

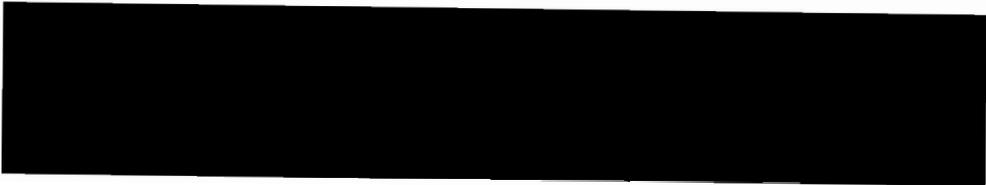
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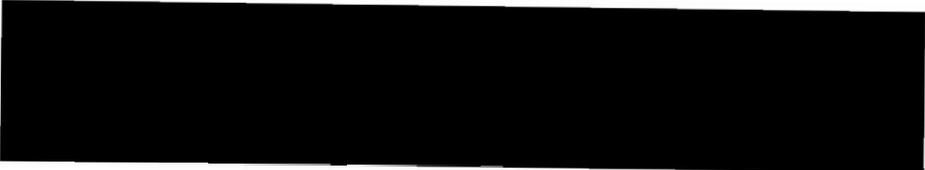


FILE: EAC 06 082 52734 Office: NEBRASKA SERVICE CENTER Date: **MAR 04 2006**

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 employment based visa petition was denied by the Director, Nebraska 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 an Italian specialty 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 contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on August 9, 1999. The proffered wage as stated on Part A of the ETA 750 is \$18.89 per hour, which amounts to \$39,291 per year. On Part B of the ETA 750, signed by the beneficiary on July 30, 1999, the beneficiary claims to have worked for the petitioner from May 1998 to March 1999.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on January 26, 2006, the petitioner states that it was established in July 1995 and currently employs eight workers.

With the petition and in response to the director's June 14, 2006, request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 1999 through 2005. The returns indicate that the petitioner files its taxes using a standard calendar year. They also reflect that the petitioner's shares were equally held by two shareholders/officers, identified as [REDACTED] and [REDACTED], from 1999 to 2003. In 2004, the tax return shows that [REDACTED] held 75% of the shares and [REDACTED] held 25%. In 2005, the return reflects that [REDACTED] was the sole shareholder. The returns also contain the following information:

	1999	2000	2001	2002	2003
Net Income ¹	\$20,328	\$100,099	\$ 28,266	\$24,370	-\$ 1,306
Current Assets	\$64,409	\$119,655	\$ 88,373	\$70,954	\$64,832
Current Liabilities	\$76,826	\$128,621	\$102,020	\$50,642	\$30,701
Net Current Assets	-\$12,417	-\$ 8,966	-\$ 13,647	-\$20,312	\$34,131
	2004	2005			
Net Income	-\$108,071	-\$ 42,622			
Current Assets	\$ 37,424	\$ 58,613			
Current Liabilities	\$184,571	\$219,963			
Net Current Assets	-\$147,146	-\$161,350			

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible

¹ 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 IRS Form 1120S. The petitioner's net income is shown on line 21 of its 2003 tax return. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) and line 17e* (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 1999 through 2005 the petitioner's net income is found on Schedule K of its tax returns for 1999 through 2005.

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.

resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner further provided copies of two bank statements from September and October 2005, copies of payroll records for 2003, 2004 and 2005, as well as copies of documents dating from June and July of 2006, relating to a 49% transfer of shares to [REDACTED] from [REDACTED]

Following a review of the evidence submitted, the director denied the petition on September 28, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record.

On appeal, the petitioner, through counsel, offers several contentions on appeal in support of the petitioner's ability to pay the proffered wage. He asserts that the director erred in failing to consider the petitioner's depreciation expense as a relevant addition to the available resources to pay the proffered wage because it represents a non-cash deduction that should be accepted as a means of establishing a petitioner's ability to pay the proffered wage. Counsel cites two prior AAO cases and a 1994 Service Center/American Immigration Lawyers Association (AILA) teleconference in support of the addition of depreciation to a petitioner's net income. Counsel also asserts that the petitioner's submitted bank statements should not have been rejected in considering the petitioner's ability to pay the certified salary. Additionally, counsel contends that the 2006 addition of another business partner who paid part of the petitioner's debts in exchange for 49% of the corporation's available shares is relevant to the petitioner's viability. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as a basis to approve the petition based on the petitioner's expectation of an increase in revenues and better financial performance. Counsel further argues that unusual events such as the September 11, 2001, World Trade Center attacks, which subsequently affected the petitioner's business in 2001 and 2002, as well as the partial change in ownership in 2004 and 2005 should have been factored into the petitioner's ability to pay the proffered wage.

