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

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



File: WAC 02 032 55942 Office: CALIFORNIA SERVICE CENTER

Date:

DEC 11 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's business is "resort rentals." It seeks to employ the beneficiary permanently in the United States as a supervisor of janitorial services. 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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter hinges on the petitioner's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on October 29, 1996. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

With the petition counsel submitted no evidence of the petitioner's ability to pay the proffered wage. In a letter, dated October 17, 2001, submitted with the petition, counsel stated that the petitioner's tax returns were incomplete and would be provided later.

Because no evidence was submitted to demonstrate the petitioner's continuing ability to pay the proffered wage, the California Service Center, on February 16, 2002, requested evidence of that ability. The Service Center requested that the petitioner demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The Service Center noted that, in accordance with 8 C.F.R. § 204.5(g)(2) the evidence of the ability to pay the proffered wage must include copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested that the petitioner provide copies of its California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1996, 1997, 1998, 1999, 2000, and 2001. Counsel also provided the requested Form DE-6 reports for all four quarters of 2001. Those reports show that the petitioner did not employ the beneficiary during 2001.

The 1996 tax return submitted was incomplete. Page one of that return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,162 during that year. No Schedule L was submitted with that return.

The 1997 tax return submitted was also incomplete. Page one of that return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,317 during that year. No Schedule L was submitted with that return.

The 1998 tax return shows that during that year, the petitioner declared a loss of \$1,702 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$35,650 and no current liabilities, which yields net current assets of \$35,650.

The 1999 tax return shows that during that year, the petitioner declared a loss of \$50,377 as its taxable income before net operating loss deduction and special deductions. The

corresponding Schedule L shows that at the end of that year, the petitioner had negative current assets and no current liabilities.

The 2000 tax return shows that during that year, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,358. The corresponding 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 during that year, the petitioner declared a loss of \$49,983 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$2,572 and current liabilities of \$1,112, which yields net current assets of \$1,460.

On June 6, 2002, the Service Center issued another request for evidence in this matter. The Service Center noted that copies of the petitioner's 1996 and 1997 tax returns submitted to the Service were incomplete. The Service Center requested complete copies of those returns and noted that if the evidence were not submitted the petition would be denied.

In response, counsel submitted copies of the petitioner's 1996 and 1997 returns. The 1996 Schedule L shows that at the end of that year the petitioner had current assets of \$10,221 and no current liabilities, which yields net current assets of \$10,221. The 1997 Schedule L shows that at the end of that year the petitioner had current assets of \$28,403 and no current liabilities, which yields net current assets of \$28,403.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 5, 2002, denied the petition.

On appeal, counsel stated,

We believe that the Immigration & Naturalization Service abused its discretion in denying the underlying petition and has incorrectly based its denial solely on the tax returns with out (sic) analyzing the financial ability or resources of the Petitioner.

Subsequently, counsel submitted a brief in which she argued that the petitioner's tax returns show the ability to pay the proffered wage. In her argument, counsel cited the petitioner's gross receipts and total assets as evidence of that ability. Counsel also stated that the petitioner's "continued growth sheds some light on (its) ability to pay the proffered wage." Counsel also submitted copies of monthly statements of the petitioner's bank account as evidence of the ability to pay the proffered

wage.

Additionally, counsel noted that Amazon.com, a business unrelated to the petitioner, has continued to expand and to hire and to pay new employees, despite continuing losses since its inception. Counsel implied that the petitioner's situation is similar.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that CIS may ignore the petitioner's losses during some years and small profits during others.

Finally, counsel cited *Masonry Masters v. Thornburgh*, 875 F2d 898 (C.A.D.C. 1989) for the proposition that CIS should include in its calculations the amount by which hiring an employee would increase the petitioner's profits. Language in that decision does, in fact, urge that any prospective increase in profits as a result of hiring a beneficiary should be considered. That pronouncement is apparently dictum, as the case was decided on other grounds. Counsel's assertion that such an increase should be considered will be addressed, however, notwithstanding that *Masonry Masters* is not authoritative support for that proposition.

