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

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 02 162 51894 Office: CALIFORNIA SERVICE CENTER

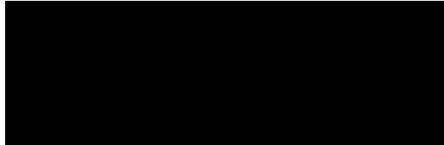
Date: **DEC 08 2003**

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, 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 on appeal. The appeal will be dismissed.

The petitioner is a computer programming/consulting firm. It seeks to employ the beneficiary permanently in the United States as an accountant. 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.

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 Form ETA 750 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 Form ETA 750 was accepted on March 20, 1998. The proffered salary as stated on the Form ETA 750 is \$52,124.80 per year.

With the petition counsel submitted an unaudited 2001 income statement and year-end balance sheet. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documents are competent to demonstrate the petitioner's ability to pay the

proffered wage. Those three types of documents are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

Counsel also provided a copy of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,331 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,088 during that year. Counsel did not provide the corresponding Schedule L.

The 2000 tax return shows that the petitioner declared a loss of \$11,577 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Further still, counsel submitted copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for all four quarters of 2001. Those returns show that the petitioner paid the beneficiary a total of \$20,498.40 during that year.

Finally, counsel submitted copies of 1998, 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing the amounts the petitioner paid to the beneficiary during those years. The 1998, 1999, and 2000 W-2 forms show that the petitioner paid the beneficiary \$5,858.80, \$16,447.50, and \$18,584.40 during those years, respectively. The 2001 W-2 form confirms that the petitioner paid the beneficiary \$20,498.40 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on June 12, 2002, requested that the petitioner provide additional evidence. Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to provide evidence of its continuing ability to pay the proffered wage beginning on the priority date and that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested a copy of the petitioner's 2001 tax return.

In response, counsel submitted a letter, dated July 3, 2002, from the petitioner's owner. The owner emphasized the petitioner's gross receipts and stated that they show the ability to pay the

proffered wage. The owner also stated that the petitioner's 2001 tax return was not yet complete. Counsel submitted a copy of a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return as evidence of that assertion. That form requested an extension until September 15, 2002.

On October 2, 2002, the California Service Center again requested evidence of the petitioner's ability to pay the proffered wage. The Service Center reminded the petitioner that, consistent with 8 C.F.R. § 204.5(g)(2) the petitioner must, with copies of annual reports, complete federal tax returns, or audited financial statements, demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner was also instructed to provide his 1999 tax return complete with the omitted Schedule L.

In response, counsel submitted a copy of the petitioner's 1999 tax return, complete with the corresponding Schedule L, and a copy of the petitioner's 2001 tax return. The 1999 Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The 2001 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also provided an undated letter from the petitioner's president describing the petitioner's expansion plans. Finally, counsel provided a copy of a bank statement showing the balance of the petitioner's bank account as of October 31, 2002.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a particular year's loss or low profit does not preclude CIS from approving the petition.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on January 8, 2003, denied the petition.

On appeal, counsel submitted a copy of the petitioner's December 31, 2002 bank statement and an unaudited 2002 income statement and year-end balance sheet. As stated above, 8 C.F.R. § 204.5(g)(2) makes clear that unaudited financial statements are not competent evidence of the petitioner's ability to pay the proffered wage. The petitioner's unaudited financial statements and bank statements will not be considered.

The regulation at 8 C.F.R. § 204.5(g)(2) also does not include bank statements among the three types of documents which may constitute competent evidence of the ability to pay the proffered wage. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow

reflect additional available funds that were not reflected on the tax return. The balances shown on the petitioner's bank statements shall not be considered in the determination of the ability to pay the proffered wage.

Counsel's argument on appeal relies chiefly on *Matter of Sonogawa Supra*. Counsel correctly argued that CIS is not precluded from finding the ability to pay the proffered wage because a petitioner's net income in a particular year is less than the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967), however, relates to petitions 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. 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 is correct that, if the petitioner's losses during some years and very low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. Counsel stated that the petitioner incurred large expenses in its expansion program and that in the future the petitioner's expenses will be much lower and its profits much greater. However, counsel submitted no evidence to corroborate his assertions. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Absent special circumstances such as those found in *Sonogawa*, 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 that the INS, now CIS, 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 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 20, 1998. The petitioner is not obliged to demonstrate that it could have paid the petitioner's wage during all of 1998, but only from the priority date forward. Seventy-eight days of 1998 had passed when the petition in this matter was filed. That is approximately 21% of that year. The petitioner must only demonstrate that it was able to pay the proffered wage during the remaining 79% of that year. Seventy-nine percent of the \$52,124.80 proffered wage is \$41,178.59.

Counsel provided W-2 forms as described above, which show wages the petitioner paid to the beneficiary during 1998, 1999, 2000, and 2001. Having demonstrated that it paid wages to the beneficiary, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only the balance of it, reduced by the amount the petitioner actually paid during each of those years. The W-2 forms show that the petitioner paid the beneficiary \$5,858.80, \$16,447.50, \$18,584.40, and \$20,498.40 during those years, respectively.

However, only a portion of the wages paid to the beneficiary during 1998 was paid after the priority date of the petition. Just as the amount the petitioner must demonstrate that it could pay must be prorated, so must the amount that the petitioner paid the beneficiary during that year, to indicate the amount paid to the beneficiary for work performed after the priority date.

On her G-325A Biographic Information Form, the beneficiary indicated that she began to work for the petitioner during September of 1997, which indicates that she worked for the

petitioner during all of 1998. Therefore, approximately 79% of the money paid to the beneficiary during 1998 was paid for work performed after the priority date. Of the \$5,858.80 paid to the beneficiary during 1998, \$4,628.45 will be credited as having been paid for work performed after the priority date.

The portion of the proffered wage which would have been due if the petitioner were obliged to pay the beneficiary the proffered wage beginning on the priority date is approximately \$41,178.59. The amount the petitioner has demonstrated that it paid to the beneficiary after the priority date and during 1998 is approximately \$4,628.45. The difference is \$36,550.14. The petitioner must demonstrate it was able to pay that difference.

During 1998 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,331. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has failed to demonstrate that it had the ability to pay the \$36,550.14 balance of the proffered wage out of its income or its net current assets during 1998.

During 1999 the petitioner paid the beneficiary \$16,447.50. The balance of the proffered wage is \$35,677.30. The petitioner must show the ability to have paid that amount during 1999. During 1999, however, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,088. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has failed to demonstrate that it had the ability to pay the proffered wage out of its income or its net current assets during 1999.

During 2000 the petitioner paid the beneficiary \$18,584.40. The petitioner must show that it was able to pay the \$33,540.40 balance of the proffered wage. During 2000 the petitioner declared a loss of \$11,577. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has failed to demonstrate that it had the ability to pay the proffered wage out of its income or its net current assets during 2000.

During 2001 the petitioner paid the beneficiary \$20,498.40. The petitioner must demonstrate the ability to pay the \$31,626.40 balance of the proffered wage during that year. During 2001 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner has failed to demonstrate that it had the ability to pay the proffered wage out of its income or its net current assets during 2001.

The petitioner failed to submit sufficient evidence that the

petitioner had the ability to pay the proffered wage during 1998, 1999, 2000, or 2001. 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.