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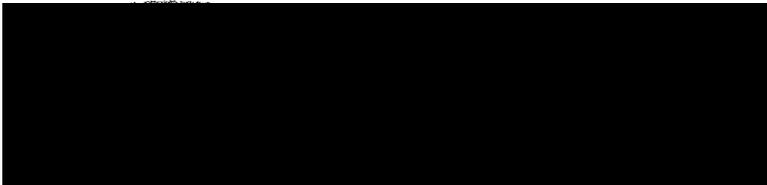
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FILE: LIN 04 150 52090 Office: NEBRASKA SERVICE CENTER Date: **NOV 21 2005**

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 denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Asian specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook for banquets. 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 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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 7, 2001. The proffered wage as stated on the Form ETA 750 is \$1,800 a month, which amounts to \$21,600 annually.

With the petition, the petitioner submitted IRS Form 1120, Federal Corporate Income Tax Return, for the years 2000 and 2003, along with a document prepared by Greenwood, Ohlund and Company, L.L.P., C.P.A., Seattle, Washington. The document compared the figures contained on the petitioner's 2002 and 2003 federal income tax returns, noting the differences in all income tax return categories listed. The 2000 Form 1120 indicated the petitioner had a taxable income of \$9,809 while the 2002 tax return indicated the petitioner had an ordinary income in that year of -\$47,170. The petitioner also submitted a letter from the beneficiary's former work place in Taishan, China.

On June 9, 2004, the director denied the petition. The director noted that neither of the tax returns submitted by the petitioner indicated that the petitioner had the ability to pay the proffered wage as of the priority date and continuing into the present. The director noted that the petitioner had not submitted tax returns for either 2001 or 2002.

On appeal, counsel states that the petitioner was in critical need of a Chinese specialty cook in December 2001 when the ETA 750 was filed, and that the passing years have exacerbated the need. Counsel then submits the following documents:

Declaration of [REDACTED] Greenwood Ohlund & Company, Seattle, Washington. Mr. [REDACTED] states that based on his professional training and experience, it is his opinion that the petitioner at all times has had the ability to pay the proffered wage. Mr. [REDACTED] continues by saying that an analysis of the petitioner's tax returns indicates that it has produced breakeven results, with small profits reported for the years 2000 to 2002. Mr. [REDACTED] states that the loss of \$53,000 in 2003 can be attributed to a spike in labor costs due to a high turnover of cooks, and the employment of standby cooks who demand higher wages than the prevailing wage offered to the beneficiary; increased insurance costs; and general increases in operating expenses. Mr. [REDACTED] also noted that in 2003, a large unexpected repair and maintenance expense was incurred and that the repair and renovation costs totaled approximately \$27,000. Mr. [REDACTED] also points out that cash flow from operations was very healthy from the years 2000 to 2002, and that \$88,000 of the \$150,000 in cash flow over a three-year period ending December 31, 2002 was invested in capital expenditures. Mr. [REDACTED] states that the owners of the corporation have shown an ability to finance corporate cash flow deficiencies with personal funds, in that they provided \$80,000 in supporting funds in 2003. Mr. [REDACTED] also states that the petitioner plans to substantially decrease existing labor costs with the hiring of the new Chinese specialty cook. In conclusion, Mr. [REDACTED] states that the petitioner, based on its history, has the ability to produce healthy positive cash flows from operations; the owners of the petitioner have had the ability to invest capital into the corporation to cover unexpected and unusual expenses; and since hiring the beneficiary will constitute a replacement of existing part-time temporary employees, all business indicators substantiate that the petitioner has at all times had the ability to pay the proffered wage.

Copies of the petitioner's federal income tax returns for the years ending December 31, 2000 to December 31, 2003, with unaudited or reviewed statements of cash flows prepared by the accounting firm for the corresponding periods of time. The petitioner's federal income tax returns for tax years 2000 to 2003 indicate the petitioner has the following taxable income: \$1,471 in 2000, \$0(zero) in 2001; \$0(zero) in 2002, and -\$47,170 in 2003.

