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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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, Director
Administrative Appeals Office

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

The petitioner is a custom tailoring firm. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel states that the evidence establishes the petitioner's ability to pay the proffered wage.

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 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:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is March 23, 2001. The proffered wage as stated on the Form ETA 750 is $2,362.97 per month, which amounts to $28,355.64 annually. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of $154,444.00, to have a net annual income of $51,476.00, and to currently have two employees.

In support of the petition, the petitioner submitted a copy of a certificate of employment dated February 22, 2001 from a former employer of the beneficiary in Korea; a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2000; and a copy of Schedule CA, California Adjustments - Residents, of the petitioner's owner for 2000.

In a request for evidence (RFE) dated January 22, 2003 the director requested additional evidence concerning the petitioner's ability to pay the proffered wage and additional evidence concerning the beneficiary's experience. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of March 23, 2001. The director specifically requested evidence for the petitioner's 2001 tax year.

In response to the RFE, counsel submitted a letter dated April 15, 2003 and the following documents: a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2001; copies of the petitioners Form DE 6 California Quarterly Wage and Withholding Reports for the four quarters of 2002; a written statement dated April 15, 2003 of the petitioner's owner; a copy of a Korean language newspaper article with certified English summary translation; copies of two photographs apparently showing the petitioner's owner with customers; and a copy of an undated certificate of experience from the same former employer of the beneficiary in Korea who had submitted the previous certificate.

In a decision dated July 9, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition. The director found that the petitioner was a sole proprietorship and that the owner's net income was insufficient to pay the proffered wage to the beneficiary and to pay the owner's household expenses. The director particularly noted a high mortgage interest deduction shown on the petitioner's tax return for 2001 as evidence of the owner's substantial household expenses.

On appeal, counsel submits a brief in the form of a statement of appeal and submits no additional evidence.

Counsel states on appeal that the director failed to correctly analyze the tax return of the petitioner's owner and failed to take into account the owner's plan to replace two part-time tailors with the beneficiary as a full-time employee. Counsel also states that the petitioner's evidence satisfies the criteria described in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

While the appeal was pending before the AAO, counsel submitted a letter dated May 14, 2004, to which counsel attached a copy of an Interoffice Memorandum dated May 4, 2004 to CIS service center directors and other CIS field office director from William R. Yates, Associate Director for Operations, CIS. The memorandum is entitled Determination of Ability to Pay under 8 CFR 204.5(g)(2). Counsel asserts that the petitioner's evidence satisfies the criteria set forth in that memorandum, in that the petitioner's net income and net current assets are each greater than the proffered wage. The memorandum from William R. Yates is not an evidentiary document, but rather is a copy of a legal authority relied upon by counsel. Counsel's letter dated May 14, 2004 was received by the AAO on May 21, 2004, which was well after the thirty-day period following the notice of appeal. Nonetheless, the issuance of the memorandum by William R. Yates on May 4, 2004 and counsel's prompt action in submitting a copy of that memorandum for the record are found to be good cause for submitting additional materials more than thirty days after the notice of appeal. The points discussed in counsel's letter of May 14, 2004 therefore will be considered by the AAO along with the issues discussed in counsel's brief.

Since no additional evidence has been submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage,

this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant petition, however, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is structured as a sole proprietorship. For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return. The tax returns of the petitioner's owner show the following amounts for adjusted gross income: $46,050.00 for 2000; and $54,986.00 for 2001. The figure for 2001, which is the year of the priority date, is greater than the proffered wage by the amount of $26,630.36.

The petitioner submitted no statement of monthly household expenses of the petitioner's owner. The only evidence related to that issue is that found in the owner's tax returns. The tax returns for 2000 and 2001 each are joint returns of the petitioner's owner and his wife. The returns shown no dependents. As the director noted in his decision, the petitioner's tax return for 2001 shows a significant deduction for mortgage interest expenses. The total interest deduction shown on the owner's Schedule A for 2001 is $40,763.00, of which $40,646.00 is for home mortgage interest and points and $117.00 is for investment interest. The tax return of the petitioner's owner for 2000 shows a similar deduction for interest. The owner's Schedule A for 2000 shows a total interest deduction of $34,004.00, of which $32,942.00 is for home mortgage interest and points and $1,062.00 is for investment interest.

