

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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

B6

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



File: EAC 99 085 51996 Office: VERMONT SERVICE CENTER

Date: **DEC 13 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, 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 manager. 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 statement 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 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 November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$450 per week, which equals \$23,400 per year.

With the petition counsel submitted a letter, dated January 11, 1999, from the petitioner's president, stating that the petitioner has employed the beneficiary as a full-time manager since 1994.

Counsel also submitted 1995, 1996, and 1997 Form W-2 Wage and Tax Statements issued by the petitioner showing that the beneficiary was paid \$20,632.10, \$14,324.20, and \$3,004.66 during those years, respectively. Those W-2 forms further reveal, however, that \$17,281 of the amount paid to the beneficiary during 1995 was derived from tips, as was \$12,040 and \$2,460 of the amounts paid during 1996 and 1997, respectively. The wages paid by the petitioner to the beneficiary were \$3,351.10 during 1995, \$2,284.20 during 1996, and \$544.66 during 1997. Because the priority date in this matter is November 14, 1997, evidence of wages paid to the beneficiary during 1995 and 1996 is not directly relevant to the issue of the petitioner's ability to pay the proffered wage beginning on the priority date.

Further, 20 C.F.R. 656.20(c)(3) states that the proffered wage may not include commissions, bonuses, or other incentives, but only the amount that the petitioner is obliging itself to pay.

8 C.F.R. § 204.5(g)(2) obliges the petitioner to demonstrate that it was able to pay the proffered wage during all of the years that have ensued since the priority date with copies of annual reports, federal tax returns, or audited financial statements.

An exception is made if the petitioner was actually paying wages to a beneficiary during a given year. If the petitioner paid some amount of wages to the beneficiary during a given year for performing in the proffered position, then those wages paid show that the petitioner was able to pay the proffered wage, at least in part. If a proffered wage is \$40,000 and the petitioner paid \$40,000 in wages during a given year, the petitioner is not obliged to show the ability to pay that wage a second time. Having paid it, the petitioner has demonstrated its ability to pay. If a proffered wage is \$40,000 and the petitioner paid the beneficiary \$30,000 during a given year, then the petitioner would be obliged to demonstrate only the ability to pay the remaining \$10,000.

Clearly, tips paid by customers cannot be equated in this context with wages paid by the petitioner. Tips that the beneficiary received during a given year were not paid by the petitioner, and do not demonstrate the petitioner's ability to pay the proffered wage. Only the wages paid by the petitioner will be included in that calculation.

Counsel also provided W-2 forms showing wages that another restaurant paid to the beneficiary during 1996 and 1997. The proposition that those W-2 forms were intended to support is unclear, but they cannot demonstrate the petitioner's ability to pay the proffered wage.

Further still, counsel provided a letter, dated January 6, 1999,

from the petitioner's payroll service. That letter states that in less than a week the petitioner would issue the beneficiary a W-2 form that would show that the beneficiary received wages of \$13,962.70 during 1998. In that letter, the beneficiary's wages do not appear to include tips. Tips of \$10,878 are segregated from that amount.

The letter also states that the other restaurant for which the beneficiary works would issue a W-2 form to the beneficiary. As observed above, any amount paid to the beneficiary by any other company is irrelevant to the petitioner's ability to pay the proffered wage.

In addition, counsel provided a copy of the petitioner's 1997 Form 1120 U.S. Corporation Income Tax Return, which covers the petitioner's July 1, 1997 to June 30, 1998 fiscal year. The return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,299 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 12, 2001, requested additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's tax returns for 1998, 1999, and 2000 and the W-2 forms showing wages the petitioner paid to the beneficiary. The Service Center also requested that the petitioner provide any other evidence that would show its ability to pay the proffered wage.

The record indicates that the request was resent twice but does not make clear the source of the difficulty in delivering the notice. Counsel's response shall be treated as timely.

In response, counsel submitted 1999 and 2000 W-2 forms issued by the petitioner to the beneficiary. Those W-2 forms indicate that the beneficiary received \$29,618.69 and \$16,272.12 during those years, respectively. As before, that amount includes the beneficiary's tips of \$23,463 and \$13,333 during those years. The wages that those W-2 forms show the petitioner paid to the beneficiary were \$6,155.69 during 1999 and \$2,939.12 during 2000.

Counsel also submitted W-2 forms showing amounts the other restaurant paid to the beneficiary during those same years. As was stated above, the amounts paid to the beneficiary by another restaurant have no relevance to the petitioner's ability to pay the proffered wage.

Further, counsel submitted a copy of the petitioner's 1998 and

2000 Form 1120 U.S. Corporation Income Tax Returns. The nominal 1998 return covers the petitioner's fiscal year from July 1, 1998 to June 30, 1999. That return shows that the petitioner declared a taxable income before net operating loss deductions and special deductions of \$15,417 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 nominal 2000 return covers the fiscal year from July 1, 2000 to June 30, 2001. That return shows that the petitioner declared a loss of \$23,100 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.

Counsel did not provide the petitioner's nominal 1999 tax return and did not explain its absence.

On February 22, 2002, the Vermont Service Center requested that the petitioner provide a copy of the 2001 W-2 form it issued to the beneficiary.

In a letter, dated March 22, 2002, submitted in response, counsel stressed the petitioner's gross revenues and salaries paid to employees and implied that those figures demonstrate the petitioner's ability to pay the proffered wage. With that letter, counsel submitted the 2001 W-2 form showing that the petitioner paid \$1,800 in wages to the beneficiary during that year. Once again, counsel submitted an additional W-2 form showing an amount paid to the beneficiary by another company. Once again, that extraneous W-2 form shall be disregarded.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 18, 2002, denied the petition.

On appeal, counsel stated that the beneficiary worked for slightly over six months for the petitioner during 2000, and that during the remaining six months the petitioner employed another manager.

As to the loss declared on the 2000 tax return, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that,

When there are reasonable expectations of continued increase in business and profits, a single year's decreased net profit does not preclude a petitioner from establishing the ability to pay.

With the appeal, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return covering the

fiscal year from July 1, 2001 to June 30, 2002. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$79,916 during that year.

Counsel also submitted payroll data pertinent to 1999 and 2000. That payroll information shows that the petitioner employed the beneficiary during all of 1999, during which he was paid \$6,155.69 in wages, and from the beginning of 2000 through the pay period ending July 15, 2000, during which time he was paid 2,939.12 in wages.

Counsel argues that the payroll data shows the beneficiary was paid \$29,618 during 1999 and \$16,272 for the portion of 2000 during which the petitioner employed him. Counsel's figures are correct, if one adds the beneficiary's tips to the wages that the petitioner paid him. As was stated above, however, tips given to the beneficiary by customers do not demonstrate the petitioner's ability to pay the proffered wage.

Subsequently, counsel submitted a brief to supplement the appeal. In that brief, counsel noted that the director had found that the petitioner had demonstrated the ability to pay the proffered wage during 1997, 1998, and 1999.

With that brief, counsel submitted a letter, dated September 23, 2002, from the petitioner's accountant. The accountant notes, in that letter, the amounts of petitioner's retained earnings at the end of its 1999, 2000, and 2001 fiscal years. The accountant does not assert any relevance of those figures to the petitioner's ability to pay the proffered wage.

The accountant also states that long-term debt to officers was erroneously included in accounts payable on the petitioner's nominal 2000 income tax return. The accountant sets forth the amounts of those debts and observes that, had they been recorded as long-term debt rather than as due within the following year, the petitioner's net current assets would have been \$125,783 higher. This office observes that, had those loans been reported as long-term debt on the petitioner's tax return, that return would have demonstrated that the petitioner was able to pay the proffered wage during that fiscal year out of net current assets.

Counsel submitted no evidence, however, that the petitioner has filed an amended return. 8 C.F.R. § 204.5(g)(2) permits the petitioner to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. Having submitted no copies of annual reports and no audited financial statements, the petitioner has opted to demonstrate its ability to pay the proffered wage with its federal tax returns and is bound by the figures which were on those returns when they were signed and submitted. A letter from

an accountant is insufficient to amend the figures on the petitioner's tax return.

