



U.S. Citizenship
and Immigration
Services

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File: WAC 02 077 52664 Office: CALIFORNIA SERVICE CENTER

Date: JUN 15 2004

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner designs and installs sprinkler systems. It seeks to employ the beneficiary permanently in the United States as a pipe fitter. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied 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.

The regulation at 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.

The petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on September 9, 1997. The proffered wage as stated on the Form ETA 750 is \$28.31 per hour, which equals \$58,884.80 per year.

With the petition, counsel submitted portions of the petitioner's owner's 1998 and 1999 Form 1040 personal income tax return. Each of those selected portions included a copy of the corresponding Schedule C showing the petitioner's income and expenses. Counsel also submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return-A, U.S. Corporation Short Form Income Tax Return.

The 1998 Schedule C shows that the petitioner returned a net profit of \$42,965 during that year. The 1999 Schedule C shows that the petitioner returned a net profit of \$77,657 during that year.

The 2000 1120-A corporate return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$10,793.13 during that calendar year. Because no balance sheet was submitted with that return, this office is unable to determine the petitioner's year-end net current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on March 13, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested complete copies of the petitioner's complete tax returns from 1997 to the present. The request stipulated that the complete tax returns submitted might be Form 1120, 1365, 1040, etc., depending on the form of the petitioner's ownership, but should be complete and include all schedules and tables. Finally, the Service Center requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters, and copies of the petitioner's 2001 W-2 and W-3 forms.

In response, counsel submitted additional copies of the petitioner's previously submitted 1998 and 1999 Schedules C and the 2000 Form 1120-A corporate return, rather than the complete returns as requested. Counsel also submitted a copy of the petitioner's 2001 Form 940EZ, Employer's Annual Federal Unemployment Tax Return, copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for all four quarters of 2001, the petitioner's 2001 California Form DE-7 reconciliation, 2001 W-2 forms for all five of the petitioner's employees, and a 2001 W-3 transmittal form. The DE-6 and W-2 forms submitted do not show that the petitioner employed the beneficiary during 2001.

On September 25, 2002, the Director, California Service Center, issued a decision in this matter. The director noted that the petitioner had submitted no evidence pertinent to its ability to pay the proffered wage during 1997 and 2001, that it failed to submit complete tax returns, as requested, for 1998 and 1999, and that its 2000 tax return showed taxable income before net operating loss deduction and special deductions of only \$10,793.13, an amount insufficient to pay the proffered wage. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and denied the petition.

On appeal, counsel repeatedly cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Although counsel does not explicitly state the proposition for which he cites *Sonogawa*, this office believes that it was cited for the proposition that the petitioner's low profits may be disregarded in the determination of the petitioner's ability to pay the proffered wage. Counsel asserts that failure to approve the instant petition will result in hardship to the petitioner. Counsel further argues that net income is not the appropriate index of ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Counsel states, but provides no evidence to support, that the petitioner has recently spent an inordinate amount on materials and equipment, and will realize a 65% reduction in expenses in coming years. Counsel asserts that the amount of this projected saving will be available to pay the proffered wage.

The assertions of counsel are not evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). An unsupported assertion is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

With the brief, counsel submits a copy of the petitioner's 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,120 during that year. Because that return does not include a balance sheet, this office is unable to determine the petitioner's year-end net current assets.

Counsel also provides a letter, dated October 14, 2002, from the president of another fire protection company. The president states in that letter that his company has worked with the petitioner on many

projects and concludes, "I am absolutely confident that our business arrangement will be vital to achieve continued success in the future."

Counsel provides a copy of the petitioner's commercial lease. The lessee named on that lease is Michel Haziza, which name is very similar to that of the beneficiary as stated on the petition. This renders the relationship of the petitioner and the beneficiary unclear.¹

Counsel submits copies of monthly bank account statements. One of the accounts belongs to Arie Eric Haziza. Another account belongs to Eric Haziza and Rosalia Tanada Haziza. Statements pertinent to a third account were also submitted. That account is in the petitioner's own name. Those statements are for the months from August 2001 to September 2002, and show balances ranging from \$194.57 to \$44,144.79.

