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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

**identifying data deleted to  
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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536



File: WAC 02 136 50895 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 2003**

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:



**PUBLIC COPY**

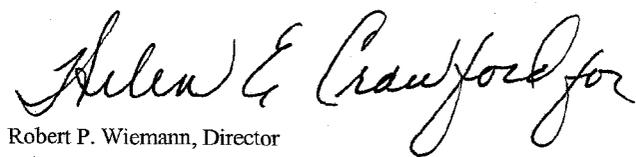
INSTRUCTIONS:

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 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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit producer of plays. It seeks to employ the beneficiary permanently in the United States as a stage manager. 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 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). The petition's priority date in this instance is August 5, 1997. The beneficiary's salary as stated on the labor certification is \$500 per week or \$26,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 30, 2002, the director required additional evidence to establish the petitioner's ability to pay

the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the beneficiary's Form W-2 for wages paid from 1997 to the present and the petitioner's 1997 and 1998 federal income tax returns, annual reports, or audited financial statements.

Counsel submitted the petitioner's Forms 990-PF, Return of Private Foundation, for 1997, and the record contained them for 1999 and 2000. The proceedings included the petitioner's financial statement for 1998. A Form W-2 showed wages for the beneficiary of \$500 in 1997 only.

The federal tax return for 1997 reflected a deficit of revenue over expenses of (\$217,745) and net current assets of \$8,816 (the difference of current assets of \$10,406 minus current liabilities of \$475), less than the proffered wage. The petitioner's 1998 financial statement stated a deficit of revenue over expenses of (\$4,836) and net current assets of \$7,592, less than the proffered wage. The 1999 federal tax return reported an excess of revenue over expenses, \$23,798, and net current assets of \$18,597, each less than the proffered wage. Their aggregate, \$42,395, does not affect outcome in this instance. See, *infra*, at 4. The 2000 federal tax return showed both an excess of revenue over expenses, \$31,895, and net current assets of \$46,681, equal to or greater than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from 1997-1999 and denied the petition.

Counsel states on appeal that all assets were current assets in 1997 and included land, buildings, and equipment. Counsel disregards Part II, line 30, cols. a and b of the 1997 federal tax return; they show through Part 3, line 2 that the petitioner disbursed practically all of its liquid funds to survive in 1997. Only by ignoring those expenditures can counsel conclude that Part I, line 27c, col. c represents a net income figure. Counsel offers authority neither for classifying land, buildings, and equipment as current assets nor for omitting disbursements made to create income. Disbursements for advertising and discretionary expenses, once made, are not available to apply to the beneficiary's wage.

In determining the petitioner's ability to pay the proffered wage, the Bureau [formerly the Service] 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 the Bureau 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.

For 1998, counsel persists in classifying all assets as current assets and, constructively, applying amounts spent for other purposes to the proffered wage. For 1999, counsel derives an income of \$50,513 from Part III of the federal tax return. Part III analyzes changes in net assets or fund balances and will not yield a statement of net current assets or a computation of the excess of revenues over expenses and disbursements.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

In 1999, the salient fact is that the excess of revenue, Part II at line 29, was \$23,798, less than the proffered wage. Of the excess of revenue, \$18,597 in net current assets is at hand to pay the proffered wage. The failure to establish the ability to pay in 1999 and the success in 2000 do not determine the outcome in this instance. Rather, the proof as to the priority date, 1997, is conclusive.

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).

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).

The petitioner has established no measure of the ability to pay, as of the critical priority date, and only one (1) year of successful operations. Indeed, counsel only claims:

THE THEATRE was organized in 1990. The organization has stayed active and made significant contributions to the public since its inception. The organization has managed to increase net income year-over-year... In this case, the [Bureau] admits that the petitioner had the ability to pay the wage in the year 2000. Therefore, the petitioner has shown that it had "reasonable expectations of meeting the ability to pay the wage standard in the foreseeable future. Therefore, under *Matter of Sonogawa*, [infra], the petitioner has met its burden.

Though prior years were, admittedly, even less profitable than 1997, counsel, nonetheless, relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 1997 was an uncharacteristically unprofitable year for the petitioner.

Contrary to counsel's interpretation, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel observes that the situation of a non-profit corporation does not permit a net profit. Likewise, "adjusted gross income" does not denote the same accounting principle as on Form 1040, U.S. Individual Income Tax Return. The excess of revenue over expenses and disbursements on Form 990-PF correctly measures the petitioner's ability to pay the proffered wage at the priority date.

After a review of the federal tax returns, financial statements, and documents, it is concluded that the petitioner has not established that it 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.