In that brief, counsel again argued that consistent with *Matter of Sonogawa, Supra.*, the Service should overlook the petitioner's poor performance during its fiscal year 2000.

Counsel's reliance on the petitioner's gross revenue and on the amount it paid in salaries during various years is inapposite. Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

Counsel attempted to show that hiring the beneficiary during all of 2000 would have reduced the petitioner's expenses during that year. Counsel noted that the beneficiary worked for the petitioner only until July of that year. Counsel notes the amount the beneficiary received the year before for his employment with the petitioner and the amount the beneficiary received for working the first half of 2000. Counsel states that the beneficiary would have received an amount in excess of the proffered wage had he worked all of 2000. Counsel also states that the petitioner was required to hire another employee to perform in the proffered position during the latter half of 2000, and implies that, had the beneficiary been employed then, that other employee's wages would have been available to pay the proffered wage.

In his discussion of the amount paid to the beneficiary, counsel relies on figures from line 1, Wages, Tips, and Other Compensation, of the beneficiary's W-2 Forms. As was discussed above, that figure includes tips paid to the beneficiary by customers. Tips do not show the petitioner's ability to pay a proffered wage. Further, counsel does not provide any evidence from which the wages of the ostensible other employee during the second half of 2000 might be computed. As such, this office is unable to include any such amount in the computation of the ability to pay the proffered wage.

Counsel correctly notes that the director stated that the petitioner has demonstrated the ability to pay the proffered wage during 1997, 1998, and 1999. Although the director made that statement, upon reviewing the evidence, this office disagrees

with that portion of the decision.

The petitioner must show the ability to pay the proffered wage beginning on the priority date and continuing during each ensuing year. This calculation is complicated by the petitioner's reporting its taxes based on a fiscal year beginning mid-year on July 1, whereas W-2 forms show wages paid during a calendar year.

The proffered wage is \$23,400. The priority date is November 14, 1997. During 1997, the petitioner need not show the ability to pay the entire proffered wage, but only that portion which would have been due had the petitioner employed the beneficiary beginning on the priority date. On the priority date, 48 days of that 365-day year remained. The petitioner must show the ability to pay $48/365^{\text{th}}$ of the \$23,400 proffered wage, or \$3,077.26.

The 1997 W-2 form submitted shows that the petitioner paid the beneficiary \$544.66 in wages during that year. On appeal, counsel indicates that the beneficiary worked for the petitioner all of that year. Absent any evidence that the earnings should be apportioned differently, this office must assume that $48/365^{\text{th}}$ of that amount was earned on and after the priority date of this petition. The \$544.66 in wages that the petitioner paid to the beneficiary during 1997, times $48/365^{\text{th}}$, equals \$71.63.

The petitioner's nominal 1997 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,299 during that year. The petitioner's fiscal year 1997 includes the last half of 1997 and the first half of 1998. This office must assume, absent any evidence that the petitioner's earnings should be apportioned differently, that half of that amount was earned during the last half of 1997 and half during the first half of 1998. Only \$649.50 of that amount was available to pay the proffered wage beginning on November 1997.

The \$71.63 which the petitioner has shown that it paid to the beneficiary during that portion of 1997 after the priority date, plus the \$649.50 which the petitioner's tax return shows it was able to pay during that same period, equals \$721.13. That amount is far short of the \$3,077.26 the petitioner is obliged to show the ability to pay during that period. The petitioner's tax return shows negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during that portion of 1997 after the priority date out of either income or assets.

On its nominal 1998 return, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$15,417. Half of that income, \$7,708.50, was presumably earned during the last half of 1998 and the other half during the first half of 1999. That amount, plus the \$649.50 carried

forward from the petitioner's 1997 return, equals \$8,358, the amount the petitioner has demonstrated it was able to contribute toward the proffered wage.

Counsel submitted a letter, described above, from the petitioner's payroll service and dated January 6, 1999 stating that the petitioner paid the beneficiary \$13,962.70 in wages during 1998. Because that amount greatly exceeds the amounts the petitioner paid the beneficiary in wages during other years, the veracity of that statement is suspect. However, because the director apparently accepted that statement as true and required no corroborating evidence, this office shall accept that statement as true.

