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U.S. Citizenship
and Immigration
Services



FILE: EAC-01-279-53041 OFFICE: VERMONT SERVICE CENTER Date: *Jul 9 2006*

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien 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 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.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy*

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 jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a jeweler. 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. The documentation indicated that the beneficiary had worked for the petitioner since 1996.

The director denied the petition because he determined the petitioner had not established its ability to pay the proffered wage.

On appeal, counsel argues that the petitioner has the 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 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 July 28, 1997. The beneficiary's salary as stated on the labor certification is \$17.00 per hour or \$35,360 per year.

With the petition, counsel submitted a copy of the petitioner's 1997 Form 1120S U.S. Corporation Income Tax Return for an S Corporation. The tax return for 1997 reflected gross receipts of \$372,610; gross profit of \$106,164; compensation of officers of \$20,800; salaries and wages paid of \$37,524; and a taxable ordinary income of (-) \$4,975. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$22,816, and current liabilities of \$19,300, yielding net current assets of \$3,516.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated November 16, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the beneficiary's 1996 and 1997 W-2 Wage and Tax Statements.

Counsel submitted a copy of the petitioner's 1996 Form 1120S U.S. Corporation Income Tax Return for an S Corporation and bank statements from various periods in 1997 and 1998. The tax return for 1996 reflected gross receipts of \$323,849; gross profit of \$86,446; compensation of officers of \$17,200; salaries and wages paid of \$26,600; and a taxable ordinary income of (-) \$3,840. The corresponding Schedule L shows that at the

end of that year the petitioner had current assets of \$21,314, and current liabilities of \$19,384, yielding net current assets of \$1,930.

In an additional request for evidence (RFE) dated February 26, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. 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, if any.

In response, counsel submitted a 2001 Form 1040 U.S. Individual Income Tax Return indicating that the business is now operating as a sole proprietorship. Counsel also submitted a copy of the petitioner's Schedule C, Profit and Loss From Business Statement for the sole proprietor's 2001 Form 1040 U.S. Individual Income Tax Return. Schedule C for 2001 reflected gross receipts of \$110,000; gross profit of \$68,144; wages of \$0; and a net profit of \$65,966. The sole proprietor's tax return reflects that he has three dependents.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel asserts the petitioner has "cash assets" which are more than sufficient to demonstrate his ability to pay the proffered wage, and that the director denied the petition in error, and should have applied *Matter of Sonogawa* 12 I&N Dec. 612 (Reg. Comm. 1967).

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, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 1996 and 1997 were uncharacteristically unprofitable years for the petitioner.

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, not gross receipts, 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 the 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer* 539 F. Supp.647 (N.D. Ill. 1982) aff'd., 703 F.2d 571 (7th Cir. 1983). The petitioner's sole proprietor's Schedule C for 2001 reflected gross receipts of \$110,000 gross profit of \$68,144; wages of \$0; and a net profit of \$65,966. The return reflects that the sole proprietor has three dependents. The petitioner conceivably could pay the proffered wage during 2001 out of this amount. The petitioner, however, must demonstrate its ability to pay the proffered wage as of the priority date.

The tax return for 1997 reflected a taxable ordinary income of (-) \$4,975. The corresponding Schedule L shows that at the end of that year the petitioner had net current assets of \$3,516. The petitioner could not pay the proffered wage out of these amounts during 1997.

While the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage for 1997 and 1998, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in the se proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Even though requested by the director in a second RFE, the petitioner failed to provide any evidence of its ability to pay the proffered wage during 1999 and 2000. The petitioner's failure to submit these documents cannot be excused. The 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 all the evidence, 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.