

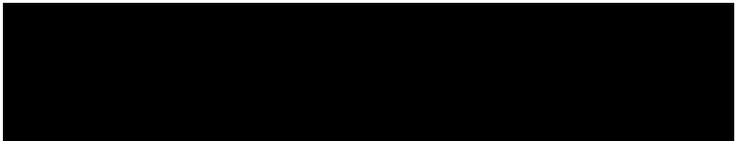
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**U.S. Department of Homeland Security
Citizenship and Immigration Services**

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



File: EAC 02 019 52838

Office: VERMONT SERVICE CENTER

Date: DEC 03 2003

IN RE: Petitioner:
Beneficiary:



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 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 Citizenship and Immigration Services (CIS) 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits additional evidence and argues that the evidence shows that the petitioner has the ability to pay the proffered wage.

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.

The petitioner must demonstrate eligibility beginning on the priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage

beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on March 19, 2001. The beneficiary's salary as stated on the labor certification is \$12.22 per hour, which equals \$25,417.60 annually.

The petition states that the petitioner employs 90 workers and had a net annual income of \$2,204,414. With the petition counsel submitted part of a copy of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation covering the petitioner's fiscal year from December 1, 1999 through November 30, 2000. The return shows that the petitioner declared a loss of \$79,707 during that fiscal year. Because no corresponding Schedule L was provided with that return, this office is unable to calculate the petitioner's year-end net current assets.

Because the evidence was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 30, 2001, requested additional evidence pertinent to that ability. The Service Center also noted that the Form ETA 750 Part B indicates that the petitioner has employed the beneficiary since July 2000 and asked for a copy of the beneficiary's Form W-2 Wage and Tax Statement.

In response, counsel submitted the requested W-2 form, which shows that during 2000 the petitioner paid the beneficiary \$5,332.36. Counsel also submitted another partial copy of its 1999 Form 1120S U.S. Income Tax Return for an S Corporation, but, again, without the corresponding Schedule L.

The Director, Vermont Service Center, determined that the evidence submitted did not established that the petitioner had the ability to pay the proffered wage and denied the petition on February 20, 2002.

On appeal, counsel submitted complete copies of the petitioner's 1999 and 2000 tax returns and the 2000 and 2001 Form 1065 U.S. Returns of Partnership Income of Eight Upper County Road Realty Trust. The petitioner's 1999 Schedule L shows that on November 30, 2000, the end of the petitioner's 1999 fiscal year, the petitioner's current liabilities exceeded its current assets.

The petitioner's 2000 return shows that the petitioner declared a loss of \$153,982 as its ordinary income (loss) during its 2000 fiscal year, which ran from December 1, 2000 through November 30, 2001. The corresponding Schedule L shows that at the end of that

fiscal year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted a letter from one of the petitioner's two shareholders. The shareholder states that he and the other shareholder are also the sole trustees and beneficiaries of the trust that owns the real estate on which the petitioner operates its business. The shareholder states that he and the partner could have adjusted the petitioner's rent as necessary to pay the proffered wage. In an appendix to that letter, the shareholder states that he and the other partner could also have adjusted the compensation of officers as necessary to pay wages. The shareholder also stated that the income and the amount of the depreciation deduction claimed by the real estate trust that owns the real estate upon which the petitioner is situated are additional funds available to pay the proffered wage.

Counsel argued that the evidence demonstrated the petitioner's ability to pay the proffered wage. On October 30, 2002, this office dismissed the appeal, finding that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date. This office noted that, because the petitioner is a corporation, it may not rely upon the funds of its owners or shareholders, or the funds of other companies that they own, to show its ability to pay the proffered wage.

With the motion, counsel submits additional evidence and a brief in which he argues that the evidence demonstrates the petitioner's ability to pay the proffered wage.

Counsel submits letters from the petitioner's shareholders stating that, when necessary, they have advanced personal assets to pay the petitioner's debts and obligations, and that they will continue to do so in the future. Counsel submitted financial statements pertinent to the net worth of those two shareholders. Counsel also submitted the petitioner's unaudited financial statements for the fiscal years ended November 30, 2000 and November 30, 2001.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), apparently for the proposition that the petitioner's losses may therefore be overlooked in the determination of its ability to pay the proffered wage. Counsel notes that the petitioner has been in operation since 1988, has employed approximately 90 employees, and has always properly discharged its payroll obligations. Counsel cites the letters from the petitioner's shareholders as evidence that the petitioner had unusual expenses recently, including a required upgrade of its

septic system in 2001 for \$100,000 and \$100,000 payments to a former partner for managing the business. Counsel states that the petitioner enjoys a good reputation and that the petitioner's shareholders have opened another similar restaurant in the same town.

Counsel cited a decision by the Board of Alien Labor Certification Appeals for the proposition that the income and assets of the petitioner's shareholders should be considered in the determination of the petitioner's ability to pay the proffered wage. This office notes that the precedent cited by counsel is not controlling in this matter and further notes that the reasoning behind that decision is unconvincing.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts and obligations, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the preferred evidence to demonstrate a petitioner's ability to pay a proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements submitted by counsel will not be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 CIS 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held 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. The court specifically rejected the argument that the INS (now CIS) should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is March 19, 2001. The proffered wage is \$25,417.60 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during its 2000 fiscal year, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 108 days of that 365-day fiscal year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 257 days. The proffered wage multiplied by $257/365^{\text{th}}$ equals \$17,896.78, which is the amount the petitioner must show the ability to pay during its 2000 fiscal year.

The petitioner declared a loss of \$153,982 during its 2000 fiscal year. The petitioner was unable, therefore, to pay any portion of the proffered wage out of its income during that fiscal year. The petitioner ended that fiscal year with negative net current assets and was, therefore, unable to pay any portion of the proffered wage out of its net current assets.

The 2000 W-2 form submitted demonstrates that during that calendar year, the petitioner paid the beneficiary \$5,332.36. Assuming that amount was paid evenly throughout the year, approximately one-twelfth of that amount, or \$444.36, was paid during December 2000, which fell within the petitioner's 2000 fiscal year. The petitioner has not demonstrated that it paid any other wages to the beneficiary during its 2000 fiscal year. The petitioner has not demonstrated that it had any other funds during its 2000 fiscal year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during its 2000 fiscal year.

Counsel is correct that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), indicates that, in appropriate circumstances, CIS may overlook a petitioner's failure to demonstrate the ability to pay the proffered wage during a particular year. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable

or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, counsel has submitted no reliable evidence that the petitioner has ever posted a profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during its 2000 fiscal year. Therefore, the objection of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of October 30, 2002 is affirmed. The petition is denied.