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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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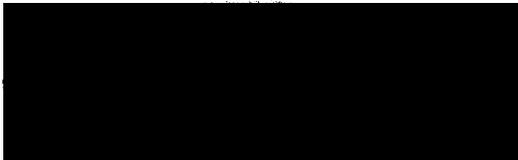
Date: DEC 17 2002

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of Professions holding an advanced degree or an alien of exceptional ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an import/export firm. It seeks to employ the beneficiary permanently in the United States as a business-planning specialist. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and argues that certain corporate assets, properly considered, compel a finding of the ability to pay. These proceedings put in issue whether the petitioner had the ability to pay the beneficiary.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 22, 1996. The beneficiary's salary as stated on the labor certification is \$41,125 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On August 28, 2000, the director requested additional evidence to establish that the petitioner had

the ability to pay the proffered wage as of the priority date of the petition, January 22, 1996.

Counsel submitted copies of the petitioner's 1996, 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Returns. Submissions also included a loan agreement letter and contemporaneous bank statements. The federal tax returns for 1996 and 1997 reflected, respectively, losses of \$(1226) and \$(1651). Schedules L recorded net current assets (defined as current assets minus current liabilities) of, respectively, \$33,389 and \$2,077. The director further noted that a shareholder's capital and income from the proceeds of a loan could not be considered when assaying the ability of the corporation to pay the proffered wage. Bank statements from 1999, it was observed, did not relate to the priority date of the petition.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues,

As reflected on petitioner's corporate income tax returns and explained above, from 1997 to 1999 petitioner's corporate assets remained stable, within a range of \$40,113 to \$52,048, regardless of the income level of the business.... Therefore, we submit that it is improper for the Center Director to ignore petitioner's "total assets" in considering the ability to pay the salary offered.

There appears to be some confusion regarding to the loan made by the corporate petitioner to [its President] in 1990 and the significance of this loan.... We submit that the record shows that the loan, which was [the President's] debt to the petitioner, was an asset to the petitioner....

Generally, the Service must consider income with expenses and assets with reference to liabilities in order to fairly assess the petitioner's ability to pay the proffered wage. K.C.P. Food Co. Inc. V. Sava, 623 F. Supp. 1080 (S.D. NY 1985). Counsel has cited no authority supporting the use of "total assets" to justify the ability to pay.

Moreover, the 1996 federal tax return clearly represents the significance of the petitioner's loan to its President at the priority date of the petition. The petitioner's Minutes show a \$40,000 loan to him, from September 15, 1990 without interest for

a term of ten (10) years, for his personal reinvestment fund. It was not a current asset available for expenses. A petitioner must establish eligibility at the priority date of the petition. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I & N Dec. 45, 49 (Comm. 1971). Finally, net current assets, as found in Schedule L, did not suffice for the proffered wage of \$41,125 at the priority date of the petition. The Service may rely on tax returns to determine a petitioner's ability to pay the proffered wage. Elatos Restaurant Corp., etc. v. Sava, 632 F. Supp 1049 (S.D.NY, 1985).

Counsel concedes,

... It is significant to note that the petitioner never claimed that the business had the ability to pay the salary offered based on income. In fact, the petitioner has explained that beneficiary's services are required for the very purpose of developing the business...

In Matter of Sonewaga [sic], 12 I & N Dec. 612 (BIA [sic] 1967), the Board of Immigration Appeals concluded that the absence of net profit of a business will not preclude a showing that petitioner can pay the wage offered. The Board also took note of the fact that the addition of the beneficiary to the petitioner's business would contribute to the increase in business' [sic] profits. Similarly, in the instant case, the petitioner ... has explained that the expertise of the beneficiary is necessary to enable petitioner to develop its business...

Counsel's reliance on Matter of Sonewaga, 12 I & N Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in Sonewaga 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 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 Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in Sonegawa, have been shown to exist in this case, nor has it been established that 1996 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's 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. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that her reputation would increase the number of customers.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present. Hence, the petitioner has not overcome the director's decision.

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.