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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 01 2007
WAC 06 055 52500

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that 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 specialty chef. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 28, 2003. The proffered wage as stated on the Form ETA 750 is $16.46 per hour, which equals $34,236.80 per year.

The Form I-140 petition in this matter was submitted on December 8, 2005. On the petition, the petitioner stated that it was established on December 1, 1998 and that it employs 40 workers. The petition states that the petitioner's gross annual income is $1,186,343 and that its net annual income is a loss of $32,964. On the Form ETA 750, Part B, signed by the beneficiary on March 6, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Glendale, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1] In the instant case the record contains the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, and a letter dated July 14, 2006 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on January 7, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared Schedule K, Line 23 Income[2] of $86,960. The corresponding Schedule L shows that at the end of that year the petitioner had $104,519 in current assets and $1,380 in current liabilities, which yields $103,139 in net current assets. This office notes, however, that because the priority date of the visa petition is March 28, 2003, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2003 the petitioner declared Schedule K, Line 23 Income of $144,027. The corresponding Schedule L shows that at the end of that year the petitioner had $99,665 in current assets and $22,349 in current liabilities, which yields $77,316 in net current assets.

During 2004 the petitioner declared a loss of $44,464 as its Schedule K, Line 17e, Income/loss reconciliation.[3] The corresponding Schedule L shows that at the end of that year the petitioner had $38,637 in current assets and $20,898 in current liabilities, which yields $17,739 in net current assets.

The petitioner's accountant's July 14, 2006 letter stated that the petitioner's depreciation deduction and repair expense occasioned the petitioner's loss during 2004, and that those amounts should be added back to its income. The accountant also stated that the petitioner's expenses during that year included $64,850 for contract workers to perform the duties of the proffered position, which expense would have been obviated by hiring the beneficiary. The accountant further stated his opinion that the petitioner is a thriving business that can afford to hire the beneficiary and pay her $50,721.20 per year. This office notes that the provenance of that figure is unknown to this office, and that the annual wage proffered in the instant case is $34,236.80 per year. The accountant appeared to refer to the sum of the petitioner's 2004 net loss, its depreciation deduction, the amounts it allegedly paid for performance of the duties of the proffered position, and its repair expense as its "true income."[4]

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] On this version of the Form 1120S a taxpayer's Schedule K, Line 23 Income includes all of the various types of income (ordinary income, long and short-term capital gain, interest income, etc.), and loss and is considered to be its net income or loss.

[3] On this revised version of the Form 1120S, the figure shown at Schedule K, Line 17e, Income/loss reconciliation includes all of the various types of income (ordinary income, long and short-term capital gain, interest income, etc.), and loss and is considered to be its net income or loss.

[4] The exact computation urged by the accountant is unclear. However, the accountant noted that during 2004 the petitioner declared a loss of $32,964, claimed a depreciation deduction of $34,290, and paid repairs of

The director denied the petition on May 26, 2006. On appeal, counsel cited the petitioner's gross receipts, its total wage expense, and its depreciation deductions as evidence of its continuing ability to pay the proffered wage notwithstanding that it declared a loss during 2004.[5]

Counsel stated, "[I]t is clear that the reported negative business income does not support the conclusion that petitioner cannot pay the proffered wage." Counsel also cited a non-precedent decision of this office as support for his assertion that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Initially, this office notes that counsel's characterization of the decision of denial, that it had found that the petitioner was unable to pay the proffered wage, belies a misunderstanding of the burden of proof in this matter. The petitioner is obliged, by 8 C.F.R. § 204.5(g)(2), to affirmatively demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In denying the petition, the director did not find that it was unable, but merely that it had failed to sustain its burden of proof.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. On page four of the appellate brief counsel stated, apparently referring to the non-precedent case cited,

> [I]t is clear that a ruling consistent with binding precedent requires that [the petitioner] be found financially strong enough to bear payment of the beneficiary's proposed wages.

That assertion belies a misunderstanding of the nature of the case he cited. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[6] or otherwise increased its net income,[7] the petitioner is obliged to show

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$32,714. The accountant asserted that the petitioner paid $64,850 for unidentified workers for performance of the proffered position. From those figures the accountant derived the "true income" figure of $96,238.

[5] Counsel also asserted that the petition was denied for the additional reason that the beneficiary had not worked for the petitioner. The decision does state, "The beneficiary has never worked for the petitioner" without specifying the relevance of that fact and counsel has apparently misapprehended that relevance. The sole issue in this case, as was noted above, is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. Any amounts the petitioner had actually paid to the beneficiary during the salient years would, of course, be relevant to demonstrating the ability to pay him the proffered wage, or at least some part of it, during those years. That the petitioner did not employ the beneficiary during the salient years is not a basis for denial in itself, but merely precludes one avenue of demonstrating the ability to pay the proffered wage during the salient years.

