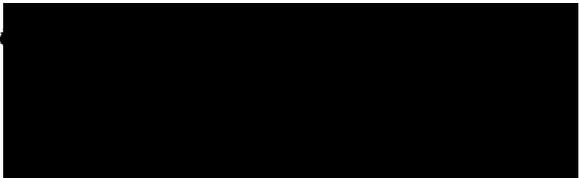


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC-02-023-57190 Office: CALIFORNIA SERVICE CENTER Date: 02/23/04

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

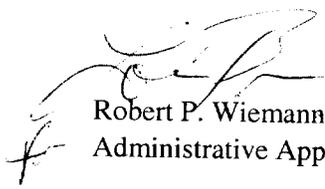
PETITION: Immigrant Petition for Alien Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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Identifying data is placed to
prevent clearly unwarranted
invasion of personal privacy

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 Montessori school. It seeks to employ the beneficiary permanently in the United States as a teacher. 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.

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 April 12, 2001. The beneficiary's salary as stated on the labor certification is \$29,850 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated February 8, 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 specified the petitioner's 2001 federal income tax return and evidence of wage payments to the beneficiary for 2001, if any.

In response to the RFE, counsel submitted the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, a copy of Form DE-6 Quarterly Wage Report for its employees for the last four quarters and, copies of Form W-2 Wage and Tax Statements for all employees during 2001. The Form 1120 for the year 2000 precedes the priority date and is therefore of limited value to the adjudication process.

The director issued a Notice of Intent to Deny (NOID), after determining that the evidence submitted was not the evidence requested and therefore the petitioner had not established that it had the ability to pay the proffered wage. The director further noted that the Form DE-6's and W-2's, submitted in response to the RFE's, did not indicate that the beneficiary was employed by the petitioner during 2001.

In response to the NOID, counsel stated that the petitioner paid \$131,136.29 in wages during 2001, which was double the amount paid during 2000 and indicated the petitioner's ability to pay the proffered wage. Counsel further stated that the petitioner's business was growing and that CIS should have considered this fact and factored in the amount of depreciation shown on the income tax return. Counsel resubmitted tax and earnings

documentation, previously submitted, as well as the petitioner's Form 1120 U.S. Corporation Income Tax Return and commercial bank statements for the period December 17, 2001 through April 15, 2002.

The 2001 Form 1120 indicated gross receipts of \$237,229, gross profits of \$237,229, compensation of officers of \$36,640, salaries and wages of \$94,496 and, taxable income before net operating loss deduction and special deduction of \$17,635. Counsel did not submit Schedule L of the 2001 federal income taxes so it is impossible to ascertain the petitioner's net current assets.

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 states that CIS should consider the petitioner's ability to generate income and the expectation of additional income in determining its ability to pay the proffered wage. Counsel further states that the reasonable expectation of the continuing conduct of business should be sufficient proof of the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Sonogawa* as applicable precedent. Counsel submits commercial bank statements for the period January 31, 2001 through December 31, 2001 and copies of cancelled checks from September 11, 2001 through December 19, 2001 and copies of evidence, previously submitted.

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 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that the beneficiary's reputation would increase the school's revenue.

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. *Supra.* at 1084.

The court specifically rejected the argument that the CIS should have considered income before expenses were paid rather than net income.

The petitioner's 2001 Form 1120 indicates a taxable income of \$17,635. The petitioner could not pay the proffered wage of \$29,850 from this amount. Therefore, after a review of 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.