Declaration by [REDACTED] the petitioner's bookkeeper. Ms. [REDACTED] states that she has provided bookkeeping and accounting services to the petitioner for nine years, and that the petitioner has at all times during these nine years paid all taxes due and all wages due to the petitioner's employees. Ms. [REDACTED] states that in 2003 when the restaurant sustained substantial damage caused by two burst water pipes, the petitioner's financial obligations were met.

Declaration of [REDACTED] the petitioner's president. Ms. [REDACTED] states that she has owned and operated the petitioner since 1976, and that during that time, all employees have been paid their full wages, all taxes were paid, and all the obligations of the restaurant were paid in a timely manner. Ms. [REDACTED] also states that the petitioner presently employs more than twenty

persons who are either U.S. citizens or permanent residents. Ms. I [REDACTED] also describes the repairs that were necessary in 2003, and the subsequent loss of business and increased costs for the necessary repairs that ensued. Ms. Luke states that during 2003 all required state and federal taxes were timely filed and all taxes were timely paid, as were the wages of employees. Ms. Luke also states that there is a chronic shortage of qualified Chinese specialty cooks. Accompanying Ms. [REDACTED] statement is a one-page document that lists the total expenses to repair the actual damage, to pay current employees for lost wages, and the estimated loss of revenue for the restaurant during this two-day period of time. Total expenses were estimated as \$23,262.61. Ms. Luke also submitted Forms 940 Federal Government Unemployment Tax Return for 2002 and 2003. These two documents indicated the petitioner paid wages of \$225,708.25 to its employees in 2002 and \$252,428.63 in wages in 2003. The petitioner also submitted Forms 941 Federal Employee Tax Records for 13 quarters from April 23, 12001 to April 2004, as well as quarterly state of Washington employee and excise tax records.

Counsel, in reviewing the documents described above, reiterates many of the statements made by Mr. [REDACTED] Ms. [REDACTED] ss, and Ms. [REDACTED] Counsel also asserts that the owners of the petitioner have successfully operated the business for 28 years during which time all its employees have been paid. Counsel asserts that for many years the petitioner has critically needed the services of a qualified Chinese specialty cook, and that it is well established that for many years there has been a chronic severe shortage of Chinese specialty cooks in the Pacific Northwest. Counsel notes that there were no applicants for the position offered to the beneficiary. Counsel also asserts that the employment of the beneficiary will result in a substantial decrease in the petitioner's labor costs as the petitioner has paid unqualified temporary and part-time cooks who have, because of their economic leverage, demanded and received compensation in excess of the prevailing wage offered to the beneficiary. Counsel refers to Mr. [REDACTED] analysis of the increased labor costs and the estimated excess labor cost of \$16,000 in 2003 due to employing standby cooks on a temporary basis. Counsel finally states that the beneficiary will replace the temporary unqualified and overpaid personnel, which will decrease the petitioner's labor costs.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The petitioner did not claim to have employed the beneficiary as of the priority date. Therefore the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). 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 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, now CIS, should have considered income before expenses were paid rather than net income. It is noted that the petitioner submitted its federal income tax return for 2000 to the record. However, since the priority date for the instant petition is December 2001, the petitioner's 2000 tax return is not dispositive. Therefore the AAO will only examine the petitioner's tax return for 2001, 2002, and 2003. As stated previously, the petitioner's taxable income during the years 2001 to 2003 is , \$0(zero) in 2001; \$0(zero) in 2002, and -\$47,170 in 2003. These figures are not sufficient to establish that the petitioner has the ability to pay the proffered wage as of the 2001 priority date and onward.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. In addition, 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ 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 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 out of those net current assets. The tax returns reflect the following information for the following years:

	2001	2002	2003
Taxable income ²	\$ 0	\$ 0	\$ -47,170
Current Assets	\$ 8,707	\$ 11,073	\$ 31,257
Current Liabilities	\$ 60,568	\$ 85,119	\$ 121,034
Net current assets	\$ -57,861	\$ -79,046	\$ -89,777

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$0(zero), and net current assets of -\$57,861 and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that it paid any

¹ 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.

