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U.S. Citizenship
and Immigration
Services

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File: WAC-02-194-51444 Office: CALIFORNIA SERVICE CENTER Date: MAY 21 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)

IN 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 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 an assisted living residence. It seeks to employ the beneficiary permanently in the United States as a 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.

On appeal, counsel asserts 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.

The 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, in part, on the petitioner's ability to pay the wage offered as of the petitions priority date, which is the date the 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 January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for 2000 reflected gross receipts of \$93,450; gross profit of \$93,450; compensation of officers of \$0; salaries and wages paid of \$5,288; and an ordinary income of \$2,611.

The director determined that counsel had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated August 13, 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 return, annual report or audited financial statement for 1998, 1999, 2000, and 2001, as well as Wage and Tax Statements (Forms W-2), Form 1099, or Form DE-6 as evidence of wage payments to the beneficiary.

Counsel submitted copies of the petitioner's 1997 through 2001 Form 1120S U.S. Income Tax returns. The tax return for 1997 reflected gross receipts of \$163,019; gross profit of \$163,019; compensation of officers of \$0; salaries and wages paid of \$22,100; and an ordinary income of -\$10,613. Schedule L of the return indicated total current assets of \$1,947, total current liabilities of \$3,415, resulting in net current assets of -\$1,468. The tax return for 1998 reflected gross receipts of \$121,150; gross profit of \$121,150; compensation of officers of \$0; salaries and wages paid of \$18,100; and an ordinary income of -\$7,719. Schedule L reflected total current assets of \$3,195, total current liabilities of \$860, resulting in net current assets of \$2,335.

The tax return for 1999 reflected gross receipts of \$65,200; gross profit of \$65,200; compensation of officers of \$0; salaries and wages paid of \$0; and an ordinary income of -\$13,048. Schedule L of the return indicated total current assets of \$0, total current liabilities of \$6,941, resulting in net current assets of -\$6,941.

The tax return for 2000 reflected gross receipts of \$93,450; gross profit of \$93,450; compensation of officers of \$0; salaries and wages paid of \$5,288; and ordinary income of \$2,611. Schedule L for the year 2000 reflected total current assets of \$1,282, total current liabilities of \$5,536, resulting in net current assets of -\$4,254.

The tax return for 2001 reflected gross receipts of \$44,740; gross profit of \$44,740; compensation of officers of \$0; salaries and wages paid of \$16,000; and an ordinary income of -\$33,413. Schedule L reflected total current assets of \$0, total current liabilities of \$20,194, resulting in net current assets of -\$20,194.

In addition, counsel submitted Wells Fargo bank statements for the period February 2001 through November 2002, and a statement reflecting that the petitioner's owner, as of September 20, 2002, had \$71,288.05 in an American Express mutual fund.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director referenced the petitioner's apparent inability to pay the proffered wage during 1998, 1999, 2000, and 2001 based on the income tax statements and addressed the petitioner's other assets stating, in pertinent part, that:

A corporation is a separate and distinct legal entity from its owners and stockholders. Consequently, any assets of its owner(s), stockholders or of other enterprises or corporations cannot be considered in determining the corporation's ability to pay the proffered wage.

On appeal, counsel states that, as verified by the documentation submitted on appeal, the petitioner has the ability to pay the proffered wage. Counsel cites *Matter of Sonogawa* 12 I&N Dec. 612, Interim decision (BIA) 1835 (1967) as precedent for the approval of the petition.

Counsel submits a "Statement of Financial Accounts" American Express portfolio summary for the period November 1, 2002 through December 4, 2002, reflecting that the petitioner's owner had a portfolio valued at \$129,751.01. Counsel also submitted copies of income tax documents, 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 *Sonegawa*, have been shown to exist in this case, nor has it been established that 1998 through 2001 were uncharacteristically unprofitable years for the petitioner.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's Forms 1120S for calendar years 1998, 1999, 2000 and 2001 demonstrate that the petitioner could not pay a proffered salary of \$24,024. During those years the petitioner had ordinary incomes of -\$7,719, -\$13,048, \$2,611, and -\$33,413, respectively.

In addition, as stated in the director's decision, the assets of the petitioner's owner cannot be considered in determining the corporation's ability to pay the proffered wage.

After a review of the federal tax returns, 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.