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



U.S. Citizenship
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Services

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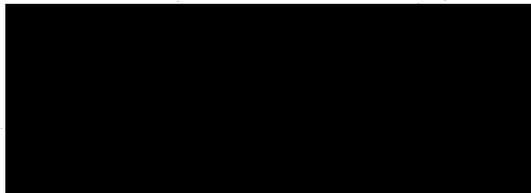
Office: NEBRASKA SERVICE CENTER

Date: **JAN 26 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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 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 granting 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 21, 2001. The proffered wage as stated on the Form ETA 750 is \$18 per hour, which equals \$37,440 per year.

On the petition, the petitioner stated that it was established during 1995 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Salt Lake City, Utah.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared \$3,540 in ordinary income during that year. The corresponding Schedule L shows that the petitioner had current assets of \$6,625 and current liabilities of \$5,449, which yields net current assets of \$1,176.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on March 24, 2003,

requested additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2002 tax return and, if the petitioner has employed the beneficiary, copies of the 2001 and 2002 Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary during those years.

In response, counsel submitted a letter dated May 13, 2003. In that letter counsel stated that the petitioning restaurant had been owned as a sole proprietorship until the first quarter of 2001, when it became a Subchapter S corporation. Counsel also asserted that the petitioner's business was adversely affected by the construction of a light rail system that eliminated the petitioner's on street parking during 1999 and closed the intersection at which the petitioner is located for some portions of 2001. Although counsel characterized those periods as "extended portions" of 2001, he did not state how many days or months the intersection was closed to traffic. Further still, counsel asserted that the beneficiary, once employed by the petitioner, would replace the petitioner's current chef.

With that letter counsel submitted an affidavit from the petitioner's owner. In that affidavit, the petitioner's owner attests to the following: (1) that when hired the petitioner would replace the current cook, (2) that construction of the light rail line removed all nearby on street parking and closed the petitioner's street beginning during early 2001¹, (3) that the petitioner's business continued to be slow during the 2002 Olympic games because of security constraints in the area, (4) that although the petitioner declared a loss during 2001 it continued to make its payroll payments, (5) that "Business is projected at pre-2000 levels, even with the downturn in the economy², and (6) that the petitioner's owner believes that the petitioner's revenue during future years will be more than sufficient to pay the proffered wage.

Counsel also provided (1) a printout of web content pertinent to the light rail system, which states that the "Salt Lake City Council has approved a \$250,000 grant to help businesses affected by Light Rail Construction," (2) a table purporting to show amounts the petitioner paid to its chefs during 2000, 2001, 2002, and the first quarter of 2003, (3) the petitioner's 2000, 2001, and 2003 W-2 forms and W-3 transmittals³, (4) the petitioner's Utah Employer's Quarterly Wage Lists for all four quarters of 2000 and all four quarters of 2001, all four quarters of 2002, and the first quarter of 2003, (5) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for all four quarters of 2001, all four quarters of 2002, and the first quarter of 2003, (6) paystubs dated January, February, and March, 2003 showing amounts the petitioner paid to Dhian Portolla during those months, (7) an unaudited profit and loss statement for the first quarter of 2003, and (8) a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹ The petitioner's owner did not state how long that closure continued.

² At that time the record contained no evidence pertinent to the petitioner's financial performance during or before 2000.

³ The petitioner submitted two W-3 transmittals with corresponding W-2 forms for 2001. One was in the name of Taj India and was in the amount of \$5,100. The other was in the name of Taj India, Inc. and was for \$20,100. Further, the petitioner's Form 941 for the first quarter of 2001 shows that the petitioner paid \$5,100 in wages, whereas the Forms 941 for the remaining three quarters of 2001 show that the petitioner paid its employees \$20,100. Those figures are consistent with, and lend credibility to, the petitioner's owner's assertion that the petitioner was a sole proprietorship until the conclusion of 2001, when it became an S-corporation.

The W-2 forms, W-3 transmittals⁴, quarterly wage lists, and quarterly returns all indicate that the petitioner paid its employees \$15,400 during 2000, \$25,200 during 2001, \$41,000 during 2002, and \$13,200 during the first quarter of 2003. Of those amounts, the petitioner's owner asserts that the petitioner paid its chefs \$15,400 during 2000, \$20,500 during 2001, \$21,600 during 2002, and \$5,400 during the first quarter of 2003. The paystubs confirm that the petitioner paid Dhian Portolla \$5,400 during the first quarter of 2003.

