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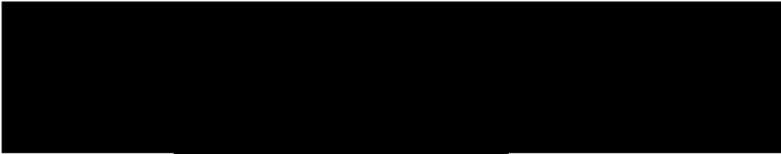
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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B6



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 02 2008
SRC 06 800 15826

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, Chief
Administrative Appeals Office

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

The nature of the petitioner's business is operating a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by 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 denial dated September 12, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 petitioner¹ must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department

¹ Chopstick Inc. is now an inactive entity according to the New York State, Division of Corporations according to information accessed on the agency's website at http://appsex8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?... on December 10, 2007.

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 5, 2002.² The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$34,379.80 per year³).

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a cover letter from counsel dated June 20, 2006; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003, 2004 and 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net income and gross annual income stated on the petition were \$2,761.00 and \$259,160.00 respectively. On the Form ETA 750 signed by the beneficiary on May 3, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that that the director erred as she did not give any consideration "of the petitioner's use of reserved funds for renovation⁵ which reduced the cash on hand." Counsel asserts that the expenditure was a one-time occurrence of expense for improvement that "will generate future growth of business."

² It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ Based upon a 35 hour work week.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Citizenship and Immigration Services (CIS) Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ What this renovation was or how it was funded was not explained by counsel. In a letter dated June 20, 2006, counsel stated that the petitioner "spent a good sum of cash in replacing the old cooking utensils and appliances in 2005." As appliances can be fixtures, this item may be what counsel has referenced on appeal. However, counsel failed to elaborate.

In support of his contentions counsel cites the case precedents of *Masonry Masters, Inc. v. Thornburgh*, 875 F.2nd 898 (D.C. Cir. 1989)⁶, *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984), *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1053 (S.D.N.Y. 1986), and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Accompanying the appeal, counsel submits a legal brief and no additional evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

⁶ Counsel used a different citation for this case precedent.

Counsel has asserted that the petitioner's net profits are evidence of the petitioner's ability to pay the proffered wage. The petitioner's Form 1120S tax returns⁷ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2002, the Form 1120S stated net income (Schedule K, Line 23) of \$28,894.00.
- In 2003, the Form 1120S stated net income of \$4,332.00.
- In 2004, the Form 1120S stated net income of \$4,540.00.
- In 2005, the Form 1120S stated net income of \$2,761.00.

Since the proffered wage is \$34,379.80 per year, the petitioner did not have sufficient net income to pay the proffered wage in any relevant year.

If the net income the petitioner demonstrates it had available during the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets were during 2002, \$48,308.00; 2003, \$50,020.00; 2004, \$33,395.00; and 2005, \$21,422.00.

⁷ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁸ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage of \$34,379.80 per year in tax years 2004 and 2005.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel has asserted in his letter dated June 20, 2006, that the petitioner's cash flow and inventory are evidence of the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner's cash flow, without providing its source or financial data, is evidence of the ability to pay the proffered wage. In generally accepted accounting principles (GAAP) based cash flow statements, the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, present an analysis of the financial health of a business. The petitioner has not submitted audited balance sheets and income statements.

Counsel states that the business' inventory provides evidence of the ability to pay the proffered wage in combination with other assets. As already stated, "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. As already discussed above net current assets after including current liabilities were less than the proffered wage. Further it is duplicative of the petitioner's finances to combine net current assets with the net income and loss as stated above.

Further, the value of inventories owned by the petitioner and their ability available to produce future income cannot be evidence of the ability to pay. By implication, counsel maintains that the inventories' potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. Insofar as the revenue generated is expressed ultimately on the tax returns as net income, counsel is attempting to duplicate the petitioner's income producing potential without considering the offsetting cost of operations. 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.

Further counsel stated that since the business had been in operation since 1991, it "spent a good sum of cash in replacing the old cooking utensils and appliances in 2005" and its cash flow was reduced because of this one-time expense in 2005.

As stated, on appeal, the petitioner asserts that that the director erred as she did not give any consideration "of the petitioner's use of reserved funds for renovation which reduced the cash on hand." Counsel asserts that the expenditure was a one-time occurrence of expense for improvement that "will generate future growth of business." Counsel has not provided any specific financial data for this statement.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

⁹ 8 C.F.R. § 204.5(g)(2).

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel cites the case precedent of *Elatos Restaurant Corp, Id* for the proposition that the record of proceeding and the "substantial reasonable evidence" as a whole should be the basis of the director's decision. It is not clear why counsel stated that the director reviewed some evidence but not all evidence submitted in this matter. Within counsel's assertion is the recognition that it is the relevant evidence (i.e. substantial reasonable evidence) that has probative value to the issue at hand which is the petitioner's ability to pay the proffered wage.

Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). As counsel points out, *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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.

Counsel has provided four years of financial evidence in the form of tax returns that demonstrate that the petitioner's net incomes were in decline (2002: \$28,894.00; 2003: \$4,332.00; 2004:\$4,540.00; 2005:\$2,761.00). Counsel has provided no explanation for this decline or offered any financial data that the petitioner's minimal profits in relation to its gross revenues were affected by unusual circumstances.

The only other criteria we are able to examine based upon independent, objective evidence is an examination of the petitioner's net current assets. As stated above the petitioner did not have sufficient net current assets to pay the proffered wage of \$34,379.80 per year in tax years 2004 and 2005. Counsel stated that the petitioner "spent a good sum of cash in replacing the old cooking utensils and appliances in 2005" and its cash flow was reduced because of this one-time expense in 2005. However no financial substantial was submitted for this assertion. There was no explanation for the diminished net current asset valuation in 2004.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the four year period examined was an uncharacteristically unprofitable period for the petitioner.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage in years 2004 and 2005.

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.