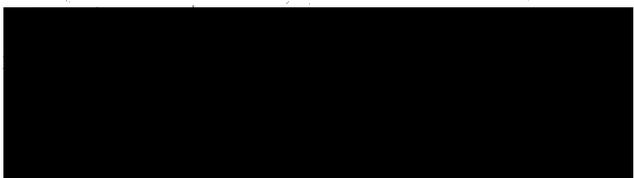




U.S. Citizenship
and Immigration
Services

36



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 13 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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 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.

for Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

**identifying data deleted 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 general and cosmetic dental office. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 and denied the petition accordingly.

In the proceedings before the director, the petitioner was represented by counsel. However, on appeal the petitioner is self-represented. On appeal, the petitioner's owner states that her business has grown significantly and will continue to do so in the future, and will be able to pay the beneficiary the proffered wage in the future.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$5,314.42 per month, which amounts to \$63,773.04 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$226,411.00, and to currently have two employees.

The evidence indicates that the petitioner is a sole proprietorship. In support of the petition, the petitioner submitted a letter dated February 18, 2003 from the petitioner's owner confirming her job offer to the beneficiary; a letter dated February 28, 2003 from a former employer of the beneficiary confirming the beneficiary's experience as a senior accountant and financial analyst from April 1994 to December 1999; a

letter dated March 3, 2002 from another former employer of the beneficiary confirming the beneficiary's employment as a senior accountant from December 1999 to the date of the letter; copies of Form 1040 U.S. individual income tax returns for the petitioner's owner for 1999 and 2001; a copy of Form 540 California Resident Income Tax Return for the petitioner's owner for 2001; and a copy of the beneficiary's bachelor of science degree in commerce, granted June 2, 1990 by San Beda College, Manila, Philippines, along with a copy of the beneficiary's course transcript.

The director found the evidence submitted to be insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the director issued a request for evidence dated May 15, 2003 requesting additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter dated July 24, 2003 and the following evidence: a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner for 2002; copies of bank statements for a business checking account of the petitioner at the Bank of America, San Francisco, California, for April, May and June of 2003; copies of combined account statements for a checking account and a savings account of the petitioner and her husband at the Bank of America for May, June and July of 2003; a copy of a deed dated June 15, 2001 from KB Home, Greater Los Angeles, Inc., granting title to the petitioner's owner to a residential condominium property in Los Angeles, California; copies of condominium contract documents for that property dated June 15, August 16, September 11 and November 8, 2001; and a copy of a quitclaim deed dated November 14, 2001 issued by the husband of the petitioner's owner to the petitioner's owner surrendering any claim of ownership in the property described in the deed mentioned above.

In a decision dated August 21, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits no brief, but submits the following additional evidence: a financial statement for the petitioner for the six-month period ending June 30, 2003; copies of monthly statements for the petitioner's business checking account mentioned above at the Bank of America for January through June of 2003, of which the copies for April, May and June are duplicates of copies submitted previously; a copy of a letter dated February 6, 2003 from Forest City Commercial Group with accompanying information and proposed contract documents for an office lease in a real estate development named Victoria Gardens, in Rancho Cucamonga, California; and an undated memorandum from CB Richard Ellis with accompanying information on a real estate development named Day Creek Marketplace, in Rancho Cucamonga, California.

The petitioner's owner states on appeal that her business has grown significantly and will continue to do so in the future, and will be able to pay the beneficiary the proffered wage in the future. The owner states that her financial report for the first half of 2003 shows that her business has grown by more than 100% compared to the previous two years, and she states that she plans to obtain another office in a new commercial center in Rancho Cucamonga, California.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, 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. Tex. 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.*, the court held that the Immigration and Naturalization Service, now CIS, 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 Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a sole proprietorship, CIS considers net income to be the figure shown for adjusted gross income on the Form 1040, U.S. Individual Income Tax Return of the petitioner's owner. The tax returns of the petitioner's owner show the following amounts for adjusted gross income: \$95,040.00 for 1999; \$50,175.00 for 2001; and \$65,654.00 for 2002. The figure for 1999 is not directly relevant to the instant petition, since the priority date is in the year 2001. No return was submitted for the year 2000.

For 2001, the adjusted gross income of the petitioner's owner is \$13,598.04 less than the proffered wage. Therefore the owner's adjusted gross income in 2001 fails to establish the petitioner's ability to pay the proffered wage in that year.

