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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 Eye Street N.W.  
Washington, D.C. 20536



File: WAC 02 255 53383

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 04 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: SELF-REPRESENTED

**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 employment-based immigrant 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 seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a furniture manufacturer. It seeks to employ the beneficiary as a furniture pattern maker. As required by statute, the petition was accompanied by certification from the Department of Labor. The director concluded that the petitioner had not established that it had the continuing financial ability to pay the beneficiary's proffered salary as of the visa priority date.

On appeal, the petitioner asserts that the business had extraordinary expenses and that an increase in income is expected.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

In this case, eligibility for the visa classification rests upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$21.80 per hour or \$45,344 annually. The petitioner is organized as a partnership.

In this case, the petitioner initially failed to submit sufficient evidence establishing its continuing ability to pay the beneficiary's proffered wage as of the priority date of January 14, 1998. On November 7, 2002, the director requested additional evidence from the petitioner to support its ability to pay the proposed salary. The director instructed the petitioner to submit evidence

consisting of either copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage. The director also requested that the petitioner submit copies of its state quarterly wage reports for the last four quarters that were filed.

The petitioner submitted copies of its last three quarterly state wage reports beginning with the quarter ending March 31, 2002 through the quarter ending September 30, 2002. These reports indicate that the petitioner employed from eleven to thirteen employees during this period and paid between \$40,000 and \$48,000 in wages each quarter. These records do not indicate that the petitioner employed the beneficiary during that time.

The petitioner also submitted copies of its Form 1065, U.S. Return of Partnership Income for the years 1998 through 2001. Its 1998 partnership tax return indicates that the petitioner declared \$40,579 in ordinary income. Schedule L of this tax return indicates that the petitioner had \$28,500 in net current assets. Neither figure was sufficient to meet the beneficiary's proposed salary of \$45,344 during this year.

In 1999, the petitioner had \$14,468 in ordinary income. Schedule L showed that the petitioner's net current assets were \$11,000. The petitioner lacked the ability to pay the proffered salary out of either of these resources.

In 2000, the petitioner's tax return shows that it claimed \$27,322 as ordinary income. Schedule L reflects that the petitioner had \$22,000 in net current assets. These figures fail to demonstrate the petitioner's ability to pay the wage offer during this year.

In 2001, the petitioner's ordinary income was \$37,222. Schedule L shows that the petitioner's net current assets were -\$8,230. As with the other relevant years, neither of these figures is sufficient to show the petitioner could cover the beneficiary's proposed salary of \$45,344.

The director denied the petition, determining that the tax returns had failed to establish that the petitioner had the continuing ability to pay the proffered wage beginning at the priority date of January 14, 1998.

On appeal, one of the petitioner's partners submits a letter stating that the petitioning business has had to update its equipment in order to stay in business. She asserts that during 1999, 2000, and 2001, the petitioner had to spend most of its income on new machinery in order to improve production. She does not expect additional extraordinary expenses and expects that product demand will continue to increase.

In determining the petitioner's ability to pay the proffered wage, CIS reviews the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983); *Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass).

On appeal, the partner provides virtually no detail as to the kind and level of expense which was needed to keep the petitioner's business afloat. Her statement does not provide the kind of evidentiary support needed to overcome the director's denial. It is observed that, contrary to her statement that demand for the petitioner's product has increased, the 2001 gross receipts, as shown on the petitioner's tax returns, decreased \$27,000 from 2000.

In some cases, uncharacteristic expenses can be considered when reviewing the petitioner's ability to pay the proffered salary. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. 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 have been shown to exist in this case, which parallel those in *Sonogawa*. Here, the petitioning business started only four years before the relevant priority date. Nor has it been shown that 1998 was an uncharacteristically unprofitable year for the petitioner.

In view of the foregoing, we cannot conclude that the petitioner has convincingly demonstrated its continuing ability to pay the beneficiary's proposed salary beginning on the priority date of January 14, 1998.

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.