

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship Services and Immigration Services

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

Bl

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

[REDACTED]

File: WAC 02 041 55470 Office: California Service Center

Date:

MAY 28 2003

IN RE: Petitioner: [REDACTED]
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 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 for
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 nursing home. 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 wage offered 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 \$11.55 per which equals \$24,024 annually.

With the petition, counsel submitted copies of the 1998 Form 1040 personal tax return of the petitioner's owner. That return shows that the petitioner's owner had an adjusted gross income of \$7,496 during that year. The accompanying Schedule C shows a net profit from the petitioning company of \$2,218 during that same year.

Counsel submitted the petitioner's 1999 and 2000 Schedule C profit statements without the corresponding Form 1040 returns of the petitioner's owner. Those forms indicate that the petitioner produced a net profit of \$3,547 and \$62,088, respectively, during those years.

Counsel also submitted the 1999 Form 990 Return of an Organization Exempt from Income Tax for Better Living Centers of Tarzana, California and a Certificate of Corporate Resolution showing that the petitioner's owner is the president/treasurer of Better Living Centers.

Because the tax returns submitted did not demonstrate the petitioner's ability to pay the proffered wage during 1998 and 1999, the California Service Center, on February 27, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested copies of the petitioner's Form DE-6 quarterly wage reports for the past eight quarters and audited corporate financial statements including balance sheets and statement of income and expenses.

In response, counsel submitted copies of the petitioner's Form DE-6 quarterly wage reports for all four quarters of 2000, all four quarters of 2001, and the first quarter of 2002. Counsel did not submit the requested audited financial statements.

On July 9, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage during 1998 and 1999. The director noted that, although the petitioner's owner is the president/treasurer of Better Living Centers, the record contains no indication that the funds of that non-profit are available to pay the wages of the petitioner's employees.

On appeal, counsel argues that the available evidence shows that the petitioner has the ability to pay the proffered wage. With the appeal, counsel submitted a copy of the 2000 and 2001 Form 1040 returns of the petitioner's owner. The 2000 return shows an adjusted gross income of \$57,701 during that year. As was noted above, the accompanying Schedule C shows a net profit of \$62,088 during that year.

The 2001 return shows an adjusted gross income of \$18,526 during that year. The accompanying Schedule C shows a net profit of \$19,935.

Counsel urges that although the petitioner's business suffered a downturn during 1998 and 1999, the petitioner has now recovered. Counsel also provides bank statements for some of the months from 1998 through 2001. Counsel argues that the balances in those statements demonstrate the petitioner's ability to pay the proffered wage. Further, counsel cites *Masonry Masters v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the director was obliged to consider the added income which the petitioner would receive as a result of hiring the beneficiary.

8 C.F.R. § 204.5(g)(2) makes clear what evidence can be used to show the petitioner's continuing ability to pay the proffered wage. Bank balances are not among the types of evidence enumerated. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's account statements somehow reflect additional available funds that were not reported on the tax returns submitted.

The position for which the petitioner proposes to hire the beneficiary is cook. Clearly, the beneficiary would either replace someone on the petitioner's kitchen staff or supplement that staff. In either event, counsel's implicit argument that the petitioner's profits would increase as a result of hiring the petitioner is at best speculative. Counsel has submitted no evidence of any possible increase in profits to be anticipated by hiring the beneficiary. No anticipated increase in profits will be included in the calculation of the funds available to pay the proffered wage.

8 C.F.R. § 204.5(g)(2) requires that the beneficiary show the continuing ability to pay the proffered wage beginning on the priority date. Ordinarily, this will mean the ability to pay the wage during the year the labor certification application is filed and the ability to pay that wage during each succeeding year until the beneficiary obtains lawful permanent residence.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) indicates that exceptions can be made for 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 incurred large moving costs and endured a period of time during

which it 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 couturiere.

In the instant case, the evidence does not establish that the petitioner's apparent inability to pay the proffered wage in 1998 and 1999 was an anomaly. To the contrary, of the years for which counsel submitted data, the petitioner appears to have had the ability to pay the proffered wage only during 2000. During 2001, the petitioner again declared profits insufficient to pay the proffered wage.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1998 and 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.

APPROVED AND FORWARDED:
[Signature]