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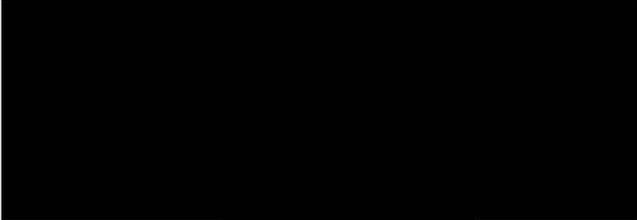
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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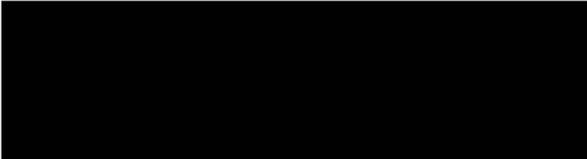
IN RE:

Petitioner:

Beneficiary:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, which amounts to \$24,960 per annum. On the ETA 750B, which the beneficiary signed on April 18, 2001, he claims that he worked for the beneficiary since January 2001.

On Part 5 of the visa petition, which was filed on May 28, 2003, the petitioner claims to have been established in 1988, to currently employ eight workers, and to have a gross annual income of \$683,250. In support of its ability to pay the beneficiary's proposed wage offer of \$24,960 per year, the petitioner initially submitted a copy of its

Form 1120S, U.S. Income Tax Return for an S Corporation for 2001. It reflects that the petitioner files its federal tax returns using a standard calendar year. It contains the following information:

	2001
Ordinary Income ¹	\$ 2,036
Current Assets (Sched. L)	\$ 13,610
Current Liabilities (Sched. L)	\$ 7,735
Net current assets	\$ 5,875

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 petitioner also provided a letter, dated April 5, 2003, from its owner/manager, [REDACTED] Mr. [REDACTED] states that the petitioner employed the beneficiary full-time from January 2001 to July 2001. He does not mention the beneficiary's salary.

The director requested additional evidence on April 9, 2004. Pertinent to the petitioner's ability to pay the proposed wage offer of \$24,960, the director instructed the petitioner to submit additional evidence to establish that it had the continuing financial ability to pay the proffered wage as of the priority date and continuing until the present. The director also requested that the petitioner provide copies of the beneficiary's 2001 Wage and Tax Statement (W-2) showing how much was paid to the beneficiary.

In response, the petitioner, through counsel, provided another copy of the petitioner's 2001 corporate tax return. The petitioner also submitted copies of payroll records for 2004 showing that the petitioner was employing the beneficiary at the certified hourly wage between March and June 2004. The most recent record shows that the beneficiary's year-to-date wages as of June 15, 2004, were \$6,720. Finally, the petitioner provided a letter, dated July 2, 2004, from an assistant branch manager at the Burke and Herbert Bank & Trust Company. The letter referenced another corporation's savings account, opened on May 10, 2004, as having a current balance of approximately \$151,000. The authorized signers are [REDACTED] and [REDACTED].

¹ For the purpose of this review, ordinary income will be treated as net income.

² 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.

On November 22, 2004, the director denied the petition. She noted that the petitioner's ordinary income and net current assets as shown on its 2001 corporate tax return was inadequate to cover the proposed wage offer of \$24,960. She further determined that although the evidence showed that the beneficiary was employed at the proffered hourly wage during 2004, no evidence had been submitted showing his earnings in any other years, including 2001. The director declined to include the savings account of a separate corporation as part of the petitioner's ability to pay the proffered wage.

On appeal, counsel submits a copy of Mr. [REDACTED] individual income tax return for 2001, and another letter, dated, December 9, 2004, from the Burke & Herbert Bank & Trust Company attesting to the balance in Mr. [REDACTED]'s checking account.

Counsel cites the petitioner's reasonable expectations of increased profits pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), as justifying approval of the petition, citing the beneficiary's training in Peruvian cuisine. He also relies on four AAO cases from 1994, 1995, and 2003, in which the ability to pay the proffered wage had been demonstrated under varying circumstances. We do not find these arguments persuasive.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the reliance on prior AAO cases, it is noted that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). Prior decisions may offer guidance in some circumstances, but are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions.

In determining a petitioner's ability to pay a proffered wage, CIS reviews whether a petitioner may have employed a beneficiary during a given period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record indicates that the petitioner has employed the alien for about six months in 2001 and has employed him at the proffered rate during a period of at least four months in 2004. Evidence of wages paid in 2004 has been provided, but no documentation of compensation paid in 2001 was offered to the record.

In this case, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001.³ Thus, the petitioner must show its ability to pay the proffered wage not only in later periods when it is claimed that it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001, 2002, and 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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 taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets.

In this case, the petitioner's corporate tax return for 2001, shows that the petitioner reported net taxable income of \$2,036, or \$22,924 less than the certified wage offer of \$24,960. No consideration of compensation received from the petitioner in 2001 may be made because such evidence was not provided. It is also noted that no federal tax returns, audited financial statements, or annual reports for any other year was provided pursuant to the requirements of the regulation at 8 C.F.R. § 201.5(g)(2).

Counsel refers the bank letter discussing Mr. [REDACTED] and his checking account as the petitioner's. This account nor the other business account referred to in the bank letter submitted to the underlying record may be considered as supporting the petitioner's own financial ability to pay the proffered wage. In this matter, the named petitioner on the preference petition is a corporation. A corporation is a separate and distinct legal entity from its owners and shareholders, consequently, 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.

³If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

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) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "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." It is further noted that a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel cites *Matter of Sonegawa, supra*, in claiming that the petitioner's increasing profits support its future prospects for success and establishes its ability to pay the proffered wage. In *Matter of Sonegawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, one federal tax return contained in the record does not represent a framework of profitable years analogous to the *Sonegawa* petitioner. While the beneficiary's expertise in Peruvian cuisine may be appreciated, the effect of his permanent employment is conjecture. It is noted that with his employment in part of the year 2001, the petitioner's 2001 tax return still reflected modest ordinary income and net current assets. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.