

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



OCT 27 2003

File: LIN 01 218 50124

Office: NEBRASKA SERVICE CENTER Date:

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:



Identifying data deleted to prevent clearly and substantiated invasion of personal privacy

**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 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.

*Selen E Crawford for*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international sales and marketing services firm. It seeks to employ the beneficiary permanently in the United States as an international sales specialist. 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 turns 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 July 16, 1997. The beneficiary's salary as stated on the labor certification is \$33,715.03 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 September 13, 2001

(RFE), the director required a statement of the identity of 3A Motors and a clarification as to why the petitioner (Gateway) offered 3A's Form 1120, U.S. Corporation Income Tax Return, for 1997, 1998, and 1999 (consolidated with the petitioner). The RFE further required evidence of the petitioner's ownership. The egregious exaction of the personal income tax return of the chief executive officer of the petitioning corporation warrants no further consideration.

Counsel responded with exhibits 52-54, documenting the identity of 3A Motors (3A), as the predecessor in interest, and its sale to the petitioner, as the successor in interest, on December 23, 1999. Exhibits 26-28 contained the corporate income tax returns of 3A for 1997, the priority date, for 1998, and for 1999 (as consolidated in the petitioner's). The 2000 corporate income tax return of the petitioning corporation appeared in Exhibit 29. The federal tax returns, for 1997-2000, reported taxable income before net operating loss deductions and special deductions as (\$16,483), a loss, (29,019), a loss, (\$42,085), a loss, and \$647, each less than the proffered wage.

The director observed that the consolidated 1999 income tax return reflected taxable income before net operating loss deduction and special deductions as a loss, (\$42,085) with depreciation of \$987, less than the proffered wage. The 2000 return showed taxable income as \$647 with depreciation of \$1,087, less than the proffered wage.

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.

On appeal, counsel submits briefs dated April 17, 2002 (I) and March 12, 2003 (II). They discuss cumulative Exhibits 1-97.

Counsel specifies in I:

Petitioner is not required to establish its ability to pay before it became the successor to 3A. It must, however, establish 3A's ability to pay from the priority date through the date of the purchase by Gateway. (Citations).

[CIS, formerly the Service, the INS or the Bureau] failed to take into consideration the letter dated December 4, 2001, from Bottaini, Gallucci & O'Hanlon, P.C., Certified Public Accountant [CPA letter] for both 3A and [the petitioner] in which it expresses its

professional opinion that 3A had the ability to pay the offered wage on July 16, 1997, and that Gateway continued to have the ability to pay it (Ex. 57).

The CPA letter does not explain how a loan to a shareholder, totaling \$17,017, might be "readily convertible to cash." It is less than the proffered wage.

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).

Schedule L of 3A's 1997 federal tax return shows negative net current assets (\$43,314), viz., the difference of current assets of \$12,828 minus current liabilities of \$56,142. Net current assets of 3A in 1998 were negative, (\$40,555), and, on the consolidated return of 3A and the petitioner in 1999 were negative, (\$91,351), all less than the proffered wage.

Exhibits 31-34 reflect that 3A and the petitioner paid wages to the beneficiary from 1997 to 1999 in annual amounts of \$17,936, \$26,904, and \$31,146.36, less than the proffered wage, and, in 2000, of \$33,715.08, equal to or greater than the proffered wage. These payments do not demonstrate the ability to pay the proffered wage at the priority date and continuing to the present.

Counsel argues, in I, that the petitioner need not pay the proffered wage if it has paid the prevailing wage, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990). That decision is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The Court held that CIS should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. See also, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

Counsel takes particular exception:

Nor did [CIS] take into consideration petitioner's future prospects. The denial fails to mention [the] business plan titled "Gateway's Profile and Executive Summary", Ex. 58. The Gateway purchase of 3A was the result of a decision to change business strategies, Ex. 52.... Indeed, petitioner's Profit and Loss statement (draft) for calendar year 2001 shows a profit of

\$23,876.14, Ex. 72 and evidences an improved profit situation in 2001. (The profit for 2001 was more than sufficient to have paid beneficiary's wages had she been employed full-time)....

This argument relies on mere unaudited financial statements, marked for internal use and for discussion purposes only, to prove the ability to pay the proffered wage. They 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's exception, *supra*, relies on a business plan adopted in 1999, after the priority date, and executed later yet in 2000-2001. Similarly, counsel charges CIS with failure to take account of assets, available in 2001 and set forth in exhibits 59-64. These contentions, as well as the business plan, concede that the predecessor in interest could not establish the ability to pay at the priority date and needed a new strategy.

In order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel argues for the effect of performance in 2000-2001 under the 1999 business plan, based on *Matter of Sonogawa*, 12 I&N Dec. 612. Counsel's reliance on *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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 1997 was an uncharacteristically unprofitable year for the predecessor corporation. Nonetheless, counsel argues, in I, that taxable income should not be determinative of the ability to pay the wage offered.

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 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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.

The AAO has considered the petitioner's brief, II, and further exhibits, 77-97. Although complete and conscientious, they do not claim to support the ability to pay from the priority date until the beneficiary obtains lawful permanent residence. The business plan and the execution on it followed long after the priority

date. They do not always support counsel's contentions about the success of the execution on the business plan. For example, the profit for 2001, which counsel states in the exception, *supra*, is less than the proffered wage. In any case, the priority date is determinative.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

After a review of the federal tax returns, financial statements, business plan, W-2 and employee wage statements and exhibits 1-97, it is concluded that the petitioner has established neither that it, nor that its predecessor in interest, 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.