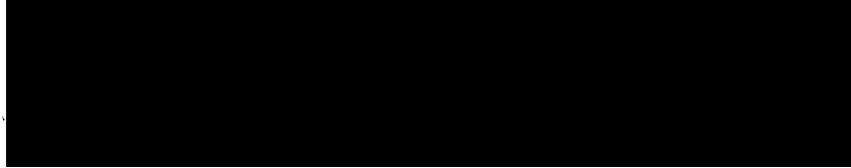


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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



File: WAC 02 152 52958 Office: CALIFORNIA SERVICE CENTER Date: **JAN 21 2004**

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 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 trading company. It seeks to employ the beneficiary permanently in the United States as an executive vice manager. 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)(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.

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 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 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is October 5, 1998. The beneficiary's salary as stated on the labor certification is \$35.52 per hour or \$73,881.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent

residence. In a Notice of Intent to Deny (NOID) dated May 30, 2002, the director required more evidence than the taxable income before net operating loss deduction and special deductions (net income), as it appeared on Forms 1120, U.S. Corporation Income Tax Returns for 1998-2001. The petitioner reported net income in those respective years of \$33,711, \$40,380, \$54,660, and \$63,257, less than the proffered wage.

Counsel countered that the net income and "stockholder's capital" must be aggregated. Counsel, variously, uses net equity, shareholders' equity, and stockholders' capital, but all identify total assets minus total liabilities on the balance sheet (net worth). Counsel computed the net income plus the net worth, in each of 1998-2001, as \$100,391, \$144,937, \$206,670, and \$272,017, equal to or greater than the proffered wage. Counsel offered no authority or accounting principle to "add back" net worth to net income. Counsel further tendered the Employer's Quarterly Federal Tax Returns (Forms 941) for 1998-2001.

The director considered unaudited financial statements, based solely on the representations of management, and the net income as reported on federal income tax returns. In a Notice of Decision, dated July 25, 2002, the director concluded that the net income, as reported on the federal tax returns, was less than the proffered wage and denied the petition.

The director cited certain authorities, but counsel argues that, properly applied, they justify the approval of this petition. See *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); *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).

Counsel reiterates that the net income and net worth on the balance sheet must be aggregated to determine the ability to pay the proffered wage. This contention is unconvincing, since net worth already includes net income, and counsel gives no reason or authority to count net income a second time. Moreover, no argument suggests how the reduction or liquidation of the net worth of a business proves the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will 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. See *Elatos, Chi-Feng Chang, and K.C.P. Food Co., Inc.*

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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

On appeal, counsel presents an Independent Auditor's Report (report), dated June 5, 2002, with balance sheets and related statements as of December 31, 1998, 1999, 2000, and 2001. The reports reveal no additional net income beyond that on the federal tax returns.

The reports, as well as Schedule L of the federal tax returns, do show the difference of current assets minus current liabilities, or net current assets, as a source of funds to pay the proffered wage. Net current assets, however, were a deficit (\$28,495) in 1998 and \$41,359 in 1999, each less than the proffered wage. Net current assets were \$97,618 in 2000 and \$120,780 in 2001, each equal to or greater than the proffered wage.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)

Further on appeal, counsel distinguishes *K.C.P. Food Co., Inc.* and insists on the aggregation of net income and net worth:

It is noted that the regional commissioner considered the value of the petitioner's inventory, which as a current asset (anything that can be converted into cash within twelve months of the balance sheet date) as a factor determining the ability to pay the proffered wage. Consideration of petitioner's stockholder equity as a current asset is thus acknowledged in the cited authority.

This reasoning is unpersuasive. Counsel's own statement makes it clear that *K.C.P. Food Co.* defined inventory as a portion of net current assets. Counsel cites no authority for the puzzling idea that it is counted again, as part of net worth.

Counsel persists further:

The [report] further reflects that the petitioner's ability to pay the proffered salary is demonstrated by the fact that it has added annual income to its assets by investing and owning "stockholder's capital" (Net Equity) [sic] Net Equity [sic] is equivalent to net assets.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel, evidently, desires to analyze net current assets, the difference of current assets minus current liabilities, as reported in the balance sheet on Schedule L of the federal income tax return. As with net income, net current assets showed improvement after the priority date. Net current assets were equal to or greater than the proffered wage, but not until 2000.

Counsel relies on an AAO decision, said to hold that three quarterly wage reports, showing payments to the beneficiary, require approval of the petition. The record does not indicate that the petitioner ever paid the beneficiary or that the beneficiary was in the United States. Counsel gives no published citation for the AAO decision, also supposed to support unaudited financial statements. While 8 C.F.R. § 103.3(c) provides that CIS' precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 *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, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, Forms 941, financial statements, and CPA statements, 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.