The \$13,962.70 which the petitioner paid the beneficiary during 1998, plus the additional \$8,358 which the petitioner's tax returns indicate it was able to pay, equals \$22,320.70, an amount slightly less than the proffered wage. The petitioner's tax return reports negative net current assets. The petitioner has not demonstrated that it was able to pay the proffered wage during 1998 out of either income or assets.

Although the petitioner is obliged to show the ability to pay the proffered wage during each year after the priority date, the petitioner did not submit its nominal 1999 tax return. This omission occurred even though the director specifically requested, on July 12, 2001, that the petitioner provide its 1999 tax return. This omission further complicates the computation pertinent to the petitioner's ability to pay the proffered wage, as appears below.

The petitioner's nominal 1998 tax return shows that the petitioner was able to contribute \$7,708.50 toward the proffered wage during the first half of 1999. The 1999 W-2 form shows that the petitioner paid the beneficiary \$6,155.69 in wages during that year, half of which, or \$3,077.85, was presumably paid during the first half of that year. The \$3,077.85 plus the \$7,708.50 which the 1998 tax return shows the petitioner could have contributed from income equals \$10,786.35, the total amount the petitioner has shown the ability to pay toward the proffered wage during the first half of 1999. Half of the \$23,400 proffered wage is \$11,700, an amount greater than the amount the \$10,786.35 the petitioner has demonstrated the ability to pay. The petitioner's tax return also shows negative net current assets. The petitioner has not demonstrated the ability to pay half of the proffered wage during the first half of 1999.

During the second half of 1999, the petitioner paid the beneficiary approximately \$3,077.85 in wages. Because counsel did not submit the petitioner's 1999 tax return, or any other competent evidence of the petitioner's ability to pay the proffered wage, no evidence exists that the petitioner was able

to contribute further toward paying the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the second half of 1999.

The 2000 W-2 form shows that the petitioner paid the beneficiary \$2,913.12 during that year. Counsel submitted payroll data indicating that the petitioner employed the beneficiary until July 15 of that year, a total of 197 days. Of that total number of days, 182 days were in the first half of the year and 15 days were during the second half. This office shall assume, absent any evidence to the contrary, that 182/197th of that amount, or \$2,691.31, was paid during the first half of the year and 15/197th of that amount, or \$221.81, was paid during the second half.

Because counsel did not submit the petitioner's nominal 1999 tax return, the record contains no evidence that the petitioner was able to contribute any further toward paying the proffered wage during the first half of 2000, other than the \$2,691.31 which the W-2 form indicates it contributed. The record does not show that the petitioner was able to pay the proffered wage during the first half of 2000.

The petitioner's nominal 2000 tax return shows a loss of \$23,000. Half of that loss, (\$11,500) was presumably incurred during the last half of 2000 and half during the first half of 2001. The W-2 form indicates that the petitioner paid the beneficiary approximately \$221.81 during the second half of 2000. The tax return also shows negative net current assets. The record does not show that the petitioner was able to pay the proffered wage out of income or assets during the second half of 2000.

The petitioner's nominal 2000 tax return indicates that the petitioner suffered a loss of approximately (\$11,500) during the first half of 2001. The petitioner's 2001 tax return indicates that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$79,916, half of which, \$39,958, is presumably attributable to the last half of 2001 and half of which is presumably attributable to the first half of 2002. The petitioner's loss from the first half of 2001, (\$11,500), plus the income from the second half of 2001, \$39,958, equals \$28,458. That amount plus the \$1,800 that the 2001 W-2 form shows the petitioner paid the beneficiary in wages during that year equals \$30,258, an amount sufficient to pay the proffered wage of \$23,400 during that year. The petitioner has demonstrated that it was able to pay the proffered wage during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1997, 1998, either half of 1999, or either half of 2000. Therefore, the petitioner has not established that it had the continuing

ability to pay the proffered wage beginning on the priority date.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petitioner's loss during 2000 might be overlooked.

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 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 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 rarely posted a large profit. The record contains no indication that the petitioner's loss during its fiscal year 2000 and poor performance during other years was uncharacteristic or unlikely to recur. 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.