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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, DC 20536



File: EAC 01 278 52665 Office: VERMONT SERVICE CENTER Date:

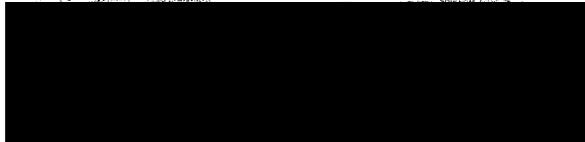
DEC 13 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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.

Helen E Crawford for
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning, carpet cleaning, equipment repair, and uniform rental firm. It seeks to employ the beneficiary permanently in the United States as a supervisor in carpet cleaning services. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 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). The petition's priority date in this instance is November 16, 2000. The beneficiary's salary as stated on the labor certification is \$22.25 per hour or \$46,280 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent

residence. In a request for evidence dated November 13, 2001 (RFE), the director required information concerning the position which the beneficiary would fill, the number of the petitioner's employees, its 2001 Employer's Quarterly Federal Tax Returns (Form 941), and Wage and Tax Statements (Form W-2) evidencing wage payments, if any, to the beneficiary for 2000.

The Form ETA 750 included the petitioner's partial 1999 and 2000 Forms 1120, U.S. Corporation Income Tax Returns, though they omitted referenced Statements. In response to the RFE, counsel offered copies, for 2001, of the petitioner's Forms 941, payroll summaries, and an unaudited income statement for eleven (11) months of 2001. Submissions included counsel's brief and an undated letter stating that the writer performed part-time carpet-cleaning supervision services for the petitioner (Dolce letter), evidently since 1999.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

With the appeal, counsel presented the petitioner's 2001 Form 1120 with Statements 1-6 and a brief. The brief states several arguments to establish the ability to pay the proffered wage.

Despite counsel's primary assertion, the director may not consider simply gross receipts and gross income. The gross receipt and gross income values, respectively, trended down from 1999-2001, being (\$628,795 and \$142,592) in 1999, (\$677,176 and \$145,930) in 2000, and (\$424,876 and \$106,370) in 2001.

Counsel further asserts that the director did not properly consider net income, because depreciation and other allowable deductions ought to be added back into income. Taxable income before net operating loss deduction and special deductions was less than the proffered wage, viz., losses of (\$28,142) in 1999 and (\$9,645) in 2000 and \$2,691 in 2001.

Finally, counsel claims an error in computing net current assets available to pay the proffered wage. By definition, the difference of current assets minus current liabilities, as seen on Schedule L of the federal income tax returns, equals net current assets. They were negative (\$12,357) at the priority date, as well as in 1999 and 2001 and, thus, less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, 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 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. Tex. 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 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Counsel's brief on appeal, next, states of 2001 documentation:

These Tax Documents clearly establish that the Petitioner had paid total compensation to its employees of \$126,456 for the first three quarter of 2001. In addition, . . . as of October 27, 2001 the year-to-date total compensation paid to employees amounted to \$150,533.06, which included more than \$15,000 paid to the gentleman filling the position to be offered to the beneficiary [as set forth in the Dolce letter].

Counsel advised, however, in response to the RFE, that full-time employment of the beneficiary would not vacate or eliminate the part-time work expressed in the Dolce letter. The record does not, moreover, name any workers whom the beneficiary will replace, state their wages, or provide evidence that the beneficiary replaced them. As to its total compensation for all employees, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The unaudited financial statement as of November 30, 2001 does not offer any evidence beyond that found in the 2001 tax return presented on appeal. Unaudited financial statements are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel asserts that the petitioner has operated and employed workers for 50 years and, recently, generated revenues of \$60,000 a year in the carpet cleaning division without a full-time supervisor. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel states that CIS should consider the ability to generate income when determining the employer's ability to pay salary. Counsel claims that CIS must approve the petition based on the petitioner's reasonable expectation of growth of income alone and relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's reliance on *Matter of Sonogawa* is misplaced. It relates to a petition 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 and routinely earned a gross annual income of about \$100,000. 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 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 couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been

shown to exist in this case, nor has it been established that 2000 was an uncharacteristically unprofitable year for the petitioner.

In passing, counsel ultimately contends that *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), also, requires CIS to approve the petition if the petitioner generates income. No authority supports that contention. *Masonry Masters, Inc.*, rather, is usually cited for the holding that the petitioner need not show the ability to pay more than the prevailing wage, as distinct from the proffered wage. It does not apply to these proceedings. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding. The salient holding in *Masonry Masters, Inc.* simply does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

After a review of the federal tax returns, the petitioner's financial documents, and the briefs, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.