CIS has not declined to consider the amount by which hiring the beneficiary will increase the petitioner's profits. However, the record contains no evidence of that projected increase in profits. No such potential increase in profits was mentioned in this matter until counsel's brief on appeal was filed. In it, counsel asserts that hiring the beneficiary will enhance the resort properties' appearance, thereby increasing customer satisfaction, and enabling the petitioner to raise rental fees or generate additional customers, and increase its profits. Counsel's assertion is not based on any evidence in the record and is apparently speculative.

In any event, counsel has provided no information from which this asserted increase in profits might be calculated or estimated. Rather than make any assumption pertinent to the amount by which hiring the beneficiary is likely to increase the petitioner's profits, this office would require evidence of that amount. No such evidence has been submitted in this case. The prospective increase in profits hypothesized by counsel is not supported by evidence and will not be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the bank accounts in this case is inapposite. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, 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. Third, bank accounts are not among the three

types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

Counsel cites the petitioner's "continued growth" as evidence of its ability to pay the proffered wage. As support of that asserted "continued growth," counsel cites what she calls the petitioner's "tremendous growth in sales," and sets out the petitioner's gross receipts from 1996 to 2001.

During 1996, the petitioner declared \$169,837 in gross receipts. In 1997, that figure rose slightly to \$175,946*. In 1998, that figure fell to \$97,520. In 1999, it rose to \$196,456. In 2000, it rose to \$251,652. In 2001, it fell slightly to \$251,569. The evidence does not support the pattern of tremendous growth counsel postulates.

In any event, the petitioner would ordinarily be required to show the ability to pay the proffered wage during each salient year, rather than merely a pattern which suggests that it would eventually achieve that ability.

Counsel chose Amazon.com as an example of a company that has continued to post large losses and yet continued to expand. Counsel asserts that this office would not deny a petition submitted by Amazon.com merely because it declares losses on its income tax returns.

Consistent with 8 C.F.R. § 204.5(g)(2), Amazon.com, or the petitioner in the instant case, or any other petitioner must demonstrate its ability to pay the proffered wage. If a petitioner demonstrates that it employs 100 or more workers, it may demonstrate this ability with a letter from a financial officer of the company stating that it is able to pay the wage. As 8 C.F.R. § 204.5(g)(2) makes plain, a petitioner that does not demonstrate that it employs at least 100 workers must choose between copies of annual reports, federal income tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage.

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. Because of the petitioner's election, the petitioner's income tax returns are the only competent evidence

* Counsel erroneously reversed the figures from 1996 and 1997. This error has been corrected in the figures set out above.

in the record pertinent to the petitioner's ability to pay the proffered wage.

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 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 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 proffered wage is \$24,960 per year. The priority date is October 29, 1996. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1996, but only that portion which would have been due had the petitioner employed the beneficiary beginning on the priority date. On the priority date, 302 days of that 365-day year had already passed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 63 days. The proffered wage times $63/365^{\text{th}}$ is \$4,308.16.

During 1996, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,162 and finished the year with net current assets of \$10,221. The petitioner has demonstrated the ability to pay the proffered wage during 1996 out of its assets.

The petitioner is obliged to show the ability to pay the entire proffered wage during 1997. During 1997, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,317 and finished the year with net current assets of \$28,403. The petitioner has demonstrated the ability to pay the proffered wage during 1997 out of its assets.

During 1998, the petitioner declared a loss of \$1,702 and ended the year with net current assets of \$35,650. The petitioner has

demonstrated the ability to pay the proffered wage during 1998 out of its assets.

During 1999, the petitioner declared a loss of \$50,377 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 1999 out of either income or assets.

During 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,358 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2000 out of either income or assets.

During 2001, the petitioner declared a loss of \$49,983 and ended the year with net current assets of \$1,460. The petitioner has not demonstrated the ability to pay the proffered wage during 2001 out of either income or assets.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999, 2000, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel asserts that the petitioner's failure to show the proffered wage can be overlooked pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa, 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 it 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 ability to pay the proffered wage. Here, the petitioner has never posted a large profit. The petitioner has posted losses during three of the six salient years. The petitioner's taxable income before net operating loss deduction and special deductions for those six years, added together, equals a net loss of \$81,225. The record contains no indication that the petitioner's losses were uncharacteristic, are unlikely to be repeated, and occurred within a framework of successful years. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.