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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, D.C. 20536



File: WAC 02 097 54436

Office: California Service Center

Date: OCT 16 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:



**PUBLIC COPY**

**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 an adult residential facility. It seeks to employ the beneficiary permanently in the United States as an administrator. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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(1) (3) states, in pertinent part:

(ii) *Other documentation -- (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It

states in pertinent part:

*(b) Evidence and processing--*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigrant benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

*(2) Submitting secondary evidence and affidavits--*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth certificate or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on December 9, 1997, indicates that the minimum requirement to perform the job duties of the proffered position of administrator is two years of experience in the job offered.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the

unavailability of the required primary and relevant secondary evidence.

Counsel submitted an affidavit from the beneficiary which stated that she worked for Isle of Dogs Neighborhood as an administrator from October 1991 to November 1994.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training of two years and denied the petition accordingly. The director noted that "an authorized person from the company/organization in which the beneficiary was employed must certify the verification of the beneficiary's prior experience."

On appeal, counsel submits a copy of the beneficiary's employment offer with Isle of Dogs Neighborhood and evidence of payment of salary from Isle of Dogs Neighborhood for the years 1992 through 1995 and explains that despite exhaustive attempts to locate an officer of the company to verify her employment, she was unsuccessful. Counsel further submits evidence of the beneficiary's receipt of a degree in Business Administration and completion of the Adult Residential Administrator Program from the State of California Department of Social Services.

In this case, it is noted that although the record contains an affidavit from the beneficiary and some payroll records from her previous British employer, "Isle of Dogs Neighborhood," there is no other credible evidence, such as affidavits from persons not parties to the petition, that she had accrued two years of full-time experience as an administrator. It is noted that the beneficiary's offer of employment from "Isle of Dogs Neighborhood" is set forth in a letter dated October 25, 1991. It stipulates that her employment hours were only 3 hours on Saturday and Sunday at an hourly wage of L3.65. If this had been a full-time position, the annual wage would have been L7,592. The pay records submitted document a total of approximately L9,000 earned during the entire period of employment. It cannot be concluded that the petitioner has sufficiently documented the beneficiary's requisite employment experience as set forth by the terms of the labor certification.

Counsel's explanation is not persuasive. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage.

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). Here, as noted above, the petition's priority date is December 9, 1997. The beneficiary's salary as stated on the labor certification is \$59,695.92 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1040, 1120-A, and 1120S for the years from 1997 through 2001. Form 1040 for 1997 showed an adjusted gross income of \$37,920. Forms 1120-A for 1998 and 1999 showed taxable income of \$0 and -\$2,740 respectively. Form 1120S showed an ordinary income of -\$6,588 in 2000 and -\$14,989 in 2001.

In determining the petitioner's ability to pay the proffered wage, CIS 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 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).

On appeal, counsel argues that the company was started in 1997 and that the first four years "were very crucial because it was the period of building a solid foundation for the company." Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petitioner's reasonable expectation of increasing profits can establish the petitioner's ability to pay

the proffered wage.

*Matter of 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 and routinely earned a gross annual income of about \$100,000.00. 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 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 has provided no evidence which establishes that unusual circumstances existed in this case which parallel those in *Sonegawa*, nor has it been established that 1997 was an uncharacteristically unprofitable year for the petitioner.

The petitioner's Form 1040 for 1996 shows an adjusted gross income of \$37,920.00. This is insufficient to pay a salary of \$59,695.92. In addition, the petitioner shows no taxable income in 1998 and negative taxable and ordinary incomes in 1999, 2000, and 2001.

Therefore, the director's decision to deny the petition has not been overcome and the petition may not be approved.

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.