Counsel submits an undated letter, on the petitioner's letterhead, from Eric Haziza. That letter states that the petitioner invested heavily in machinery and equipment in recent years and intends to purchase an additional vehicle, and that those purchases are responsible for the petitioner's low profits. The letter lists various corporations with whom the petitioner has contracted. Finally, the letter states that, "Michel [sic] Haziza's services to the company would be very beneficial to the continued success of [the petitioner]." In another letter, dated October 7, 2002, Eric Haziza states that he personally guarantees payment of the proffered wage to the beneficiary. Eric Haziza states, "I believe that I possess [sic] the personal financial capability to personally guarantee the payment of the wage to Michel [sic] Haziza." The signature line of that letter indicates that Eric Haziza is the petitioner's president.

With that letter, counsel submitted the 2000 and 2001 Form 1040 joint income tax returns of Arie and Rosalia Haziza. Finally, counsel submitted a monthly brokerage account statement for Arie and Rosalia Haziza.

The petitioner is currently a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. Neither the owners, the stockholders, nor any other individuals are obliged to pay the debts and obligations of a corporation out of their own income and assets. Therefore, the income and assets of the Hazizas, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered.

Reliance on the petitioner's own bank statements is similarly 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 its tax returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the preferred evidence of a petitioner's ability to pay a proffered wage.

Counsel's citation of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is unconvincing. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within

¹ A close relationship between the petitioner and the beneficiary might impugn the validity of the job offer and thereby render the petition deniable. See *Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000); *Bulk Farms, Inc. v. Martin*, 963 F2d 1286 (9th Cir. 1992).

a framework of profitable or successful years. The petitioning entity in *Sonegawa* changed business locations and paid rent on both the old and new locations for five months during the year in which it filed the petition. 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.

If a petitioner's losses or low profits are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, however, no evidence has been submitted that the petitioner has ever posted a large profit. Counsel and Eric Haziza have asserted that the petitioner's recent purchases of equipment were uncharacteristic, but provided no evidence in support of that assumption. See *Matter of Treasure Craft of California*, *Supra*. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is too speculative to establish the ability to pay the proffered wage.

Counsel's assertion that a denial of the petition will result in hardship is inapposite. 8 C.F.R. § 204.5(g)(2) contains no hardship exception to the requirement that the petitioner prove its ability to pay the proffered wage.

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. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS, then the Immigration and Naturalization Service 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 September 9, 1997. The proffered wage is \$58,884.80 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1997, but only that portion which would have been due if it had hired the petitioner on the priority date. The petitioner, however, submitted no evidence pertinent to its ability to pay the proffered wage during 1997. The petitioner, therefore, has not demonstrated its ability to pay the salient portion of the proffered wage during 1997.

During 1998 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire

proffered wage. Because the petitioner was a sole proprietorship during those 1998 and 1999, the income and assets of the petitioner's owner may be considered in the determination of the petitioner's ability to pay the proffered wage during those years. During those years, however, the petitioner must also show that its owner was able to support himself and his family on the income and assets he would have retained after paying the proffered wage.

In order to aid it in that determination, the Service Center requested that the petitioner provide complete tax returns. Counsel and the petitioner, however, provided only portions of the 1998 and 1999 returns. Those portions are not satisfactory substitutes for the complete tax returns requested. 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). The petitioner has failed to demonstrate its ability to pay the proffered wage during 1998 and 1999.

During 2000, the petitioner declared taxable income before net operating loss deduction and special deductions of \$10,793.13. That amount is insufficient to pay the proffered wage. Because the petitioner submitted no evidence of its year-end net current assets, this office may not consider those funds in the determination of the petitioner's ability to pay the proffered wage.²

The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2000.

During 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of \$2,120. That amount is insufficient to pay the proffered wage. Because the petitioner submitted no evidence of its year-end net current assets, this office may not consider those funds in the determination of the petitioner's ability to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to pay the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.

² End-of-year net current assets are the taxpayer's end-of-year current assets, shown on Schedule L at lines 1(d), 2b(d), and 3(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.