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U.S. Citizenship
and Immigration
Services



FILE: WAC 02 223 50003 Office: CALIFORNIA SERVICE CENTER Date: **MAY 17 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as 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:

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

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 remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant 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 Korean and Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean style cook. 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 director concluded that the petitioner had not established its continuing financial ability to pay the proffered wage.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the director failed to properly evaluate the petitioner's tax return in support of its continuing ability to pay the proffered wage.

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)(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. . . . 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].

Eligibility in this case is based upon the petitioner's continuing 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 19, 2001. The beneficiary's salary as stated on the labor certification is \$2,008 per month for a 40-hour week, or \$24,096 per year. The record indicates that the petitioner is a sole proprietorship. The visa petition, filed July 1, 2002, indicates that the petitioner was established in 1983 and maintains a payroll of sixteen employees.

The petitioner initially provided an incomplete copy of its continuing ability to pay the proffered annual salary of \$24,096. On October 30, 2002, the director requested additional evidence in support of the petitioner's ability to pay the beneficiary's wage offer. The director instructed the petitioner to submit complete federal tax returns, audited financial statements, or annual reports. The petitioner was specifically advised to submit its 2000 and 2001 federal tax returns, copies of the last four quarters of its state quarterly wage reports, and copies of its Transmittal of Wage and Tax Statements (W-3s) for 2001, showing total wages paid to all employees.

In response, the petitioner's counsel submitted the requested information. The petitioner's W-3 shows that it paid \$236,410 in wages, tips, and other compensation to its employees during 2001. Its state wage reports, representing its payroll from the quarter ending December 31, 2001 through the quarter ending September 30,

2002, indicates that it maintained an average payroll of seventeen full and part-time employees. The federal tax returns of the sole proprietor reflect that he filed jointly with his spouse and claimed one dependent in 2000 and 2001. These tax returns also contain the following additional information:

Year	Business Income	Adjusted Gross Income
2000	\$37,778	\$55,637
2001	38,369	49,258

As the petitioner is a sole proprietor, his income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietor and his dependents must be reviewed when determining his continuing ability to pay the beneficiary's proposed annual wage offer of \$24,096. He must be able to demonstrate that he can sustain his individual living expenses as well as pay the beneficiary's proposed salary.

Following a review of the petitioner's financial data based on his adjusted gross income as set forth on the federal tax returns, the director concluded that the petitioner had not established his continuing ability to pay the proffered wage as of the priority date of the visa petition. Citing the petitioner's 2001 federal tax return, the director reasoned that while the sole proprietor's adjusted gross income was more than the beneficiary's proffered wage, it was not enough to reasonably support both the sole proprietor and his family, as well as pay the proposed salary of \$24,096.

On appeal, counsel asserts that the sole proprietor's 2001 income exceeded the proffered wage by enough to support a family of three. Counsel also asserts that the petitioner is a well-established restaurant and submits a copy of an Internet/*Los Angeles Times* review of the restaurant, a copy of a business credit line for \$50,000, and copies of bank statements for various months in 2001 and 2002.

The petitioner did not provide a summary of the owner's actual living expenses. It is noted that the beneficiary's annual proffered wage of \$24,096 represents almost 50% of the owner's 2001 adjusted gross income of \$49,258, out of which he must support himself and his family. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982) *aff'd*, 703 F. 2d 571 (7th Cir. 1983). Although this sole proprietor does not have as large a family as described in *Ubeda*, the AAO cannot conclude that the director necessarily erred in finding that the petitioner had failed to establish that it had the continuing ability to pay the proffered wage based on the lack of reasonably sufficient funds remaining after paying the additional expense of the beneficiary's proffered wage.

It is also noted that although a business line of credit available from a lending institution may give some indication of a petitioner's creditworthiness, it also represents an obligation that must be repaid if used as an additional cash resource. It is essentially a lending institution's unenforceable commitment to make a loan up to a specified maximum amount for a specified time period. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Comparable to the limit on a credit card, CIS will not treat a line of credit as cash or as a cash asset, as it represents a potential increase in a firm's liabilities as a means of paying the proffered wage. Similarly, it is further noted that bank statements may represent a portion of a petitioner's financial picture, but do not necessarily illustrate all of its encumbrances and expenses.

Counsel also claims that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable in the instant case. *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 *Sonegawa* 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 *Sonegawa*. Rather, the relevant financial data that is contained in the record shows that the petitioner has had two modestly profitable years and there is no indication that these were within a framework of more profitable years.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

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.