The 2002 tax return shows that the petitioner declared \$22,616 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities, which yields net current assets of \$0.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 19, 2003, denied the petition.

On appeal, counsel argues that the evidence demonstrates the petitioner's ability to pay the proffered wage and asserts, "in this case, the petitioner has clearly stated that for business reasons, he [sic] must replace the individual who now occupies the [proffered position]."

Contrary to counsel's assertion, the petitioner has not stated why it is seeking to replace the incumbent in the proffered position. Counsel does not state the reason either, other than to characterize it as a business reason. The fundamental purpose of the visa category pursuant to which the petition in this case was filed is to aid business owners in filling jobs for which workers are otherwise unavailable. The position is currently filled. If the petitioner were seeking to replace the incumbent with the beneficiary out of preference, rather than necessity, that would be inconsistent with the purpose of the instant visa category. Merely characterizing the reason for seeking to replace the incumbent as a business reason is insufficient. Because this consideration formed no part of the basis for the decision of denial, however, it shall not be addressed further.

With the appeal counsel submitted copies of the 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Each of those returns includes a corresponding Schedule C, Profit or Loss from Business, showing the financial performance of the petitioning restaurant during those years. Because the priority date is March 21, 2001, evidence pertinent to the petitioner's financial performance during 2000 and previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The figures on that form, however, shall be accorded some evidentiary value and addressed for reasons set forth below.

Counsel also urged that the proceeds of a \$15,000 low-interest business loan occasioned by the harm done to the petitioner's business should also be considered in the determination of the petitioner's ability to pay the proffered wage.

Neither a loan nor an indication of available credit is an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The borrowed funds or additional credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

⁴ The W-3 transmittals and W-2 forms, considered together, show that the petitioner did not employ the beneficiary.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$37,440 per year. The priority date is March 21, 2001.

Counsel did not submit the petitioner's owner's 2001 Form 1040 U.S. Individual Income Tax Return. The corresponding Schedule C with that return would have shown the petitioner's financial performance during the first quarter of that year, during which quarter the petitioner was a sole proprietorship. That return should have been provided and, if not provided initially, requested. Without it, this office is unable to determine whether the petitioner earned a profit or suffered a loss during that quarter, or to determine the extent of that profit or loss. Nevertheless, whether that 2001 return would aid the petitioner's cause or hinder it, it is unavailable to this office and the appeal must be adjudicated without that relevant evidence.

During the last three quarters of 2001, when the petitioner was owned in corporate form, the petitioner declared ordinary income of \$3,540. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$1,176. That amount is also insufficient to pay the proffered wage.

Counsel urges, however, that for "business reasons" the petitioner will replace the incumbent in the proffered position if it is legally able to employ the beneficiary. Counsel urges, therefore, that the wages paid to that incumbent during salient years should be included in the calculation of funds that were available to pay the proffered wage. During 2001 the petitioner paid its chef, Mr. [REDACTED] \$15,700. That amount, added to the petitioner's ordinary income, equals \$19,240, an amount less than the proffered wage.⁵

The petitioner also asserted that the petitioner's owner and his wife performed the duties of chef at the restaurant when the incumbent was unavailable. Counsel urges, therefore, that amounts paid to the petitioner's owner and his wife should be included in the calculation of funds available to pay the proffered wage.

During 2001 the petitioner paid total wages of \$25,200. Of that amount, \$15,700 went to Mr. [REDACTED] the regular chef. Of the \$9,500 balance, \$1,200 went to the petitioner's owner's wife and the \$8,300 to another employee. Counsel urges that the \$1,200 paid to the petitioner's owner's wife should also be included in the calculation of the funds available to pay the proffered wage, as it was paid to her for performing the duties of the chef.

As was noted above, the petitioner's 2001 ordinary income and the amount it paid to its regular chef during 2001, added together, are less than the annual amount of the proffered wage. The petitioner has not credibly demonstrated that any other funds were available to it during 2001 with which it could have paid the proffered wage. The petitioner's ordinary income and the amount it paid to its regular chef are insufficient to demonstrate the ability to pay the proffered wage during 2001.

Even if the restaurant were shown to be operable with only one employee, and the \$1,200 paid to the owner's spouse were included in the amount available to pay the proffered wage, as counsel urges, the total that counsel has demonstrated was available to pay wages during 2001 would still equal only \$20,440, which is still less than the proffered wage.