The director found that the $40,646.00 home mortgage deduction showed a significant financial obligation of the petitioner's owner, and that adding that obligation to the proffered wage of $28,355.64 would result in a negative amount of -$14,015.65 remaining to pay the owner's other household expenses. Counsel, in his brief, states that the owner's high home mortgage interest deduction for 2001 is explained by the fact that the owner has a line of credit tied to his home mortgage on which he took out an $80,000.00 loan, which the owner then in turn lent to the owner's brother. 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). No evidence in the record supports counsel's assertions on this point. Counsel suggests that the director should have issued a further RFE seeking clarification of the mortgage interest issue. However, the director was under no obligation to issue a second RFE. *See* 8 C.F.R. § 103.2(b)(9).

In analyzing the petitioner's tax return for 2001, the director stated that the return showed that the petitioner's owner has two dependents. The director was incorrect on that point, for the return shows only two personal exemptions, for the owner and his wife, and no dependents. Nonetheless, the director was correct in finding that the return showed insufficient adjusted gross income to pay the owner's household expenses and also to pay the

proffered wage. The home mortgage interest deduction $40,646.00 could have been a legitimate tax deduction only if that amount had in fact been paid by the owner and his wife in interest during 2001. Deducting that amount from their adjusted gross income of $54,986.00 would have left them only $14,346.00 for all of their other household expenses. Even if the explanation offered in counsel's brief were in the form of acceptable evidence, the information in the brief fails to clarify the personal financial situation of the owner and his wife. An $80,000.00 loan at the interest rate of 6.0% as suggested by counsel would require annual interest of only about $4,800.00 per year, leaving about $36,000.00 in 2001 as the interest paid on the owner's home mortgage apart from any line of credit.

Counsel suggests that the depreciation schedules for the owner's various real estate investment properties attached to the owner's tax returns establish that the owner's net current assets are in the hundreds of thousands of dollars. It is certainly plausible that the owner and his wife had a substantial net worth in 2001. The very fact that they had a high home mortgage interest deduction suggests that their home is of substantial value. Moreover the federal depreciation schedules show them to be the owners of two commercial properties. One of those properties is apparently the building in which the petitioning business is located, which is shown as having been acquired in July 1985, with a tax basis at that time of $57,941.00. The second property is described as a six-unit commercial property, also acquired in July 1985, with a tax basis at that time of $115,883 in the building and a tax basis at that time of $348,171.00 in the land.

The petitioner's evidence, however, does not contain a full financial statement for the owner and his wife, therefore the record lacks information on the market values of any real properties they own, and on the amounts of any liabilities.

The tax return information therefore is insufficient in itself to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing thereafter.

The petitioner's tax return evidence is supplemented by a written statement of the petitioner's owner explaining his business plan for paying the proffered wage to the beneficiary. The owner states that his business presently has two part-time employees who assist the owner. The owner states that he plans to replace those two part-time employees with the beneficiary, who will be hired on a full-time basis. The owner states that the combined salary costs for the two part-time employees are $22,000.00, and that the money saved on the salaries of those part-time assistants would be used toward paying the $28,350.00 proffered wage for the beneficiary. The owner states that with the presence of a full-time custom tailor the owner would be able to reduce his own tailoring duties and focus more on customer relations and satisfaction among the numerous celebrity customers of the petitioner. The owner's statement also names three persons as customers of the petitioner. Two of those persons are nationally known in the entertainment field and one of those persons is a nationally known lawyer.

The owner's statements about the petitioner's salary costs are consistent with the information on the owner's Schedule C attached to his 2001 tax return. That schedule shows gross receipts or sales of $133,559.00, gross income of $110,923.00, and expenses for wages of $22,500.00, along with other expenses, resulting in a net profit from the business of $59,771.00.

The owner's statements about celebrity customers of the petitioner are corroborated by a Korean-language newspaper article in the record, with which the petitioner submitted a certified English summary translation. The summary translation states that the article dates from a 1990 edition of the Los Angeles Korea Times Weekly Journal in which the petitioner's owner is profiled. The summary translation names one of the persons mentioned in the owner's statement as a customer of the petitioner, and the newspaper article includes a picture of that person with the petitioner's owner. The summary translation of the article names four additional persons as

customers of the petitioner, each of whom was also nationally known in the entertainment field, though two of those persons have since died. The petitioner's evidence also includes copies of two photographs, one of which shows the petitioner's owner taking a measurement of the nationally known lawyer mentioned above, apparently at the petitioner's place of business.

