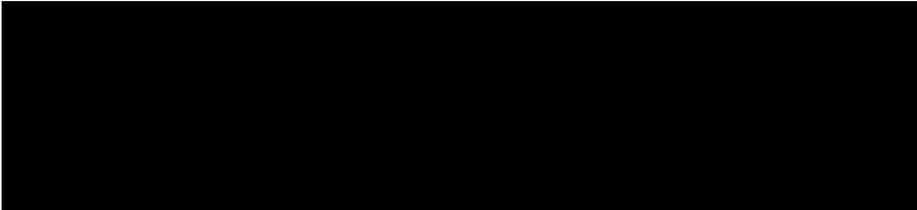




U.S. Citizenship
and Immigration
Services

[Handwritten signature]



FILE: EAC-02-149-52544 Office: VERMONT SERVICE CENTER Date: **APR 26 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:

PUBLIC COPY

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a sous 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 argues that the evidence demonstrates the petitioner's ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 continuing ability to pay the wage offered beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on January 13, 1998. The proffered salary as stated on the labor certification is \$18.58 per hour which equals \$38,646 annually.

Counsel initially submitted a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of \$534,535; gross profit of \$279,438; compensation of officers of \$61,692; salaries and wages paid of \$34,411; and an ordinary income from trade or business activities of \$8,831. The director determined that counsel has submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated June 18, 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 exacted the petitioner's federal income tax returns, annual reports or audited financial statements, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary.

In response to the RFE, counsel submitted the petitioner's bank statements from January 1998 through June 2002. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. Specifically, the director stated, in pertinent part, that:

Evidence submitted to establish your ability to pay consisted of Form 1120S, United States Income Tax return for an S Corporation, covering the year 1998. This return reflected ordinary income of \$8,831 and the balance sheet, Schedule L, reflected that current liabilities of \$78,187 exceeded current assets of \$16,356 by \$61,831. This return failed to establish your ability to meet the proffered wage of \$38,646.40 for the year of filing, 1998.

On appeal, counsel asserts that Schedule L of the petitioner's 1998 Form 1120S tax returns contained errors and submitted a letter from an accountant addressing those purported errors. The letter indicated that the \$52,000 on line 17 of Schedule L, Mortgages, Notes and Bonds payable in less than 1 year, should have been placed on line 20, Mortgages, Notes and Bonds payable in 1 year or more. The letter further indicated that the amount on Line 19, Loans from shareholders, \$28,444, is not an obligation due within one year and that line 17 and line 19 should be excluded from current liabilities for 1998. Counsel concludes that these changes as well as the addition of \$61,692, Compensation of Corporate Officers, results in a total of \$80,523 available to pay the proffered wage. Counsel states that this amount as well as the average daily balance of the petitioner's bank statements clearly indicate the petitioner's ability to pay the proffered wage. Counsel cites the "Regional Commissioner's 1967 decision *Matter of Sonogawa, 12 I&N 612*" as a "flexible approach" to establishing the petitioner's eligibility to pay.

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, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084.

Counsel's reliance on *Matter of Sonogawa, 12 I&N Dec. 612* (Reg. Comm. 1967) is misplaced. It 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 have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been shown that 1998 was an uncharacteristically unprofitable year for the petitioner.

The new evidence submitted with the appeal is not adequate to demonstrate that the petitioner has sufficient ability to pay the proffered wage. The regulation states that "evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2). Unaudited internal reports are not sufficient to establish ability to pay the beneficiary's salary.

The AAO notes that no amended tax return for 1998 was submitted in connection with the purported mistakes made by the petitioner's accountant. Thus, it cannot be concluded that the petitioner has established its ability to pay the proffered wage for 1998. In addition, the petitioner has proffered no accounting as to why its 2000, 2001 and 2002 federal tax returns have not been submitted nor any evidence as to why they are not available. The director clearly requested evidence from the petitioner concerning its continuing ability to pay the proffered wage. 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).

After a review of the only federal tax return submitted, 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.