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

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

[REDACTED]

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date: DEC 03 2003

IN RE: Petitioner:  
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:

[REDACTED]

**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, Director  
Administrative Appeals Office

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

The petitioner is a staffing service. It seeks to employ the beneficiary permanently in the United States as a medical records administrator. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day 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 request for labor certification was accepted on December 10, 1998. The proffered salary as stated on the labor certification is \$27.05 per hour,

which equals \$52,264 per year.

With the petition counsel submitted copies of the petitioner's 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns.

The 1999 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$49,799 in that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$54,333 in that year.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$321,824 in that year.

Counsel also submitted a letter, dated July 31, 2002, from the petitioner's CEO citing the petitioner's gross receipts as proof of its ability to pay.

On October 20, 2002, the California Service Center requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the petitioner's wage reports for the last quarter of 2001 and the first three quarters of 2002. Those reports show that the petitioner did not employ the beneficiary during those four quarters.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on January 28, 2003, denied the petition.

On appeal, counsel submits what purport to be the petitioner's profit and loss statements for the 2002 calendar year and its balance sheet for the end of that year. Counsel submitted no evidence that those financial statements were produced pursuant to an audit, rather than a compilation or review.

8 C.F.R. § 204.5(g)(2) makes clear that the primary documents competent to demonstrate a petitioner's ability to pay a proffered wage are copies of annual reports, federal tax returns, or audited financial statements. Counsel has not shown those financial statements to be audited financial statements, and their contents will not be considered.

Counsel also provided a letter from a CPA who implied that the petitioner's financial condition would be more correctly depicted

by a cash accounting method, rather than the accrual method that the petitioner uses for tax purposes. To reflect the petitioner's cash position, the accountant stated that the depreciation deduction, the bad debt allowance, and the accounts payable should be added to the petitioner's income.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable buildings and equipment. The value lost as buildings and equipment deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, it is not available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The bad debt allowance, similarly, is not a cash expenditure in the year taken. Rather, it is an acknowledgement that revenue recorded during a previous year under the accrual convention is not likely to be received. Again, however, the petitioner's election of a particular method of accounting accords various revenues and expenses to various years independent of when receipts or expenditures actually occur. The petitioner may not now shift those revenues and expenses among various years as necessary to render the petition approvable.

Finally, the petitioner's accounts payable, while not actually paid during the year recorded, are attributed to that year based, again, on the petitioner's election to use accrual method tax accounting. The petitioner may not shift that expense to another year as convenient.

In essence, counsel and the accountant argue that the petitioner's tax returns do not show the true financial condition of the corporation. Pursuant to 8 C.F.R. 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to.

The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the Immigration and Naturalization Service, now CIS, should consider the petitioner's circumstances, rather than making a mechanical judgment based on the petitioner's taxable income.

Counsel is correct that, if the petitioner's losses or low profits are uncharacteristic and occurred within a framework of more profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage.

The petitioning entity in *Sonogawa* 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 *Sonogawa*, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel has suggested no special circumstances in this case that suggest that the petitioner's low profits were uncharacteristic. Absent such special circumstances, CIS will first examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, to calculate the petitioner's ability to pay the proffered wage. 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*, *Supra* at 1084, the court held that the Immigration and Naturalization Service (INS, now CIS) had properly relied upon 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 INS should have considered income before expenses were paid rather than net income.

The proffered wage is \$52,264 per year. The petitioner is obliged to demonstrate that it has had the continuing ability to pay that wage since December 10, 1998.

The petitioner's 1999 tax return shows that the petitioner declared a taxable income before net operating loss deductions and special deductions of \$49,799 and finished the year with negative net current assets. The petitioner has not shown that it was able to pay the proffered wage during that year either out of income or assets.

The 2000 return shows taxable income before net operating loss deduction and special deductions of \$54,333 in that year. The petitioner was able to pay the proffered wage during that year out of income.

The 2001 return shows taxable income before net operating loss deduction and special deductions of \$321,824. The petitioner was able to pay the proffered wage during that year out of income.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.