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

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

File: WAC 02 110 51191 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**

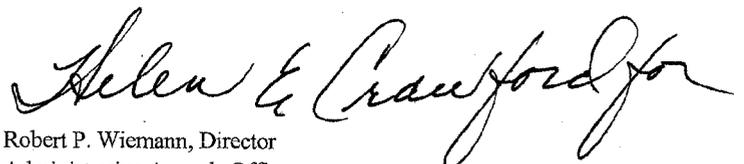
INSTRUCTIONS:

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 Director, California Service Center, denied the preference visa petition, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting and financial services firm. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 December 29, 1997. The beneficiary's salary as stated on the labor certification is \$13.14 per hour or \$27,331 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 16, 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 petitioner's signed, federal income tax returns for 1997-2001 with all schedules and tables, annual reports, or audited financial statements. In addition, it exacted copies of the petitioner's quarterly wage reports (Forms DE-6) for all employees as accepted for the last four (4) quarters.

Counsel submitted the petitioner's 1997, 1999, and 2000 Forms 1120A, U.S. Corporation Short-Form Income Tax Returns, and Forms DE-6, as requested. Counsel noted that the 2001 Form 1120A was not yet available. The federal tax returns showed taxable income before net operating loss deduction and special deductions of (\$8,903), a loss, in 1997, \$18,404 in 1998, and \$21,100 in 1999, each less than the proffered wage, and \$30,503 in 2000, 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 and denied the petition.

On appeal, AAO received a brief and ten (10) exhibits on September 9, 2002. None included the petitioner's 2001 federal income tax return. Only exhibit C contained new evidence, namely, statements of accounts receivable for periods ending December 31, 1997-2001 and July 31, 2002 (unaudited statements).

Counsel's appeal brief adds in \$21,000, the salary paid to the President of the corporation in 1997, because he "could have taken less to pay some of the Beneficiary's wage." Counsel, thus, arrives at a "true profit" of \$14,805, despite all, less than the proffered wage. Sums applied to other purposes at the priority date are not available for the proffered wage.

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).

To remedy the deficiency of proof at the priority date, Exhibit C includes an unaudited statement of accounts receivable of \$26,410 as of December 31, 1997, less than the proffered wage. Unaudited financial statements have 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.

Moreover, Part III of the federal tax return for 1997 reports

current assets as a deficit of cash, (\$351) and no trade notes and accounts receivable. Current assets less current liabilities of \$6,975 for accrued taxes state a deficit of net current assets, (\$7,326), less than the proffered wage.

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 advances an explanation to argue that the unaudited financial statement in exhibit C is plausible:

... Petitioner's method of accounting is on a "cash basis". Which meant that though Petitioner had earned the right to collect its fee for accounting service rendered from a client, unless Petitioner actually received the fee by the time Petitioner prepared its Tax Return, that particular fee would go unreported on the Tax Return.

As well as lacking any authority, this exposition does not reveal any assets beyond those already found to be inadequate to pay the proffered wage at the priority date. If the petitioner did not receive fees, they are not available to pay the proffered wage. If the petitioner did receive the fees, the federal tax return reflected them through the taxable income line of the federal tax return. That was (\$8,903), a loss, in 1997, 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).

The petitioner's data are similarly flawed as to the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence. Therefore, counsel's evidence, based largely on hopes projected from taxable income in 2000, is moot. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), *supra*.

Nonetheless, counsel argues that the director failed to consider the future income that the beneficiary might generate in

determining the petitioner's ability to pay the proffered wage. Counsel cites, but misreads, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). It holds that the petitioner need not pay the proffered wage if it has paid the prevailing wage. That holding 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 the Bureau (formerly the Service or the INS) 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*, 742 F.Supp. 682 (D.D.C. 1990).

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers. The Immigrant Petition for Alien Worker (I-140) states that it is a new position. The petitioner does not claim, for example, that the beneficiary's reputation would increase the number of customers.

The circuit in *Masonry Masters, Inc.*, 875 F.2d 898, 903 (D.C. Cir. 1989), was "puzzling" over a "concern" about elements of proof of the ability to pay the proffered wage and the value of the employee's services, in dictum only. Dictum is not controlling in the matter of the value of the employee's services. On the contrary, persuasive authorities delineate the effective evidence.

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

Exhibit E of the appeal bases the consideration of the employee's contribution to future earnings on a misreading of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). That decision 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.

After a review of the federal tax returns and counsel's brief, 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.