During 2002 the petitioner declared ordinary income of \$22,616. The petitioner ended that year with no net current assets. During that year the petitioner paid its regular chef \$16,200. That amount, added to the petitioner's ordinary income, equals \$38,816, an amount slightly greater than the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

Pertinent to the petitioner's failure to show its ability to pay the proffered wage with its 2001 ordinary income and the amount it paid to its chef during the same year, counsel argues, that the petitioner's low profits during that year were caused by the construction of the Salt Lake City light rail service, which occasioned the loss of

⁵ For reasons noted above in the explanation of net current assets, the petitioner's net current assets are not to be included in this sum.

convenient on street parking and caused street closures that directly affected access to the petitioner's business for an unstated period during 2001. The petitioner's owner anticipates that the restaurant will now return to its former profitability.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. Counsel is correct that, consistent with that decision, if the petitioner's losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

During 1998 the petitioner declared \$27,809 in profit. The petitioner's owner declared adjusted gross income of \$23,517, including the petitioner's entire profit offset by deductions. During that year the petitioner's owner and owner's spouse had two dependents. No evidence was requested or provided pertinent to the petitioner's owner's recurring expenses and household budget during that year. This office is unable to say, therefore, what part, if any, of that adjusted gross income the petitioner's owner might have been able to use toward paying the proffered wage while still supporting his family on the balance. Further, although the petitioner paid Schedule C, Line 26 Wages Less Employment Credits of \$20,460, no evidence was submitted from which this office can determine what portion of those wages were paid to the petitioner's chef. As such, the petitioner has not demonstrated what portion of those wages would have been available to pay the wages of the beneficiary during that year, if he had then been hired. The petitioner has not submitted evidence sufficient to demonstrate that it could have paid the proffered wage during 1998.

During 1999 the petitioner declared profit of \$38,171. The petitioner's owner declared adjusted gross income of \$32,738, including the petitioner's entire profit offset by deductions. During that year the petitioner's owner and owner's spouse had three dependents. No evidence was requested or provided pertinent to the petitioner's owner's recurring expenses and household budget during that year. This office is unable to say, therefore, what part, if any, of that adjusted gross income the petitioner's owner might have been able to use toward paying the proffered wage. Further, although the petitioner paid Schedule C, Line 26 Wages Less Employment Credits of \$20,100, no evidence was submitted from which this office can determine what portion of those wages were paid to the petitioner's chef. As such, the petitioner has not demonstrated what portion of those wages would have been available to pay the wages of the beneficiary during that year. The petitioner has not submitted evidence sufficient to demonstrate that it could have paid the proffered wage during 1999.

During 2000 the petitioner declared profit of \$31,061. The petitioner's owner declared adjusted gross income of \$28,907, including the petitioner's entire profit offset by deductions. During that year the petitioner's owner and owner's spouse had four dependents. No evidence was requested or provided pertinent to the petitioner's owner's recurring expenses and household budget during that year. This office is unable to say, therefore, what part, if any, of that adjusted gross income the petitioner's owner might have been able to use toward paying the proffered wage. Further, although the petitioner paid Schedule C, Line 26 Wages Less Employment Credits of \$15,400, no evidence was submitted from which this office can determine what portion of those wages were paid to the petitioner's chef. As such, the petitioner has not demonstrated what portion of those wages would have been available to pay the wages of the beneficiary during that year. The petitioner has not submitted evidence sufficient to demonstrate that it could have paid the proffered wage during 2000.

As was stated above, if the petitioner's losses or low profits during 2001 were uncharacteristic, occurred within a framework of profitable years, and are unlikely to recur, then they might be disregarded. The evidence submitted, however, is insufficient to show that the petitioner's poor performance during 2001 was uncharacteristic and insufficient to show that it is unlikely to recur. The petitioner has submitted some evidence that access to its business was restricted by construction during 2001, but no evidence that the petitioner's profits would otherwise have been much higher. Further still, neither the petitioner's owner nor counsel has stated whether the petitioner has regained the convenient on street parking the loss of which the petitioner's owner stated was a factor in its poor performance during 2001. The basis for the petitioner's owner's prediction of future profits is unclear.

The additional evidence submitted is insufficient to overcome the petitioner's failure to demonstrate that it could pay the proffered wage during 2001 out of its income and the amount it paid to the chef it intends to release.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.