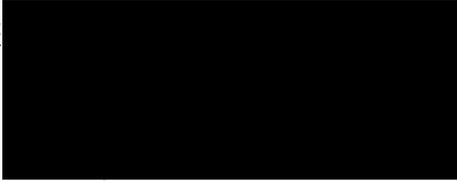


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

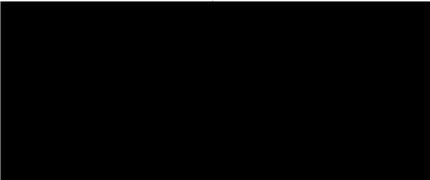


FILE: WAC 02 194 51021 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

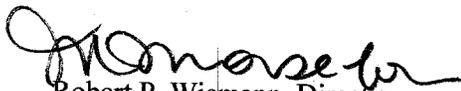


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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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 employment-based immigrant 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 summarily dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

The petitioner's counsel filed an appeal on January 4, 2003, requesting an additional thirty days to submit a brief and/or evidence. The attached letter from counsel merely states that the petitioner's accountant needs time to gather more documentation. There is no statement on the appeal form (I-290B Notice of Appeal) or the accompanying letter giving a reason for the appeal or even citing disagreement with the director's decision.

As of this date, more than twelve months later, no additional evidence or brief has been received to the record.

Inasmuch as the petitioner's representative has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, the appeal must therefore be summarily dismissed.

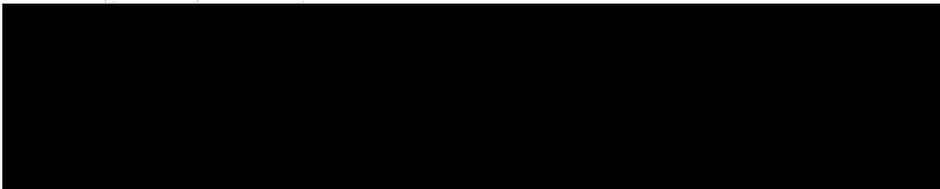
ORDER: The appeal is dismissed.

Bp

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

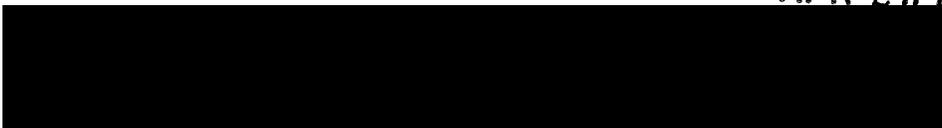


U.S. Citizenship
and Immigration
Services



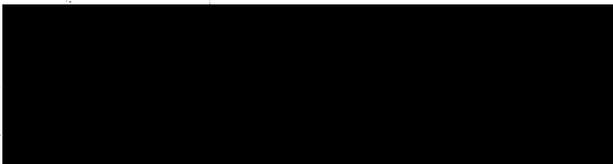
FILE: WAC 02 193 50407 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

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:



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prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a dental clinic. 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 approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional documentation and contends that the petitioner has demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$12.64 per hour or \$26,291.20 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1992 and is organized as a corporation. It has four employees.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1999 and 2000. The information set forth on the petitioner's 1999 corporate tax return reflects that it declared a taxable income before net operating loss deduction (NOL) and special deductions of \$8,620. Schedule L of this tax return also shows that the petitioner had \$3,694 in current assets and \$26,604 in current liabilities, producing -\$22,910 in net current assets. CIS will consider net current assets because it represents the level of liquidity that a petitioner has as of the date of filing. It is a measurement of the cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's taxable income before the NOL deduction of \$8,620, nor its net current assets of -\$22,910 was sufficient to cover the wage offer of \$26,291.20 per year.

The petitioner's 2000 corporate tax return indicates that the petitioner's taxable income before the NOL and other deductions was \$25,417. Schedule L shows that it had -\$1,651 in current assets and declared \$24,514 in current liabilities, resulting in net current assets of -\$26,165. As in the previous year, neither its taxable income, nor its net current assets could cover the beneficiary's proffered wage.

On August 15, 2002, the director requested additional evidence from the petitioner relevant to its ability to pay the beneficiary's proffered wage, as well as evidence establishing the beneficiary's prior work experience. The director instructed the petitioner to submit annual reports, audited financial statements, or complete, signed tax returns.

Included in the petitioner's response were its 1998 and 2001 corporate tax returns. In 1998, the petitioner filed Form 1120-A, U.S. Corporation Short-Form Tax Return. It declared a taxable income before NOL and other deductions of -\$47,211. Its balance sheet reflected in Part III of the tax return shows that it had \$9,279 in current assets and declared no current liabilities, producing net current assets of \$9,279. Neither its taxable income, nor its net current assets in this year were sufficient to cover the beneficiary's proffered salary.

In 2001, the petitioner filed Form 1120S, U.S. Income Tax Return for an S Corporation. It declared ordinary income of \$26,842 and -\$73,427 in net current assets. In this year, its declared ordinary income was enough to pay the beneficiary's proposed wage of \$26,291.20.

The director reviewed the petitioner's net income and net current assets and denied the petition, concluding that the petitioner had not shown a continued financial ability to pay the proffered wage of \$26,291.20 per year.

On appeal, counsel asserts that the petitioner expended 35% of its expenses from 1998 to 2001 on new dental equipment, which accounts for its modest net income. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533,534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is further noted that a statement from the petitioner's principal shareholder, Dr. Rafael Sustento, is included in the materials submitted on appeal. It belies counsel's assertion regarding the reasons for the petitioner's lower income. Dr. Sustento's statement summarizes the petitioner's business plan for the next two years. It specifically states that the petitioner's earnings have been below industry standard for the last three years and that "Dr. Sustento attributes this to his decision to spend more time with his family and focus on his growing children." The summary also notes that the petitioner has recently spent \$30,000 in a laboratory and expects to hire another dentist and expand its operating hours.

Because of the petitioner's projected plans to increase its revenue, counsel maintains that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. This assertion is not persuasive in this case. It is noted that the *Sonogawa* case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. 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 business hardships have been shown to exist in this case, which parallel those in *Sonegawa*. Nor does the evidence demonstrate that the petitioner's business has suffered unusual losses within a framework of profitable years.

In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) In this case, in every year except 2001, neither the petitioner's net income, nor its net current assets establish the ability to pay the beneficiary's proposed salary.

On appeal, counsel also includes a copy of the petitioner's bank statement, dated November 29, 2002, showing an ending balance of \$32,233.04. While this is a substantial amount, it reflects only a partial picture of the petitioner's financial status on a particular date. It does not reflect other encumbrances and does not represent a sustainable source out of which the proffered wage can be paid.

Following a review of the evidence contained in the record, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.