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

*ADMINISTRATIVE APPEALS OFFICE
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File: LIN 02 196 50664 Office: NEBRASKA SERVICE CENTER

Date: **APR 13 2004**

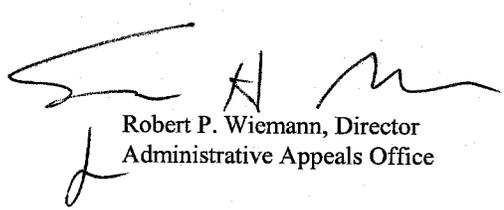
IN RE: Petitioner:
Beneficiary:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as an accountant. 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.

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 June 7, 2001. The proffered wage as stated on the Form ETA 750 is \$49,000 per year.

With the petition counsel submitted a letter, dated April 26, 2002, from an accountant. That accountant stated that he had compiled the petitioner's financial reports and tax returns during the previous three years, that the petitioner had a recent upturn in revenue, that it employs 43 workers, and that it has

the ability to pay the proffered wage. The letter has an area stamped for a notary's attestation, but was not attested to by a notary.

Counsel also submitted a copy of the petitioner's 2001 Form 1065 U.S. Return of Partnership Income. The return states that the company declared a loss of \$24,760 as its ordinary income 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 Nebraska Service Center, on June 27, 2002, requested additional evidence pertinent to that ability. The Service Center requested, pursuant to 8 C.F.R. § 204.5(g)(2), that the evidence must include the petitioner's most recent copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a letter, dated September 17, 2002, in which he argued that the amount of the petitioner's gross income, the amount of taxes it paid, and its wage and salary expense during 2001 demonstrated its ability to pay the proffered wage during that year. Counsel submitted copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the first two quarters of 2002 as evidence that the petitioner continues to have the ability to pay the proffered wage.

Finally, counsel submitted a copy of the petitioner's 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$23,177.54 during that year.

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 November 13, 2002, denied the petition.

On appeal, counsel asserts that the amount shown on Line 8, Total Income, of the petitioner's 2001 Form 1065 U.S. Return of Partnership Income, is greater than the proffered wage and, therefore, conclusively demonstrates that the petitioner was able to pay the proffered wage during that year.

Counsel also argues that the petitioner has a reasonable expectation that its business will improve based on the anticipated needs of the aging baby boom generation. Therefore, counsel asserts, consistent with the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), that the petitioner's losses should be overlooked in determining its ability to pay the proffered wage.

As to counsel's first assertion, this office notes that the petitioner's total income is its income before various expenses and deductions.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that its total income 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 expenses¹ or otherwise increased its net income², 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 ordinary income.

Counsel previously asserted that the amount of taxes the petitioner paid shows its ability to pay the proffered wage. This office is unable to perceive any nexus between the amount of the petitioner's taxes and its ability to pay the proffered wage.

Counsel did not further explain that assertion, and this office is unable to address it further.

Counsel's argument pertinent to *Matter of Sonogawa*, is unconvincing. *Sonogawa* 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

¹ 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.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* 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 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. Here, the petitioner has submitted no evidence that it has ever posted a profit. Although nursing homes in general may be lucrative businesses, assuming that this particular 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 June 7, 2001. The proffered wage is \$49,000. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 2001, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 157 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 208 days. The proffered wage multiplied by 208/365th equals \$27,923.29, which is the amount the petitioner must show the ability to pay during 2001.

The petitioner paid the beneficiary \$23,177.54 during 2001. Having paid that amount, the petitioner has demonstrated that it

was able to pay that portion of the proffered wage. The petitioner is obliged to show the ability to pay the remaining \$25,822.46 of the proffered wage.

During 2001, however, the petitioner declared a loss. Further, the petitioner finished the year with negative net current assets. The petitioner was unable to contribute any portion of the proffered wage out of its taxable (ordinary) income or assets. The petitioner has not, therefore, demonstrated the ability to pay the entire proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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.