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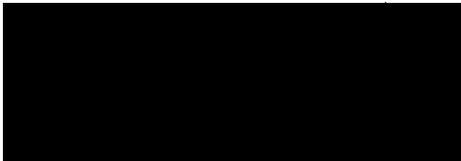
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536

**B6**



File: 

Office: VERMONT SERVICE CENTER

Date:

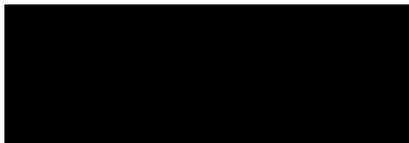
**FEB 06 2004**

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 Director, Vermont Service Center, revoked approval of the preference visa petition that 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 a cook. As required by statute, the petition was accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. In revoking the petition, 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 and additional evidence.

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.

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 October 25, 1999. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour, which equals \$23,857.60 per year.

With the petition counsel submitted copies of monthly statements of the petitioner's bank accounts. Counsel asserted that the account balances showed the petitioner's ability to pay the proffered wage.

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 September 9, 2000, requested additional evidence pertinent to that ability. The Service Center also specifically requested complete copies of the petitioner's 1998 federal tax return.

In response, counsel submitted the petitioner's nominal 1998 Form 1120 U.S. Corporation Income Tax Return. Because the petitioner's present ownership acquired the petitioner on March 31, 1998, that return covers only the period from April 1, 1998 to December 31, 1998. The return shows that the petitioner declared a loss of \$7,122 as its taxable income before net operating loss deduction and special deductions during that period. The corresponding Schedule L shows that at the end of the year the petitioner had current assets of \$11,095 and current liabilities of \$3,514, which yields net current assets of \$7,581.

This office notes that, because the priority date is October 25, 1999, the petitioner's income and assets during 1998 are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

In a letter, dated December 4, 2000, which accompanied the petitioner's response, counsel asserted that the petitioner's bank balances show the petitioner's ability to pay the proffered wage. Counsel also urged that, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petition may be approved despite the petitioner declaring a loss during 1998. The Service Center approved the petition on December 13, 2000.

On March 21, 2002, the director, Vermont Service Center, issued a Notice of Intent to Revoke the approval of the petition. The director found that the evidence submitted did not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director accorded the petitioner the opportunity to submit additional evidence pertinent to that ability, stating that such evidence must include at least the petitioner's 1999 and 2000 federal income tax returns.

On August 13, 2000, the director, Vermont Service Center, found that the petitioner had failed to respond to that notice and revoked the petition.

On appeal, counsel states that a timely response was delivered to the director on April 23, 2002. Counsel provides a receipt for a FedEx delivery to the Service Center on that date. Counsel asserts that the petitioner had failed to respond indicates that the director failed to consider timely submitted evidence.

With the appeal, counsel submits copies of the evidence allegedly initially submitted in response to the Notice of Intent to Revoke.

The director did not consider that evidence in issuing his decision of revocation. The AAO, however, shall consider it on appeal.

Counsel submits copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the last quarter of 2001 and the second quarter of 2002. Those documents show that the petitioner paid \$5,184 in wages to the beneficiary during each of those quarters.

Counsel also submitted a copy of the petitioner's 2001 Form W-2 Wage and Tax Statement issued to the beneficiary. That W-2 form shows that the petitioner paid wages of \$5,184 to the beneficiary during that year. That W-2 form, together with the quarterly tax return for the last quarter of 2001, indicates that the petitioner employed the beneficiary during that quarter and during no other quarter of 2001. No other evidence was provided pertinent to wages the petitioner paid to the beneficiary.

Counsel also provides copies of the petitioner's 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns. The 1999 return shows that the petitioner declared a loss of \$851 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$15,688 and current liabilities of \$4,907, which yields net current assets of \$10,781.

The 2000 return shows that the petitioner declared a loss of \$1,142 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$12,081 and current liabilities of \$5,356, yielding net current assets of \$6,725.

The 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,195 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$17,764 and current liabilities of \$5,065, yielding net current assets of \$12,699.

From that evidence, counsel argues that the petitioner has demonstrated its ability to pay the proffered wage. Counsel again relies heavily in his argument on the bank statements submitted with the petition.

Counsel's reliance on the petitioner's bank statements 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 the tax return. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage. Counsel has submitted no audited financial statements or annual reports and has chosen, therefore, to demonstrate the petitioner's ability to pay the proffered wage with the petitioner's tax returns.

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 both CIS and 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 the INS, now 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 the INS, now 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 October 25, 1999. The proffered wage is \$23,857.60. During 1999, however, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due of the petitioner had hired the beneficiary on the priority date.

On the priority date, 297 days of that 364-day year had elapsed. The petitioner is obliged to demonstrate its ability to pay the proffered wage during the remaining 67 days. The proffered wage multiplied by  $67/364^{\text{th}}$  equals \$4,391.37, which is the amount the petitioner must demonstrate the ability to pay during 1999.

During 1999, the petitioner suffered a loss. The petitioner is unable, therefore, to demonstrate the ability to pay the

proffered wage during that year out of its income. However, the petitioner ended the year with net current assets of \$10,781. The petitioner has demonstrated that it could have paid the salient portion of the proffered wage during 1999 out of its net current assets.

During 2000 and ensuing years, the petitioner must demonstrate the ability to pay the entire \$23,857 proffered wage. During 2000, the petitioner declared a loss. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its income during 2000. The petitioner's 2000 year-end net current assets were \$6,725, which amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during 2000 with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

Counsel submitted a W-2 form and a quarterly tax return showing that the petitioner paid the beneficiary \$5,184 during 2001. The petitioner is obliged to demonstrate the ability to pay the \$18,673.60 balance of the proffered wage.

During 2001, the petitioner declared a taxable income of \$4,195. The petitioner's net current assets at the end of that year were \$12,699. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during that year out of its income or its net current assets. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

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

Counsel implies that the inability to pay the proffered wage during those years is not dispositive. Counsel cites *Matter of Sonogawa, Supra.*, for the proposition that the petitioner's losses may be overlooked and the petition approved.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), however, 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 *Sonegawa*, 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 *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 and very low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner is a new business, and has never posted a large profit. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

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.