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

wages to the beneficiary during 2001. In 2002, as previously illustrated, the petitioner shows a taxable income of \$0(zero), and net current assets of -\$79,046, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner has not demonstrated that it paid any wages to the beneficiary. As previously illustrated, the petitioner shows a taxable income of -\$47,170 in 2003 and net current assets of -\$89,777 and has not, therefore, demonstrated the ability to pay the proffered wage.

The petitioner has also not established that it has additional funds or sources of funds that could be utilized to pay the proffered wage. On appeal, Mr. ██████, the petitioner's accountant, asserts that cash flows from operations were very healthy from 2000 to 2002, and the petitioner's operations provide sufficient cash income to maintain all of its operations. Counsel's reliance on assertions such as Mr. Skone's is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying Mr. Skone's statement, the AAO cannot conclude that his remarks represent audited financial statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Mr. ██████ also stated that the petitioner's owner has shown its ability to finance corporate cash flow deficiencies with personal funds. However, it is noted that a corporation is a separate and distinct legal entity from its owners and shareholders. The assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In addition, counsel asserts on appeal that the beneficiary will replace higher paid temporary and unqualified staff and that such replacements will lower the petitioner's labor costs. Counsel, however, beyond referring to Mr. Skone's description of excess labor costs in 2003, provides no further evidentiary documentation to substantiate this assertion. 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). Furthermore, based on the beneficiary's prospective monthly wage of \$1,800 as stipulated on the Form ETA 750, the beneficiary would be working at an hourly rate of approximately \$11.25.³ Contrary to counsel's assertion that the temporary cooking staff is able to demand higher wages than the prevailing wage to be paid to the beneficiary, the petitioner's one page document that examined wages lost on September 5 and 6, 2003, also indicated the hourly salary of the petitioner's employees. If this document is accurate, no one employee, other than the petitioner's owner, who earned \$35 an hour, earned more than ten dollars an hour for their labors. Thus the hourly wage to be given to the beneficiary is higher than those of current employees and without more persuasive evidence, does not appear to necessarily lower the labor costs for the petitioner. With regard to any replacement employees, the record does not name the temporary workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the temporary cook position involves the same duties as those set forth in the Form ETA 750, in particular with reference to cooking Chinese banquet-style meals. The petitioner has not documented the position, duty, and termination of any workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Without more persuasive evidence, the petitioner has not demonstrated that any other funds or sources of funding are available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

³ This figure is calculated by dividing the beneficiary's monthly salary by 160 hours of work, which would constitute four weeks of a forty-hour workweek.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$4,673 and net current assets of \$25,518. Thus, the petitioner had the ability to pay the proffered wage during 2002. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

With regard to the totality of the petitioner's circumstances, the petitioner stated in the initial petition that it had been in business under the present ownership since 1976. The petitioner also has demonstrated the additional financial debts incurred in 2003 following problems with its physical infrastructure. The petitioner also provided extensive documentation of its payment of wages to its employees over a three-year period of time. Although counsel asserts that the petitioner since 1976 has always paid its labor and business expenses on time, counsel did not provide any further substantiation of this assertion. However, more importantly, for purposes of these proceedings, neither counsel nor the petitioner has established that the petitioner has the ability to pay the proffered wage as of December 7, 2001, the priority date for the petition. Regardless of any extra expenses in 2003, or whether the petitioner's employees are always paid on time, for purposes of the I-140 visa petition process, the petitioner has to establish that it has the financial ability to pay the proffered wage as of the December 2001 priority date and onward.

With regard to the petitioner's negative net current assets, and negative taxable income, the AAO has examined petitioners with negative income or financial resources. For example, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years within 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

While the petitioner has established that it had unexpected financial debts in the year 2003 along with additional labor costs, the petitioner did not establish that the year 2003 or any year examined in these proceedings were uncharacteristically unprofitable years for the petitioner. Without more persuasive evidence, it does not appear that the petitioner in the instant petition has any unusual circumstances similar to those outlined in *Sonogawa*. As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.

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