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Citizenship and Immigration Services

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

OCT 28 2003

File: WAC 01 216 53247 Office: CALIFORNIA SERVICE CENTER Date:

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 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 remanded for further consideration and action.

The petitioner is a board and care home. 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 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 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 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 day the Form ETA 750 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 Form ETA 750 was accepted on June 3, 1996. The proffered wage as stated on the Form ETA 750 is \$1,590.30 per month, which equals \$19,083.60 per year.

With the petition counsel submitted a copy of Schedule C from the petitioner's owner's 2000 tax return. That Schedule C shows that during that year the petitioner returned a net profit of \$25,172.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on September 26, 2001, requested additional evidence pertinent to that ability. The Service Center observed that, pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on priority date, and that the evidence must consist copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested that the petitioner provide its 1996, 1997, 1998, and 1999 tax returns.

The notice was sent to an outdated address and returned to the Service Center. The notice was reissued on May 29, 2002 and sent to counsel's updated address.

In response, counsel submitted the 1997 Form 1040EZ individual tax return of the petitioner's current owner, and the 1998 and 1999 Form 1040 joint tax returns of the petitioner's owner and owner's spouse. The 1998 and 1999 returns show that the owner and owner's spouse had three dependents.

Because evidence in the file indicates that the petitioner's current owner did not own the petitioning entity during 1997, that person's finances are not directly relevant to the petitioner's ability to pay the proffered wage during that year or to any other issue in this case.

Schedule C of the 1998 return indicates that the petitioner returned a net profit of \$7,379 during that year. Page one of that Form 1040 indicates that the petitioner's owner and owner's spouse declared an adjusted gross income of \$31,092 during that year, including the profit from the petitioner.

Schedule C of the 1999 return indicates that the petitioner returned a net profit of \$7,031 during that year. Page one of the Form 1040 indicates that the petitioner's owner and owner's spouse declared an adjusted gross income of \$23,578 during that year, including the profit from the petitioner.

In addition, counsel submitted a copy of the petitioner's monthly bank account statement for the month ending July 16, 2002. The statement shows an ending balance of -\$2,173.04.

Finally, counsel submitted 1996 and 1997 Schedules C, Profit or Loss from Business (Sole Proprietorship) showing that the petitioner, then under different ownership, suffered losses of \$2,566 and \$5,483 during those years, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay

the proffered wage beginning on the priority date and, on September 24, 2002, denied the petition. The director stated that the petitioner had failed to submit evidence pertinent to 1996, 1997, 2000, and 2001. In so stating, the director failed to note that counsel submitted 1996 and 1997 Schedules C showing the petitioner's losses during those years.

The director stated that, although the petitioner's owner's adjusted gross income during 1998 and 1999 was greater than the proffered wage, the balance that would have remained after paying the proffered wage would have been insufficient to support the petitioner's owner's family of five during those years.

On appeal, counsel submits the 2000 and 2001 Form 1040 joint returns of the petitioner's owner and owner's spouse, showing that they had four dependents during those years.

The Schedule C, Profit or Loss from Business (Sole Proprietorship) submitted with the 2000 Form 1040 return shows that the petitioner returned a net profit of \$25,172 during that year. Page one of the Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$30,118 during that year, including all of the petitioner's profit.

The Schedule C, Profit or Loss from Business (Sole Proprietorship) submitted with the 2001 Form 1040 return shows that the petitioner suffered a loss of \$35,918 during that year. Page one of the Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$35,352 during that year, including the petitioner's loss.

Counsel argues that approximately \$13,000 of the petitioner's expenditures were consistent from year to year and that the remainder of the petitioner's expenditures were "fungible." Counsel notes that the \$13,000 in consistent expenses, subtracted from the petitioner's gross profit would leave an amount sufficient to pay the proffered wage.

Counsel further argues that, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), any years during which the petitioner may have been unable to pay the proffered wage may be overlooked, in light of the petitioner's overall financial stability and growth.

What counsel means by "fungible" in the context of business expense deductions is unclear. That the petitioner's expenses vary from year to year does not indicate that some of those expenses may be disregarded. If counsel implies that some of the expenses deducted on the petitioner's tax returns were unnecessary to the petitioner's business, that position appears to be inconsistent with the petitioner claiming those deductions,

as 26 USC Subtitle A, Chapter 1, Subchapter B, Part VI, Sec. 162. - Trade or business expenses, states that only the ordinary and necessary expenses of a business may be deducted from income.

In any event, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service 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. The court specifically rejected the argument that the INS (now CIS) should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The petitioner is a sole proprietorship, and has been a sole proprietorship since the priority date. The owner of a sole proprietorship is obliged to pay the debts and obligations of his company out of his own income and assets. Therefore, the personal income and assets of the owner of a sole proprietorship may also be considered in determining a petitioner's ability to pay the proffered wage. Any amount that the petitioner's owner would have been obliged and able to provide was a fund available to pay the proffered wage.

The petitioner's owner must be able to pay the proffered income out of his personal income and assets and retain the ability to

support his family with his remaining income and assets. In order to show the amount the petitioner's owner would have been able to pay, the petitioner's owner must submit not only evidence of his income and assets, but of his expenses. The Service Center requested no such budget and the petitioner provided none. Without that information, this office is unable to compute the amount of his income and assets the petitioner's owner could have contributed toward paying the proffered wage.

The director must accord the petitioner an opportunity to submit evidence that its owner was able to contribute a sufficient amount to the petitioner during each year since the priority date that the petitioner could have paid the proffered wage. The evidence submitted may include evidence of the petitioner's owner's income and assets during each of those years.* For each year during which the petitioner will rely on evidence of the income and assets of its owner, the petitioner **must** submit evidence of the petitioner's owner's expenses during that year to demonstrate the amount by which his income and assets exceeded those expenses.

Counsel cites *Matter of Sonegawa, Supra.*, for the proposition that the petitioner's failure to demonstrate the ability to pay the proffered wage might be excused. *Sonegawa*, however, does not stand for the proposition that a petitioner need not show the ability to pay the proffered wage. It 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. 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 *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

* Because the petitioner changed ownership during the pendency of this petition, information pertinent to two different owners might be required. During 1996 and 1997, the petitioner must show that the petitioner's previous owner, not the current owner, would have been able to contribute sufficiently that the petitioner could have paid the proffered wage.

part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. If counsel is to rely on *Sonegawa*, however, the burden is on counsel to submit evidence that the petitioner's poor performance was anomalous.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing.