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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

[REDACTED]

File: WAC 02 104 50308 Office: California Service Center

Date:

**DEC 13 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]

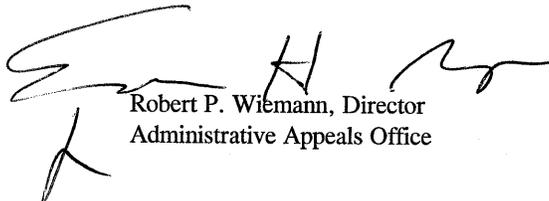
**INSTRUCTIONS:**

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

**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 painting contractor. It seeks to employ the beneficiary permanently in the United States as an estimator. 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.

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(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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on January 12, 1998. The proffered salary as stated on the labor certification is \$24.48 per hour which equals \$50,918.40 annually.

With the petition, counsel submitted an incomplete 2000 Form 1040 joint income tax return of the petitioner's proprietor and the proprietor's spouse.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 28, 2002, requested additional evidence conforming to 8 C.F.R. § 204.5(g)(2) pertinent to that ability. The Service Center also requested copies of the beneficiary's Form W-2 wage and tax statements from 1998 through 2001 and the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters.

In response, counsel submitted the complete 1998, 1999, 2000, and 2001 Form 1040 joint income tax returns of the petitioner's proprietor and his spouse. Those returns indicate that the petitioner's proprietor his spouse have three dependent children.

Further, counsel submitted 1999, 2000, and 2001 W-2 wage and tax statements showing that the petitioner paid the beneficiary \$7,140, \$20,176, and \$20,656.96 during those years, respectively. Counsel also submitted a letter from the beneficiary stating that he had no W-2 form for 1998 because his employer did not issue him a W-2 for that year.

Finally, counsel submitted the petitioner's California Form DE-6 quarterly wage reports for all four quarters of 2001. Those forms corroborate that the petitioner paid the beneficiary \$20,656.96 during 2001.

The 1998 return shows that the petitioner's proprietor and his spouse declared an adjusted gross income of \$54,202 during that year, including \$21,371 shown on Schedule C as the petitioner's adjusted gross profit.

The 1999 return shows that the petitioner's proprietor and his spouse declared an adjusted gross income of \$42,637 during that year, including \$20,657 shown on Schedule C as the petitioner's adjusted gross profit.

The 2000 return shows that the petitioner's proprietor and his spouse declared an adjusted gross income of \$79,719 during that year, including \$13,772 shown on Schedule C as the petitioner's adjusted gross profit.

The 2001 return shows that the petitioner's proprietor and his spouse declared an adjusted gross income of \$58,546 during that year, including \$45,512 shown on Schedule C as the petitioner's net

profit.

On August 2, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel noted that when the depreciation deduction is added to the petitioner's adjusted gross income, the total substantially exceeds the proffered wage. Counsel cited the minutes of a November 16, 1994 teleconference between the Vermont Service Center and the American Immigration Lawyers' Association for the proposition that this calculation is correctly part of the determination of the petitioner's ability to pay the proffered wage.

The 1994 opinion expressed in a phone call is not binding upon the Director, California Service Center, nor is it binding upon this office. This office disagrees with the opinion that the addition of the petitioner's adjusted gross income and depreciation deduction should be part of the calculation of the petitioner's ability to pay the proffered wage.

A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as buildings and equipment deteriorate. This deduction represents the expense of buildings and materials spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The depreciation deduction represents the accumulation of funds necessary to replace perishable equipment and buildings, and that amount 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*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

In calculating the petitioner's ability to pay the proffered wage, the Bureau will first examine the net income 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 Bureau 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 Bureau, then the Immigration and Naturalization Service, 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. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

Counsel also cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that even though the petitioner's income was low during some years, the petitioner should be approved because various indicators can be interpreted as showing that business is improving.

*Matter of Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. During the year in which the petition in *Sonogawa* was filed 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 low profits are experienced during an uncharacteristic year within a framework of profitable or successful years, then the period of uncharacteristically low profit might be disregarded in determining ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

During 1998, the adjusted gross income of the petitioner's proprietor and his spouse was \$54,202. The record contains no evidence of the wages, if any, which the petitioner paid to the

beneficiary during that year. That adjusted gross income, reduced by the amount of the proffered wage, \$50,918.40, equals \$3,283.60, an amount too small to support the petitioner's proprietor's family of five.

During 1999, the adjusted gross income of the petitioner's proprietor and his spouse was \$42,637. Counsel submitted evidence which shows that the petitioner paid the beneficiary \$7,140 during that year. The proffered wage of \$50,918.40, reduced by the \$7,140 the petitioner actually paid the beneficiary during that year equals \$43,778.40. The petitioner's adjusted gross income during that year was insufficient to pay the balance of the proffered wage.

The adjusted gross income of the petitioner's proprietor during 1998 would have been insufficient both to pay the proffered and to support the petitioner's proprietor's family. The adjusted gross income of the petitioner's proprietor during 1999 was insufficient to pay the proffered wage. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.