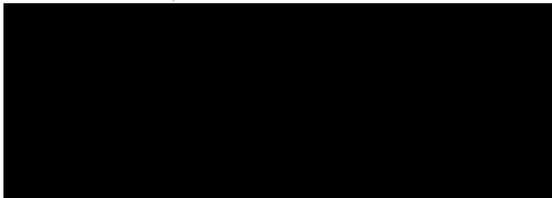


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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC-02-275-52322 Office: CALIFORNIA SERVICE CENTER

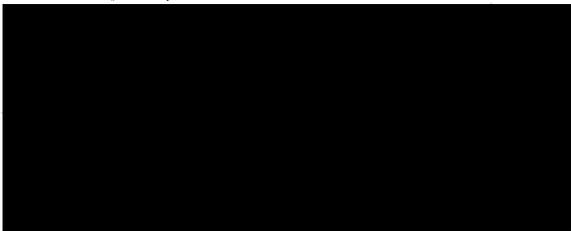
Date: APR 27 2004

IN RE: Petitioner:
Beneficiary:

PETITION: 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(iii) 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 unskilled labor 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) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 20, 1998. The beneficiary's salary as stated on the labor certification is \$1,525.33 per month or \$18,303.96 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's qualifications. In a request for evidence (RFE) dated December 4, 2002 the director requested 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 also requested additional evidence of the beneficiary's qualifications.

Counsel responded to the RFE with a letter dated February 6, 2003, accompanied by additional evidence.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence consisting of financial statements for the petitioner for February 1998 and March 1998, and a printout of an Internet web page showing U.S. Department of Labor projections on the 25 occupations projected to grow the fastest during the 2000-2010 time period, including home health aides.

Counsel states on appeal that the director erred in relying primarily on tax return evidence, while failing to give adequate weight to other evidence indicating the financial soundness of the petitioner's business.

The evidence relevant to the petitioner's ability to pay the proffered wage which was submitted prior to the director's decision consists of the following: copies of Form 1040 U.S. individual income tax returns for the owner of the petitioner for the years 1998, 1999, and 2000, filing status as single, with California Form 540 individual income tax returns for those same years; a copy of a Form 1040 U.S. individual income joint tax return for the owner of the petitioner and the owner's wife for the year 2001, with California Form 540 individual joint return for that year; an original W-2 form for the beneficiary for the year 1998; copies of W-2 forms for the beneficiary for the years 1999, 2000 and 2001; IRS printouts of W-2 forms for the beneficiary for the years 1999, 2000 and 2001; copies of the petitioner's State of California Employment Development Department Quarterly Wage and withholding Report (DE-6) for four quarters of the year 2001 and two quarters of the year 2002; a copy of a California fictitious business name notice for the petitioner submitted by the owner; a statement of monthly expenses of the owner of the petitioner; and copies of excerpts from two publications containing lists of senior citizen residences in San Diego, CA.

The record before the director also included summary pages for certain months of several bank accounts in the name of the owner of the petitioner, as follows.

Account number ending in 371,

- 1998: January, February, March, April, June, July and August (some with account number blacked out, account determined by context in the record);
- 1999: January, February, April, May, June, July, August, September, October, November and December;
- 2000: January, February, March, June, July, August and December;
- 2001: February, May, June ; and
- 2002: January.

Account number ending in 772:

- 2002: May, June, August, September, October, November and December.

Account numbers ending in 623, 371 & 102, combined statements:

- 2000: August, September, October and November.

Account numbers ending in 824 and 212, combined statements:

- 2002: April and September.

Finally, the record also includes one monthly combined statement for two accounts with account numbers ending in 574 and 505, in the names of two persons, neither of whom is the owner of the petitioner:

- 1999 March.

The bank statements summarized above appear in the record in approximately reverse chronological order, with statements and partial statements from different accounts mixed in with each other.

The director found that the federal tax returns of the petitioner showed the following amounts for adjusted gross income: \$3,985 for 1998, -\$21,166 for 1999, and \$1,030 for 2000. The director found that those amounts were less than the proffered wage of \$18,303.96. The director's analysis of those tax returns was correct. The director did not discuss the tax return for 2001, which is a joint return for the owner and his wife. The adjusted gross income on that return is \$9,909. That amount is also less than the proffered wage.

