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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, DC 20536*

File: EAC 02 149 51851

Office: VERMONT SERVICE CENTER

Date: **APR 13 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:

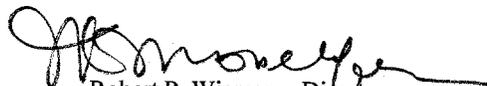
INSTRUCTIONS:

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.

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant head chef. 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 additional evidence and a brief.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$18.58 per hour, which equals \$38,646.40 per year.

With the petition counsel submitted the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The return states that the petitioner declared ordinary income of \$8,831 during that year. The corresponding Schedule L shows that at the

end of that year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 27, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 1998, it provide copies of the Form W-2 Wage and Tax Statements showing the wages the beneficiary earned.

In response, counsel submitted copies of the petitioner's bank statements from various months. Although counsel submitted no argument pertinent to those statements, counsel implicitly urged that they demonstrate the petitioner's ability to pay the proffered wage.

The director noted that the petitioner's 1998 ordinary income was \$8,831 and that its current liabilities exceeded its current assets by \$61,831. 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 March 12, 2003, denied the petition.

On appeal, counsel asserts that the decision of denial was arbitrary, unreasonable, and contrary to 8 C.F.R. § 204.5(g). Counsel did not elaborate on that assertion.

Counsel also submits a letter, dated January 10, 2003, from the petitioner's accountant. Counsel asserts that the petitioner's tax return, as modified by the accountant's letter, shows the ability to pay the proffered wage. In that letter, the accountant states he made an error on the petitioner's 1998 Schedule L. The accountant states that \$52,000 was listed on Schedule L at Line 17 though it should have been listed on Line 20, as it was not due within a year and was not, therefore, a current liability.

The accountant also stated that the \$28,444 shown on the Schedule L at Line 19, Loans from Shareholders, should not have been included in the petitioner's current liabilities. This office notes that Schedule L, Line 19, Loans from Shareholders are not a current liability. Further, the statement in the decision of denial that the petitioner's 1998 current liabilities exceeded its current assets by \$61,831 clearly indicates that the director did not include that line item in the calculation of current liabilities.

As to the accountant's assertion that the tax return should have reflected greater net current assets, this office notes that neither the accountant nor counsel has provided any indication

that a corrected tax return was filed. The regulation at 8 C.F.R. § 204.5(g)(2) states that copies of annual reports, federal tax returns, or audited financial statements are competent evidence of the petitioner's ability to pay the proffered wage. The accountant's assertion that a return should have shown greater net current assets, or more net income, or more or less of anything at any line item, is insufficient to amend a tax return and insufficient to show the ability to pay the proffered wage.

The petitioner has submitted no annual reports or audited financial statements. The determination of the petitioner's ability to pay the proffered wage will be based on the figures on the petitioner's tax return, which is the only competent and probative evidence in the file pertinent to the petitioner's ability to pay that wage.

Subsequently, counsel filed a brief to supplement the appeal. In the brief, counsel states that the petitioner's Line 7, Compensation of Officers, and the Director's Fees shown under Other Deductions on page six of the return, and included in the amount shown at Line 19, Other Deductions, were available to pay the proffered wage. Counsel further asserts that the amounts shown on the petitioner's bank statements should be included in the determination of the petitioner's ability to pay the proffered wage.

The only indication in the record that those amounts were available to pay the proffered wage is counsel's assertion. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel provided no evidence to support his assertion. This office is unable to divine, for instance, whether or not those fees were owed to the recipients pursuant to contract. As with any other expense shown on the petitioner's tax return, absent any indication that they were available to pay the proffered wage, this office cannot assume that they were anything other than a necessary expense.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return. 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). Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and

probative evidence of a petitioner's ability to pay a proffered wage.

Finally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as support for "a flexible approach to establishing ability to pay."

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) 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 petitioner's low net income during 1998 was uncharacteristic, occurred within a framework of profitable or successful years, and is unlikely to recur, then that low profit might be overlooked in determining ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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 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 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. The court specifically rejected the argument that 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 priority date is January 13, 1998. The proffered wage is \$38,646.40 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 12 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 353 days. The proffered wage multiplied by $353/365^{\text{th}}$ equals \$37,375.83, which is the amount the petitioner must show the ability to pay during 1998.

During 1998, the petitioner declared \$8,831 in ordinary income, an amount insufficient to pay the salient portion of the proffered wage. According to the only competent evidence in the record, the petitioner ended the year with negative net current assets and was unable, therefore, to contribute anything toward paying the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not shown that it was able to pay the proffered wage during 1998.

Beyond the decision of the director, this office notes that the Service Center, on June 27, 2002, requested that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. The request stipulated that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements. The petitioner's response should have contained evidence pertinent to the petitioner's ability to pay the proffered wage during 1999, 2000, and 2001, but did not. The petitioner has failed to demonstrate the ability to pay the proffered wage during those years. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. 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.