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**U.S. Department of Homeland Security**

**Citizenship and Immigration Services**

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

File: WAC 02 034 51392 Office: CALIFORNIA SERVICE CENTER

Date: APR 07 2004

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.

  
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 a flight school. It seeks to employ the beneficiary permanently in the United States as a ground instructor. 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.

The regulation at 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. Here, the Form ETA 750 was accepted on December 19, 1997. The proffered wage as stated on the Form ETA 750 is \$17 per hour, which equals \$35,360 per year.

With the petition counsel submitted a letter in which the petitioner's owner stated the amounts of the petitioner's gross revenues during 1997, 1998, 1999, and 2000. Counsel also provided copies of the 1997, 1998, 1999 and 2000 Form 1040 joint personal income tax returns, including the corresponding Schedule C Profit or Loss from Business, of the petitioner's owner and the owner's spouse.

The 1997 Schedule C shows that the petitioner declared a net profit of \$24,381 during that year. The corresponding Form 1040 shows that the petitioner's owner and owner's spouse declared a loss of \$52,244, including all of the petitioner's profit offset by deductions, as their adjusted gross income during that year.

The 1998 Schedule C shows that the petitioner declared a net profit of \$39,710 during that year. The corresponding Form 1040 shows that the petitioner's owner and owner's spouse declared a loss of \$19,724, including all of the petitioner's profit offset by deductions, as their adjusted gross income during that year.

The 1999 Schedule C shows that the petitioner declared a loss of \$5,202 during that year. The corresponding Form 1040 shows that the petitioner's owner and owner's spouse declared a loss of \$26,853 as their adjusted gross income during that year.

The 2000 Schedule C shows that the petitioner declared a loss of \$555 during that year. The corresponding Form 1040 shows that the petitioner's owner and owner's spouse declared a loss of \$28,602 as their adjusted gross income during that year.

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 February 20, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center, consistent with 8 C.F.R. § 204.5(g)(2), requested that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements to establish that ability.

The Service Center also requested that the petitioner submit copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2000 and a list of the job titles and duties of each of the employees listed on that form.

In response, counsel submitted the requested quarterly wage reports, job titles and job descriptions. Counsel also provided the petitioner's 2000 Form W-2 Wage and Tax Statements. Those documents indicate that the petitioner did not employ the beneficiary during 2000.

Finally counsel provided another copy of the petitioner's owner's 2000 income tax return. Counsel provided no additional competent evidence of the petitioner's ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on June 12, 2002, denied the petition.

On appeal, counsel submits a statement from the petitioner's owner indicating that the petitioner is currently unable to accommodate all applicants to its school due to an insufficient number of instructors. As support for that statement, counsel cites a portion of a December 20, 1996 letter, submitted with the Form ETA 750, in which a partner of an aviation firm states that "If [the petitioner] was able to get more Japanese speaking instructors they would be able to accommodate more Japanese students."

Similarly, counsel cites a statement by the petitioner's accountant, in a letter dated July 8, 2002, submitted on appeal, as corroboration that the petitioner is turning away students due to a lack of qualified instructors.

Counsel also cites a June 26, 2002 letter from an official of the Federal Aviation Administration (FAA), submitted on appeal, as evidence of the ability to pay the proffered wage. In that letter, the official states that flight instructors are the first expense paid out of tuition, and that to use the petitioner's net income as an indicator of its ability to pay the proffered wage is therefore unrealistic.

Subsequently, counsel submitted copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the second, third, and fourth quarters of 2000 and the first quarter of 2001.

Counsel cited *O'Connor v. Attorney General of U.S.*, 1987 WL 18243 (D. Mass., 1987) for the proposition that the assets of the petitioner's owner are an appropriate consideration in this matter.

Counsel also cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a given year's net income is not dispositive of the petitioner's ability to pay a proffered wage.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), however, relates to petitions 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. 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 *Sonogawa*, 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 *Sonogawa* was based in 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 and occurred within a framework of profitable or successful years, then those losses might be discounted in determining ability to pay the proffered wage. Here the petitioner has never posted a large profit and nothing in the record indicates that the petitioner's losses during some years and low profits during others are atypical. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative, unless counsel is able to support that proposition.

In support of that proposition, counsel offers the statement of the owner of the company that the company turns away student applicants for lack of a sufficient number of instructors. Counsel offers the statement of the petitioner's accountant that the petitioner's aircraft are not optimally utilized. Counsel provides a letter from a partner in an aviation firm who states that if the petitioner had additional instructors it could accommodate more students.

The owner did not state how many applicants the petitioner has turned away annually, how many additional students the petitioner would be able to accommodate if it employed the beneficiary, what gross amount those students would pay to the petitioner, what additional expenses the petitioner would incur by accepting that additional number of students, etc. In short, counsel has submitted no evidence of the amount of additional net profit, if any, the petitioner might reasonably expect if it is permitted to hire the beneficiary. If this expectancy is to be included in the determination of the petitioner's ability to pay the proffered wage, it must be supported and quantified by clear and convincing evidence. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Similarly, counsel asserts that because the petitioner is a sole proprietorship, the income and assets of the petitioner's owner should be included in the determination of the petitioner's ability to pay the proffered wage. Counsel is correct. However, counsel provided no evidence of any of the petitioner's owner's income or assets other than the joint income tax return of the petitioner's owner and owner's wife. Those income tax returns will be considered in the determination of the petitioner's ability to pay the proffered wage. Because the record contains no evidence of any assets, however, no assets will be considered.

A letter from a FAA official indicates that the petitioner's gross receipts, rather than its net income, should be considered in the determination of the petitioner's ability to pay the proffered wage. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses\*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net profit or the petitioner's owner's adjusted gross income.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily consider the petitioner's net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Because the petitioner is a sole proprietorship, the petitioner's owner's adjusted gross income will also be considered. CIS may rely on federal income tax returns in determining a petitioner's ability to pay a proffered wage. *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 INS, now 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. 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 proffered wage is \$35,360 per year. The priority date is December 19, 1997. During 1997, the petitioner need not show the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 351 days of that 364-day year had elapsed. The petitioner is only obliged to show the ability to pay the proffered wage during the remaining 13 days of that year. The proffered wage multiplied by 13/365<sup>th</sup> equals \$1,259.40, which is the amount the petitioner is obliged to show the ability to pay during 1997.

During 1997, the petitioner's owner and the owner's spouse declared a loss of \$52,244 as their adjusted gross income. That figure included all of the petitioner's profit. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during 1997.

During 1998 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1998, the petitioner's owner and the owner's spouse declared a loss of \$19,724 as their adjusted gross income. That figure included all of the petitioner's profit. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner and the owner's spouse declared a loss of \$26,853 as their adjusted gross income. That figure included all of the petitioner's loss of \$5,202 for that year. The petitioner has

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\* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner and the owner's spouse declared a loss of \$28,602 as their adjusted gross income. That figure included all of the petitioner's loss of \$555 for that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner failed to submit sufficient evidence that it had the ability to pay the proffered wage during 1997, 1998, 1999, or 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.