

BCG

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536



File: EAC 01 228 51527 Office: VERMONT SERVICE CENTER Date: **AUG 12 2003**

IN RE: Petitioner:
Beneficiary:

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)

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 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.

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 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 Japanese specialty cook. 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). Here, the petition's priority date is November 12, 1999. The beneficiary's salary as stated on the labor certification is \$18.34 per hour or \$33,378.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. In a request for evidence (herein RFE) of November 16, 2001, the director required the

petitioner's 1999 and 2000 federal income tax returns, as well as 1999 and 2000 Wage and Tax Statements (Forms W-2), evidencing wages paid to the beneficiary.

The petitioner submitted 1998 and 1999 Forms 1120, U.S. Corporation Income Tax Returns, showing a taxable income before net operating loss deduction of, respectively, \$11,587 and \$6,710. Net current assets equaled \$25,480 and \$19,310 for 1998 and 1999, being the difference between current assets and current liabilities, as found in Schedule L of the federal tax returns. Also, one (1) Form W-2 for 2000 reflected the petitioner's payment of \$6,000 in wages to the beneficiary. The petitioner omitted any federal tax return for 2000.

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

On appeal, counsel submits a brief, bank statements for November 1, 1997 to August 31, 2001, and a deed subject to an attached rider subject to a contract, not attached (the conditional deed).

Counsel's brief states relative to 1999:

POINT III

The petitioner had a taxable income of \$6710 + depreciation of \$48,761 + [cash of] \$45,792 and loans from stockholders of \$198,064, which is a grand total of \$296,327.

The petitioner had more than enough funds to provide the Beneficiary salary of \$33,560.

Counsel's argument is not persuasive. In determining the petitioner's ability to pay the proffered wage, 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 both Service and 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 Service 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.

The petitioner's fiscal year 1998 precedes the priority date. Net current assets were \$25,480 and taxable income was \$11,587. The total of \$37,067 was equal to or greater than the proffered wage. See, *infra*, at 5-6, for the limited relevance of years before the priority date.

The petitioner's fiscal year 1999 includes the priority date and warrants particular reference. The petitioner reported net current assets of \$19,310, and taxable income was \$6,710, a total of \$26,020, less than the proffered wage.

The petitioner must show that it had 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).

For fiscal year 2000, a Form W-2 shows \$6,000 in wage payments to the beneficiary, less than the proffered wage. Bank balances are said to be adequate to cover monthly operating expenses of the petitioner and the proffered wage. In fact, the beginning balance for the month of the priority date, \$30,409.71, the ending balance, \$18,136.15, and the average of all balances, as stated by counsel for 2000, is \$31,685.41. Each is less than the proffered wage. The petitioner submits no federal tax return or other evidence acceptable under 8 C.F.R. § 204.5(g)(2) for its fiscal year 2000.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel argues, generally, that loans from shareholders are a current asset, available to pay the proffered wage. These loans appear as a long-term liability on Schedule L, the balance sheet of the federal tax return. Counsel cites no authority to stand accounting terminology on end and count them as current assets.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I & N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

The unexplained omission on appeal of the federal tax return for 2000, i.e., for the petitioner's year ending August 31, 2001, impairs the assessment of counsel's claim of a constantly growing volume for the business. The business existed only since 1996 according to the visa petition (I-140). As noted, the net income and net current assets do not support the ability to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972).

Point II of counsel's brief urges:

Through all this, the petitioner's also (sic) had the ability to acquire the building from which the petitioner operates. Please see copy of deed as Exhibit B.

The conditional deed is undated, lacks the contract referenced in a rider, does not record any transfer under it, and specifies no year for which it might support the payment of a proffered wage. It does not, apparently, reveal any asset or income not already included in the tax returns and financial statements.

Matter of Ho, 19 I & N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel's reliance on *Matter of Sonogawa*, 12 I & N Dec. 612 (Reg. Comm. 1967) is misplaced. 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 1999 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 his reputation would increase the number of customers.

After a review of the federal tax returns, Forms W-2, conditional deed, and bank statements, 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 until the beneficiary obtains 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.