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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, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



File: EAC 02 156 51993 Office: Vermont Service Center

Date:

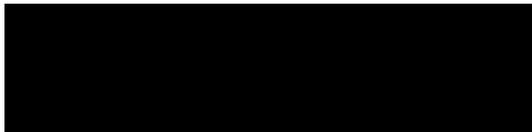
DEC 09 2003

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:



Identifying data deleted to  
prevent identity and unwanted  
invasion of personal privacy

**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, Vermont Service Center, and is now before the Administrative Appeals Office 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 cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of 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 or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on April 24, 2001, indicates that the minimum requirement to perform the job duties of the proffered position of cook is two years of experience in the job offered.

With the initial filing, the beneficiary submitted an affidavit in which he stated that he worked as a cook from October 1996 to September 1997 for Town Court Diner, which is no longer in business, and was paid in cash. The beneficiary also stated that he worked for Oasis Restaurant from September 1997 to May 1999 and was paid in cash, and when he went to the owners to ask for a letter of employment they refused because they said they could get into trouble for paying him "off the books."

In response to the director's request for evidence, counsel submitted a letter of experience from Juan Santos, a former co-worker at the Oasis Restaurant, which stated that the beneficiary worked at Oasis Restaurant in September of 1997.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training of two years and denied the petition accordingly. The director noted that the affidavit was from a co-worker of the beneficiary, not from an employer or trainer as required by 8 C.F.R. § 204.5(1)(3)(ii).

On appeal, counsel submits an affidavit from Fortino Lopez which states that the beneficiary was trained by him at Town Country Diner during the 1990's. The affidavit, however, does not state a time period when the beneficiary was being trained, nor does it specify Mr. Lopez's address and title. The regulation at 8 C.F.R. § 204.5(1)(3)(ii) clearly requires evidentiary submissions to provide this information. Therefore, the petitioner has not overcome this portion of the director's decision.

A second affidavit from Mr. Santos, submitted on appeal, provides additional details of the work done by the beneficiary as a member of the kitchen staff, specifying his duties and title. This affidavit still fails to meet the regulatory criteria, however, because Mr. Santos neither trained nor supervised the beneficiary.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage.

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 April 24, 2001. The beneficiary's salary as stated on the labor certification is \$11.90 per hour which equates to \$24,752.00 per annum.

In response to the director's request for evidence, counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1065 for 2000 and 2001. Form 1065 for 2001 showed an ordinary income of -\$13,251.00. Form 1065 for 2000 showed an ordinary income of -\$16,668.00.

In determining the petitioner's ability to pay the proffered wage, CIS 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 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).

On appeal, counsel argues that *Matter of Sonogawa*, 12 I&N Dec. 612 (reg. Comm. 1967) is analogous to the instant petition. Counsel asserts that in the instant case the petitioner "invested a substantial sum in the improvement of the business," and that the improvement to the business "like the petitioner's relocation in Sonogawa, are indicative of the potential for increased business."

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or

difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 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 couturiere.

Counsel has provided no evidence which establishes that unusual circumstances existed in this case which parallel those in *Sonegawa*, nor has it been established that 2000 and 2001 were uncharacteristically unprofitable years for the petitioner. The restaurant was established in 1997 and the petitioner has not provided evidence of sustained profits or outstanding reputation as a restaurant. It is noted that the renovations to the restaurant began in 2002. It is not clear how this could impact the petitioner's taxes for 2000 and 2001.

In addition, the petitioner's accountant argues on appeal that "[t]here are certain items that needed to be added back to \$13,251 loss, like depreciation, amortization, partners payroll that was included in the salaries and wages, and payroll taxes paid for the partners."

We note that CIS may properly rely upon 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 recognized. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1954 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *K.C.P. Food Co. v. Sava*, 632 F. Supp. 1080 (S.D.N.Y. 1985); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). There is no precedent that would allow the petitioner to add to net

income the depreciation expense charged for the year. See *Elatos Restaurant Corp. v. Sava, supra*. Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage.

The petitioner's ordinary income for 2001 is -\$13,251.00. The petitioner could not pay a salary of \$24,752.00 a year from this amount.

The petitioner's ordinary income for 2000 is -\$16,668.00. The petitioner could not pay a salary of \$24,752.00 a year from this amount. Thus, the petitioner has failed to demonstrate the ability to pay the proffered wage as of the petition's priority date and continuing.

Therefore, the director's decision to deny the petition has not been overcome and the petition may not be approved.

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.