The director stated that the petitioner claimed to have employed the beneficiary from 1998 to the present. The director found that of the several W-2 forms and IRS printouts of W-2 information for the beneficiary in the record, only the IRS printout for the year 2001 refers to the petitioner and to the individual who is the signatory for the petitioner on the I-140 petition. The director did not mention that the photocopy of the beneficiary's W-2 form for 2001 in the record showed the same information as appeared on the IRS printout.

The director found that the IRS printout for the year 2001 showed payments by the petitioner to the beneficiary in the amount of \$9,700 in that year. The director also found that the California quarterly wage and withholding reports for 2001 also showed the beneficiary as earning \$9,700 from the petitioner in the year 2001. The director found that even crediting the amount of \$9,700 toward the proffered wage, the petitioner's evidence still failed to establish the petitioner's ability to pay the proffered wage in the year 2001. The director's analysis of the W-2 forms, the IRS printouts and the quarterly wage and withholding reports was correct.

The director next turned to the bank statements in the record. The director incorrectly stated that the bank statements were from two accounts. In fact, although the statements are from two different banks, the statements are for eight different accounts, as summarized above. The director also stated that the "combined total" of the accounts over the 38-month time frame covered by the statements, November 20, 1998 through January 23, 2002, equals \$33,913.62, which the director found equates to an average of \$770.76 per month. The director also noted that the statements show the accounts as overdrawn sixteen times.

The director's decision does not explain which figures from the statements were added to reach the total of \$33,913.62. The total deposits shown on the bank statements were far in excess of \$33,913.62 during that period. But regardless of which figures were used in calculating that total, the missing statements in the period covered by the statements prevent any meaningful analysis of the bank statements as an indicator of the owner's financial condition. Moreover, the statements in evidence appear to relate only to business accounts of the owner, lacking any information about accounts used by the owner for the personal matters of the owner and his household. The director's analysis of the bank statements was therefore incorrect in failing to note that the statements relate to eight different accounts and in failing to note the missing statements. Nonetheless, the conclusion of the director that the information in the bank statements fails to establish the ability of the petitioner to pay the proffered wage was correct. The bank statements offered in evidence by the petitioner contain substantial gaps, and therefore fail to serve as acceptable alternative evidence to the petitioner's tax returns to establish the petitioner's ability to pay the proffered wage. The missing monthly statements prevent any meaningful analysis of the average closing balances in any of the accounts. Moreover, there is no proof that the funds shown on the bank statements represent additional funds beyond those shown on the tax returns.

Finally, the director considered the statement of monthly expenses submitted by the petitioner, showing expenses of \$2,826.60 per month, which is equivalent to \$33,919.20 per year. The director correctly found that this level of expenses was a further ground for finding that the evidence failed to establish the ability of the petitioner to pay the proffered wage, while still allowing the owner to maintain his own household's living expenses. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

Counsel asserts that the petitioner's evidence apart from its tax returns establishes its ability to pay the proffered wage under the criteria approved in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, counsel's reliance on *Matter of Sonogawa* is misplaced. That case 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case. The petitioner submitted financial information for the years 1998, 1999, 2000 and 2001. The tax returns for the owner of the petitioner show the highest level of adjusted gross income achieved during those years to be \$9,909, received in 2001. That amount is not considered to be adequate to pay the owner's reasonable household expenses, even before paying the proffered wage, as discussed above. The petitioner submitted no financial information on years earlier than 1998, therefore the record lacks any basis for finding that the years 1998 through 2001 were uncharacteristically unprofitable or difficult years under the criteria in *Sonegawa, supra*.

As noted above, counsel submits on appeal several documents in evidence relevant to the petitioner's ability to pay the proffered wage. All of the evidence submitted with counsel's notice of appeal is being submitted for the first time on appeal. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted on page two above.

The petitioner was also given reasonable notice by published decisions of the AAO and its predecessor agencies as well as by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted for the first time on appeal will not be considered for any purpose.

For the foregoing reasons, the decision of the director was correct in finding that the evidence fails to establish the petitioner's ability to pay the proffered wage from the priority date to the present.

Beyond the decision of the director, the record lacks evidence that the beneficiary had the required three months of experience in the offered job as of the January 20, 1998 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.