[6] The petitioner might be able to show, for instance, that the beneficiary would replace a named employee, thus obviating that other employee's wages.

the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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.

Wages or other payments paid to particular current employees or contractors whom the beneficiary would replace are on a different footing. As was noted above, any expense that the petitioner is able to demonstrate would be obviated by its hiring the beneficiary is a potential source of funds available to pay the wage proffered.

In the instant case, in his July 14, 2006 letter, the accountant stated that, "The salaries and wages of $670,233.00 [during 2004] included $64,850.00 for outside labor to cover the duties and responsibilities that [the beneficiary] would assume if and when she can accept employment [in the proffered position]."

By "outside labor," counsel appears to mean nonemployee contract workers. This office notes that the instructions to the Form 1120S, U.S. Income Tax Return for an S Corporation clearly states that amounts listed at Line 8 represent wages and salaries paid to employees. This precludes non-wage payments to contractors being listed there. Further, amounts paid to employees as salaries and wages, are reported on Form W-2 Wage and Tax Statements and are subject to FICA and Medicare, whereas payments to contract workers are reported on Form 1099 and are not subject to those levies. In order to avoid those levies, the petitioner would be unlikely to misrepresent contractor payments as wages and salaries on its tax return. Significantly, the petitioner listed no cost of labor expenses on its Schedule A, line 3.

Further, other than the accountant's unlikely assertion, the record contains no evidence that indicates the existence of any contract laborers or any other workers whom the beneficiary would replace. The petitioner failed to provide any Form W-2 Wage and Tax Statements, Form 1099 Miscellaneous Income statements, or other documentation to identify the employee or employees who would be replaced or to verify what salary the petitioner paid these other workers from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record that attests to the claim that the beneficiary will replace those other workers. Further still, there is no evidence in the record that those workers performed the duties of the proffered position. Under these circumstances, the accountant's conclusory statement, absent any verification, is insufficient to show that any funds paid to other workers were available during the salient years to pay the wages of the proffered position.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

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[7] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.[8] Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Similarly, the accountant urged that repair expenses charged to 2004 are nonrecurring and should be added back to the petitioner's net income in gauging its ability to pay the proffered wage. Again, the accountant did not argue that it should be spread among various years, but rather that it should simply be ignored, as though the expense was never incurred. Amounts paid for repairs to structures and personalty are a tangible expense. This office does not agree to consider a statistic that results from subtracting certain expenses from the petitioner's income.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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 employ and pay 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 a given 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 532; *K.C.P. Food Co., Inc. v. Sava*, 623

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[8] Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

F.Supp. at 1083; *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). *See also* 8 C.F.R. § 204.5(g)(2).

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 that 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 -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[9] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $34,236.80 per year. The priority date is March 28, 2003.

As stated above, during 2003 the petitioner declared Schedule K, Line 23 Income of $144,027. That amount is sufficient to pay the annual amount of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2003.

As also stated above, during 2004 the petitioner declared a loss of $44,464. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of $17,739. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2004 with which it could have paid additional wages.

The petition in this matter was submitted on December 8, 2005. On that date the petitioner's 2005 tax return was unavailable. Although the service center issued a request for evidence in this matter, it only requested W-2 forms. The service center never requested evidence pertinent to later years. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner's 2004 tax return does not demonstrate that it was able to pay the proffered wage during that year. Therefore, the petitioner's tax returns do not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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[9] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Counsel urges, however, that notwithstanding the shortcoming of that particular tax return, the petition should be approved based on the totality of the circumstances. Notwithstanding that counsel cited a non-precedent case for that proposition, which case is ineffective as precedent, a line of cases exists that supports the propositions that a petition may be approved notwithstanding that the petitioner declared a loss or low profits during a given year and that the totality of circumstances should be considered. The seminal case is *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

In that regard, the accountant stated that the petitioner's repair expense during 2004 is a non-recurring expense. The record contains no other explanation of the nature of the petitioner's 2004 repair expense, or of why it was greater than its 2002 and 2003 repair expenses. Further, the accountant did not state the basis of his purported knowledge that the repair expense will not recur. Under these circumstances, this office cannot find that the repair expense constituted an unusual circumstance.

Further, although the petitioner enjoyed a profit during 2002 and 2003, and then suffered a loss during 2004, those four years are insufficient to demonstrate that the petitioner's loss during 2004 was uncharacteristic and unlikely to recur.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal. 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.