Counsel also asserts that the director should have considered the petitioner's assertion that former employees' wages who are no longer working for the petitioner as shown on the payroll records for 2003, 2004, and 2005, are now available to be applied toward payment of the beneficiary's proffered wage. In fact, [REDACTED] asserts in a letter submitted with the petition that the salaries of all workers who were employed and left the petitioner's employment in 1999 through 2002 would be used to pay the beneficiary's wages.³ He also claims in a second

³ He also suggested that the payment of officer compensation represents a flexible payment that may be reduced to accommodate payment of the proffered wage. It is noted that such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by a beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The

letter provided with the petitioner's response to the director's request for evidence that wages of \$5,400 paid to a former employee named [REDACTED] who was employed in 2003 are now available to help cover the proffered wage; that the wages of \$24,839 paid to the former principal shareholder and officer, [REDACTED] in 2004 would be available to pay the proffered wage, as well as the wages of \$39,315 paid to another worker identified as [REDACTED] are available to pay the proffered wage. These assertions are not sufficient, standing alone, to establish the petitioner's ability to pay the proffered wage for the periods asserted. 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. In order to demonstrate that the beneficiary was intended as a replacement for a former employee, the record must identify this worker, state their wages, verify their full-time employment, and provide evidence that the position of the former employee encompassed the same duties as those set forth in the Form ETA 750. The petitioner has not documented the identity, position, duties, and termination of the worker who performed the duties of the proffered position in 1999 through 2002. For 2003 and 2004, the petitioner has not documented that the departed employee held the proffered position or performed proffered duties. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The principal shareholder's assertion that its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date during the relevant period. Rather, such a general statement merely suggests, without specific supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 and 2002, in the context of its gross receipts, were within the general range of \$800,000 to \$900,000 that was generally comparable to the gross receipts of approximately \$883,000 generated in 1999, although not as high as the one million received in 2000, but compared favorably to the gross receipts of \$698,000 and \$658,000 produced in 2003 and 2004, respectively.

Relevant to counsel's assertions that the petitioner's two bank statements from September and October 2005 establish its ability to pay the proffered wage, it is noted that although such statements reflect a balance on a given date, they do not represent a sustainable ability to pay the proffered wage in 2005 and are not considered in lieu of the required evidence as set forth in the regulation at 8 C.F.R. § 204.5(g)(2). While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. For example, such statements were not shown to demonstrate that the funds reported somehow reflect additional available funds that were not reflected on its 2005 tax return, such as the cash specified on Schedule L that would already be considered in determining the petitioner's net current assets.

petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it 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, although requested by the director to submit copies of the beneficiary's Wage and Tax Statements (W-2s) if it employed the beneficiary, none were submitted by the petitioner and the record fails to indicate whether the petitioner employed or paid compensation to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. 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. 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

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. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may 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 represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay.

Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

With regard to the 1994 AILA/Service Center conference minutes or the two prior AAO decisions cited by counsel relating to adding back depreciation, it is noted that these events or documents are not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.⁴ Binding precedents are defined 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 this case, the petitioner failed to demonstrate its ability to pay the proffered wage in 1999 because neither its net income of \$20,328 nor its net current assets of -\$12,417 was sufficient to cover the certified salary of \$29,291 per year. It is noted that counsel's suggestion on appeal that the proffered wage be prorated will not be considered here because we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

In the year 2000, the petitioner has demonstrated the ability to pay the proffered wage because its net income of \$100,099 was sufficient to pay the proposed wage offer.

For 2001, neither the petitioner's net income of \$28,266 nor its net current assets of -\$13,647 was sufficient to pay the proffered wage. The petitioner has not established its ability to pay for this year.

In 2003, neither the petitioner's net income of -\$1,306 nor its net current assets of \$34,131 was sufficient to pay the proffered wage.

Similarly, in 2004, neither its net income of -\$108,071 nor its net current assets of -\$147,146 could cover the proffered wage and did not support the petitioner's ability to pay during this year.

Finally, in 2005, the petitioner net income of -\$42,622 as well as its net current assets of -\$161,350 was insufficient to pay the certified wage. The petitioner did not establish its ability to pay the certified salary during this year.

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates 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 *Sonogawa* 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

⁴See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

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 petitioner had 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 the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, although the petitioner has established its ability to pay in one of the relevant years, neither its net income nor its net current assets were sufficient to demonstrate its ability to pay in the other six years, including the year that it filed the application for labor certification. Moreover, it cannot be concluded that buying out one of the shareholders and subsequently selling shares to ██████████ in 2006 after the petition was filed represents the kind of unique business circumstance that supports a conclusion that the petition should be approved based on the petitioner's ability to pay the proffered wage as of the priority date. A petitioner must establish eligibility at the time of filing; 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). It may not be concluded that the petitioner's circumstances present a framework of profitability such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is August 9, 1999. Based on a review of the underlying record and the arguments submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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.