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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

[Redacted]

File: [Redacted] WAC 03 031 55353

Office: CALIFORNIA SERVICE CENTER Date: AUG 12 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Helen E Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a contract specialist. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

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). The petition's priority date in this instance is May 23, 2001. The beneficiary's salary as stated on the labor certification is \$3,782 per month or \$45,384 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of Intent to Deny (NOID) dated January 16, 2003, the director required additional evidence to establish the petitioner's ability

to pay the proffered wage as of the priority date and continuing to the present. The NOID required the petitioner to establish the ability to pay the proffered wage to both of two (2) beneficiaries for whom the director had concurrent petitions. The petitioner's Forms 1120 U.S. Corporation Income Tax Return reflected taxable income before net operating loss deduction and special deductions of \$6,123 in 2000, \$6,493 in 2001, and \$5,748 in 2002, less than the proffered wage. Schedules L reported current assets minus current liabilities. They showed a difference, as net current assets, of (\$26,840), a deficit, in 2000 and \$35,834 in 2001, each less than the proffered wage, and \$50,171 in 2002, equal to or greater than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, with particular reference to the priority date and continuing to the present, and denied the petition.

On appeal, counsel submits Wage and Tax Statements (Forms W-2) and the petitioner's quarterly wage and withholding reports (Forms DE-6) for wages paid to the beneficiary from 2000-2003, a magazine advertisement, duplicates of tax returns, and a brief and attachments.

Counsel states on appeal, but does not offer any authority, that:

Taxable income does not properly reflect assets that may be used in determining a corporation's financial viability and its ability to pay wages. ... Thus, depreciation and cash (to the extent that the assets exceed liabilities) should be added to the taxable income.

To the contrary, in determining the petitioner's ability to pay the proffered wage, the Bureau [formerly the Service] will 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. Tex. 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).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau 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. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Counsel cites no authority that the corporation might sell off its total assets to establish the ability to pay the proffered wage. Taxable income and the net current assets, stated at page 3, *supra*, properly constitute such funds.

In addition, funds are available if paid to the beneficiary as wages. Forms W-2, submitted on appeal, report \$3,019.58 in 2000, \$27,529.57 in 2001, and \$33,717.77 in 2002, each less than the proffered wage. Counsel, further, advocates the use of wages and salaries paid to others as evidence of the petitioner's ability to pay the beneficiary the proffered wage. These are expenses and, once disbursed, are not readily available to pay the beneficiary's wage.

Counsel concedes that the petitioner must prove the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12). The petitioner's financial data defeats that proof.

The petitioner had been in business for five (5) years at the priority date. Summarizing the funds available for 2000, the petitioner's taxable income was \$6,123 and wages paid to the beneficiary were \$3,019.58, a total of \$9,142.58, less than the proffered wage. Net income and net current assets did not equal or exceed the proffered wage before the priority date.

The circumstances are quite different from, and reliance is misplaced on, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within 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 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 2001 was an uncharacteristically unprofitable year for the petitioner.

Former counsel argued 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. Former counsel did not, however, provide 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 his reputation would increase the number of customers.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Forms I-140) for one more worker at the same wage, using the same priority date, reflected on a Form ETA 750. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

Note is taken of the sums for 2001 and 2002 of taxable income, net current assets, and payments of wages to the beneficiary as reported on Forms W-2. Those sums are \$69,856.57 and \$89,636.77, equal to or greater than the proffered wage. Forms DE-6 report the payment of wages to this beneficiary continuing afterwards at a rate equal to or greater than the proffered wage.

The petitioner has not, however, responded with any evidence, pertinent to the priority date, to support the ability to pay the proffered wage in view of the petition for another beneficiary. The NOID specifically required it. The absence of a required document creates the presumption of ineligibility for the petition.

8 C.F.R. § 103.2(b) states:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

(2) Submitting secondary evidence and affidavits - (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

After a review of the federal tax returns, Forms W-2 and DE-6, counsels' briefs of February 13, 2003 and April 30, 2003, and a paid advertisement, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salaries offered as of the priority date of the petitions and continuing until the beneficiaries obtain lawful permanent residence.

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.