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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



File: WAC 02 116 55336 Office: California Service Center

Date:

JUL 21 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 the Bureau of Citizenship and Immigration Services (Bureau) 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
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 convalescent health care provider. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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 April 27, 2001. The proffered salary as stated on the labor certification is \$11.93 per hour which equals \$24,814.40 annually.

With the petition, counsel submitted the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared an ordinary income of -\$31,934 for that year. The corresponding Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

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 9, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested that the petitioner submit audited annual reports, complete federal tax returns, or audited financial reports to demonstrate its continuing ability to pay the proffered wage beginning in 2000.

In response, counsel submitted a letter, dated June 27, 2002. In that letter, counsel stated that the depreciation deduction the petitioner claimed is not an actual expense, but a paper loss. Counsel argued that the amount of the petitioner's depreciation expense should be included in the calculation of the petitioner's ability to pay the proffered wage. In support of that position, counsel cited an unpublished decision by this office, implicitly asserting that the facts of that case are similar to those of the instant case.

Although 8 C.F.R. § 103.3(c) provides that Bureau precedent decisions are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. The instant case will be considered on its own merits without reference to any previous nonprecedent decisions.

Counsel also argued that the petitioner's business is expanding and that this creates a reasonable expectation of increased profits. Counsel submitted a settlement sheet showing that a property transferred to Christine Cabansag on November 24, 1999. Counsel stated that she is the petitioner's founder and president and that the property was paid for by the petitioner and is to be used in the petitioner's business. Counsel also stated that the petitioner has established a home care division within its business. Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that this office may consider evidence that the petitioner's profits are likely to improve, which counsel asserts is the case.

With that letter, counsel also submitted monthly statements of the petitioner's mortgage, line of credit, and checking account, and various receipts tending to confirm that the petitioner operates a

convalescent home.

On August 8, 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 correctly observed that, as the priority date of this petition is April 27, 2001, financial data for previous years is not directly relevant to the issue of petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. The return shows that the petitioner declared an ordinary income of \$4,384 during that year. The corresponding Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

Counsel noted that the petitioner had \$506,715 in gross receipts during that year, paid \$203,572 in wages and compensation of officers, and had an ordinary income of \$4,384. Counsel argued that those figures demonstrate that the petitioner has adjusted to its expansion and experience substantial growth in profits. Counsel further argued that the amount of the petitioner's depreciation deduction and the balance of its line of credit and bank accounts should be included in the calculation of the ability to pay the proffered wage. Counsel submitted monthly statements pertinent to the petitioner's various accounts.

Counsel is correct that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) this office may consider, in an appropriate case, evidence that a petitioner's business is likely to improve. *Sonogawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Counsel is correct that, if the petitioner's losses 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 submitted no evidence that it has ever reported a profit, and the assumption that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel further argues that the petitioner's account balances evince the ability to pay the proffered wage and that, in the alternative, the petitioner could draw upon the line of credit to pay that wage. However, 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. Those balances will not be considered in the computation of the petitioner's ability to pay the proffered wage.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner will not be considered in the calculation of the funds available to pay the proffered wage.

Counsel asserts that the depreciation deduction shown on the petitioner's returns is not a real expense, and that the amount of that deduction should be included in the calculation of the petitioner's ability to pay the proffered wage. However, 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 determining the petitioner's ability to pay the proffered wage, the Bureau will first examine the 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.

The petitioner's tax returns show that it was unable to pay the proffered wage out of its ordinary income during 2001. The return further demonstrates that the petitioner was unable to pay that wage out of its net current assets during that same year.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. 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.