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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 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 098 51903 Office: California 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, California 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 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 October 14, 1997. The proffered salary as stated on the approved labor certification is \$11.55 per hour which equals \$24,024 annually.

With the petition, counsel submitted unaudited financial statements of Lego Foods, Inc for the 2000 calendar year. The accountant's report which accompanied those financial statements clearly states that the accountant compiled information provided by management into the standard form, but did not audit or review the statements and expressed no opinion or any other form of assurance pertinent to their accuracy or veracity. Those financial statements were produced pursuant to a compilation rather than an audit. Therefore, according to 8 C.F.R. § 204.5(g)(2), they are not competent evidence of the petitioner's ability to pay the proffered wage.

Counsel also submitted unsigned copies of its 1998 and 1999 Form 1120S U.S. income tax returns of an S corporation for Lego Foods, Inc. doing business as Victor's Square Delicatessen.

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 April 17, 2002, requested additional evidence pertinent to that ability.

Specifically, the Service Center requested evidence consistent with 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's ability to pay the proffered wage beginning on the priority date.

The Service Center also requested the petitioner's signed income tax returns for 1997 through 2001, and California Form DE-6 quarterly wage reports for the previous four quarters.

In response, counsel submitted signed 1997, 1998, 1999, and 2000 Form 1120S U.S. income tax returns of an S corporation for Lego Foods, Inc. doing business as Victor's Square Delicatessen. The petitioner did not provide its 2001 return.

In a letter, dated June 19, 2002, which accompanied the tax returns, counsel stated that [REDACTED] is the parent company of the petitioner, [REDACTED]

[REDACTED] Counsel also stated that he would provide the petitioner's 2001 return immediately after it had been filed.

The 1997 return shows that the petitioner declared a loss of \$10,547 as its ordinary income for that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1998 return shows that the petitioner declared an ordinary income of \$14,121 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 return shows that the petitioner declared a loss of \$25,630 as its ordinary income for that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 return shows that the petitioner declared an ordinary income of \$29,506 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 also provided Lego Foods, Incorporated's California Form DE-6 quarterly wage reports for the last three quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner did not employ the beneficiary during those quarters.

On August 2, 2002, the Director, California Service Center, denied the petition, finding that the petitioner's income tax returns for 1997, 1998, and 1999 did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel argued that the petitioner's gross income, rather than its net income, should be used to determine whether the petitioner is able to pay the proffered wage. Subsequently, counsel submitted a brief.

In the brief, counsel argued (1) that the petitioner's business is increasing and that the increase should be considered in the calculation of the ability to pay the proffered wage, (2) that the petitioner's depreciation deduction should be added to the petitioner's net income as part of the calculation of the petitioner's ability to pay the proffered wage, (3) that the petitioner incurred \$12,012 in overtime payments which it would have avoided if it had been able to hire the beneficiary, which amount should also be considered in the computation of the ability to pay the proffered wage, and (4) that the annual prevailing wage was erroneously increased from \$10,504 to \$24,024.

As to his first point, counsel observed that the petitioner's gross income increased from \$880,600 in 1997 to \$914,487 in 2000.

Counsel stated that the petitioner is confident that, if it is able to hire the beneficiary, this trend will continue, and that therefore, pursuant to the holding in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner should be approved.

If those two isolated years are taken as indicative of a trend, they would indicate an annual increase in gross receipts of 1.27 percent. However, the petitioner's gross income during 1998 was

only \$852,743 and its gross income during 1999 was only \$852,597. The record does not indicate even the modest positive trend in gross receipts which counsel posits.

Counsel never provided the petitioner's 2001 income tax return which the Service Center requested on April 17, 2002 and which counsel stated, in his letter of June 19, 2002, that he would provide as soon as it was filed. This office is therefore unable to analyze the figures from that return.

Further, the holding in *Sonegawa*, supra, is not so broad as counsel asserts. *Sonegawa* 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. 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 *Sonegawa*, 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 couturière.

Counsel is correct that, if the petitioner's losses during some years and very low profits during others are uncharacteristic, had identifiable causes unlikely to recur, and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining the petitioner's ability to pay the proffered wage. The record, however, 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.

Counsel's assertion that the petitioner's depreciation deduction should be added to the petitioner's net income as part of the calculation of the petitioner's ability to pay is similarly unpersuasive.

A depreciation deduction, while not necessarily a cash expenditure during the year claimed, represents value lost as equipment and buildings deteriorate. This deduction represents the expense of buildings and equipment 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.

Counsel asserts that the petitioner's ability to pay the proffered wage should be based on the petitioner's gross income, rather than its net income. This office notes that this argument is contrary to counsel's argument that the calculation of the ability to pay the proffered wage should include adding the petitioner's depreciation deduction to its net income, and apparently urged in the alternative. Further, counsel offers no calculation pursuant to which the petitioner's gross income could be used to gauge its ability to pay a given wage.

In any event, in calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income reflected on the petitioner's federal income tax returns, 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 CIS, 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 urged that, because the petitioner was unable to employ the beneficiary during the pendency of the petition, it incurred overtime expense. The amount of that overtime expense, counsel urges, should be included in the calculation of the petitioner's

ability to pay the proffered wage. In the brief, counsel stated that the petitioner was forced to pay 150% of the proffered wage for work the beneficiary would have done if the petitioner had been able to employ him since the priority date. Pursuant to this calculation, counsel states that the petitioner would have saved \$12,012 per year by hiring the petitioner.

That calculation indicates that during each hour which the beneficiary would have worked, the petitioner paid another worker time-and-one-half wages to cover those hours. Counsel offered no evidence to support the veracity of this implied assertion and the accuracy of the calculation based upon it. The assertions of counsel are not evidence. 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).

The proffered wage is \$24,024 per year. During 1997 the petitioner declared a loss of \$10,547. The petitioner declared an ordinary income of \$14,121 during 1998. During 1999 the petitioner declared a loss of \$25,630. At the end of each of those years, the petitioner's current liabilities exceeded its current assets. Those returns are the only competent evidence in the record of the petitioner's income and assets and they do not support the proposition that the petitioner was able to pay the proffered wage during 1997, 1998, or 1999.

Counsel's final argument is that the amendment of the proffered wage to \$24,024 annually, as shown on the Form ETA 750 Application for Alien Employment Certification, occurred on July 5, 2001. Prior to that time, the petitioner had proffered a wage of \$6.50 per hour, or \$13,520 annually, and counsel urges that the earlier, lower proffered wage should be used in calculating the petitioner's ability to pay the proffered wage during 1997, 1998, 1999, and 2000.

Initially, this office notes that even pursuant to the analysis counsel urges, the petitioner would not have demonstrated the ability to pay that lesser wage during 1997 or 1999. In any event, the proffered wage on the labor certification is \$24,024 per year, and this office cannot vary the terms of an approved labor certification. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage shown on the approved labor certification beginning on the priority date of the petition.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1997, 1998 or 1999. 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.