Counsel asserts that the petitioner's evidence satisfies the criteria in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), a case in which the Regional Commissioner reversed the denial of an I-140 petition that had been denied for failure to establish the petitioner's ability to pay the proffered wage. Counsel states that in *Sonegawa* the petitioner had been in business since 1956, or for eleven years, that the petitioner was found to be well recognized in its local town, and that there was no evidence that the petitioner would not continue to remain in business. Counsel states that in the instant petition, the petitioner has been in business since 1990, or for two years longer than the petitioner in *Sonegawa*, that the patronage of well-known celebrities is evidence that it is well recognized in its local town, and that there is no evidence that the petitioner will not continue to remain in business. Counsel also notes that in *Sonegawa* the prevailing wage for the offered position of clothes designer was $6,240.00 per year, which was much higher than the petitioner's net business profit in 1966 of $280.00. Counsel points out that in the instant case the business income of nearly $60,000.00 per year is significantly higher than the proffered wage of $28,355.64.

Counsel's assertions based on *Matter of Sonegawa* are supported by evidence in the record in the instant case and are accurate summaries of facts in the *Sonegawa* case relied upon by the Regional Commissioner in reaching his decision. Some significant facts in *Sonegawa* differ from the facts in the instant case, notably the fact that the petitioner in *Sonegawa* had recently moved to a new location and was experiencing an unprofitable period following previous profitable years. Nonetheless, the facts indicated by petitioner's evidence in the instant case are in some respects stronger than the facts in *Sonegawa*, since the instant petitioner's tax returns show business income in excess of the proffered wage both in the year 2001, which is the year of the priority date, and in the year 2000.

Crediting the owner's statement that he intends to replace the petitioner's two part-time employees with the beneficiary in a full-time capacity results in an increase in the petitioner's salary costs from $22,500.00 for the two part-time employees to the proffered wage of $28,355.64 to be paid to the beneficiary, an increase of $5,855.64.

The AAO finds counsel's assertions based on *Matter of Sonegawa*, 12 I&N Dec. 612, to be persuasive. Although the petitioner's tax returns alone are not sufficient to establish the petitioner's ability to pay the proffered wage, the information in those returns in conjunction with the information in the owner's written statement dated April 15, 2003, including the owner's sufficiently detailed statements on replacing two part-time employees with the beneficiary in a full-time capacity, and the corroborating evidence of a Korean language newspaper article and photographs of the petitioner's owner with customers, is sufficient to establish that the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly analyzed the petitioner's tax return for 2001, and correctly found that because of high home mortgage interest expenses that year the adjusted gross income of the petitioner's owner and his wife was not sufficient to establish the petitioner's ability to pay the proffered wage. The director erred in stating that the petitioner had two dependents, when in fact the 2001 tax return shows no dependents and shows only two personal exemptions, for the petitioner's owner and his wife.

The record before the director contained no legal memorandum from counsel setting forth counsel's theory of the case. Had such an analysis been submitted by counsel prior to the director's decision it might have been helpful

to the director. Counsel's analysis of the relevance of *Matter of Sonegawa*, 12 I&N Dec. 612, was presented for the first time in counsel's brief on appeal. Nonetheless, the director erred in failing to consider sufficiently the information in the statement of the petitioner's owner and the evidence corroborating the owner's statement. For the reasons discussed above, the assertions in counsel's brief are sufficient to overcome the director's decision concerning the petitioner's ability to pay the proffered wage.

A second issue in the instant petition concerns the beneficiary's qualifications for the offered position.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The ETA 750 submitted with the instant petition requires two years of experience in the offered position.

The petitioner's initial submission included a certificate of employment from a former employer of the beneficiary in Korea stating the beneficiary's experience as a custom tailor from July 15, 1994 to June 10, 1997. That certificate lacked any indication of the number of hours worked by the beneficiary in that position. In the RFE issued January 22, 2003, the director stated that the letter of experience was incomplete because the hours per week were missing from the letter. The director requested a complete original letter of experience as evidence.

The petitioner's response to the RFE included a certificate of experience from the beneficiary's former employer in Korea which showed the same dates of employment as the previously-submitted certificate, but which also stated that the beneficiary worked for 40 hours per week. The second certificate also included a description of the duties performed by the beneficiary in that previous employment, duties which were very similar to those specified for the offered position on the ETA 750.

In his decision, the director made no mention of the beneficiary's qualifications. The absence of any such mention in director's decision indicates that the director was satisfied with the second certificate from the beneficiary's former employer in Korea, and the AAO finds that the second certificate is sufficient to establish that the beneficiary had the required two years of experience in the offered position as of the priority date.

In summary, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and is sufficient to establish that the beneficiary had the required experience in the offered position as of 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.