing gross revenues, the petitioner did not state taxable income sufficient to pay the proffered wage. Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage during that five-year period.

There are no parallels in the subject case to the precedent case *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner has never experienced an increase in taxable income sufficient to pay the proffered wage. Taxable income in 1999 was a loss of <\$851.00>, while in 2000 the loss rose to <\$1,142.00>. Taxable income in 2001 was \$4,195.00, while in 2002 and 2003 it rose to \$8,783.00 and \$14,600.00 respectively. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, as is the case here. Counsel, by submitting complete tax and payroll records, has not established a case for application of *Matter of Sonegawa*. The petitioner is not a viable business that by paying the beneficiary her present wage in 2003 has proved its ability to pay the proffered wage from the priority date.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999 through 2003 was an uncharacteristically unprofitable period for the petitioner.

Counsel's contention cannot be concluded to outweigh the evidence presented in the five corporate tax returns as submitted by petitioner that by any test demonstrates that petitioner could not pay the proffered wage from taxable income the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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. The documentation submitted by petitioner does not establish that petitioner had the ability to pay the proffered wage on the priority date. Accordingly, the decision of the director will be affirmed, and the petition will remain revoked.

ORDER: The motion is granted. The petition will remain revoked.

⁷ Counsel explains that in 2001 the beneficiary was unable to work full time, and, therefore earned less than the proffered wage.