For 2002, the adjusted gross income of the petitioner's owner is \$1,870.96 more than the proffered wage. On her 2002 tax return the petitioner's owner marked her filing status as head of household and she listed two children as dependents. The amount of \$1,870.96 remaining after paying the proffered wage is found to be insufficient to pay the personal household expenses of the petitioner's owner.

For the above reasons, the tax returns of the petitioner's owner fail 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 record before the director also contained documents pertaining to a condominium purchase by the petitioner's owner in 2001. The owner's assets in the year of the priority date are relevant to the issue of the petitioner's ability to pay the proffered wage, but the evidence fails to give sufficient information about the owner's assets and liabilities. The condominium documents show a trust liability on the property in the amount of \$344,950.00, but the record contains no information on other liabilities of the petitioner's owner. Therefore the record provides an insufficient basis for calculating the owner's net total assets, or net current assets, either at the priority date or any time thereafter.

The evidence submitted prior to the director's decision also includes statements for a business checking account of the petitioner at the Bank of America for April, May and June of 2003, and for a checking account and a

savings account of the petitioner's owner and her husband at that bank for May, June and July of 2003. The closing balances on the business checking account statements are \$30,905.82 for April 30, 2003; \$13,690.48 for May 30, 2003, and \$16,276.02 for June 30, 2003. The combined closing balances on the checking and savings account statements of the petitioner's owner and her husband are \$9,733.00 for May 8, 2003; \$9,082.79 for June 9, 2003; and \$15,790.58 for July 10, 2003.

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns.

In any event, in the instant petition, no bank statements for 2001 or 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

In his decision, the director based his analysis on the petitioner's figures for total income shown on the owner's tax returns for 2001 and 2002, rather than on the adjusted gross income figures, which are slightly lower. Nonetheless, even using the higher figures for total income, the director concluded that the tax returns failed to establish the petitioner's ability to pay the proffered wage in those years. The director correctly noted that to satisfy the petitioner's evidentiary burden, the tax returns must show income sufficient to pay for the owner's personal expenses as well as to pay the proffered wage. The director did not discuss the financial evidence in the record other than the tax returns of the petitioner's owner. The director's analysis of the evidence was therefore incomplete. However, as discussed above, the other financial evidence fails 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. Therefore the director's failure to address that evidence did not affect the outcome of the case. The director's decision to deny the petition was correct, based on the evidence submitted prior to his decision.

On appeal, the petitioner submits additional evidence consisting of a financial statement for the petitioner for the six-month period ending June 30, 2003; copies of monthly bank statements for that same six-month period (three of which are duplicates of statements submitted previously), and documents relating to a possible additional office location for the petitioner.

The petitioner's owner asserts that the financial statement for the first six months of 2003 shows that her business income was increasing significantly over the prior two years. The financial statement purports to be an audited statement. At the bottom of each page appears the name and signature of a person who is identified as a "C.P.A.," along with the number "CTEC No. A007839." The number presumably refers to a state registration number, though no explanation of that number appears in the evidence. Despite its claim to be an audited financial statement, the appearance of the statement and the information contained therein raise questions about that claim.

The financial statement is not on the letterhead of the accountant whose purported signature appears on the bottom of each of the two pages of the statements, nor is it accompanied by any cover letter from the accountant certifying that the statement was audited by him. The financial statement's title refers only to the petitioning business and makes no mention of the personal finances of the petitioner's owner, even though, as a sole proprietorship, the petitioning business is not a separate legal entity from the owner. The statement shows current assets as including funds in a "Regular Checking Account" in the amount of \$293,453.53 as of June 30, 2003. That figure is inconsistent with the closing balance in the petitioner's business checking account as of June 30, 2003 of \$16,276.02, as shown on the bank statement for that month submitted in evidence. The record contains no explanation for this inconsistency.

The Board of Immigration Appeals stated in *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), that "[i]t is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Because of the inconsistencies mentioned above, the financial statement for the six-month period ending June 30, 2003 cannot be considered as reliable evidence of the petitioner's financial situation.

The petitioner's owner asserts that her business has shown significant financial improvement, which will permit it to pay the proffered wage to the beneficiary in the future. The evidence relevant to this issue includes the financial statement discussed above, copies of the petitioner's bank statements for 2003, and information pertaining to two commercial real estate developments in Rancho Cucamonga, California which are being considered by the petitioner's owner as possible locations for a second office. As discussed above, the financial statement for the first six months of 2003 is not found to be reliable evidence concerning the petitioner's financial situation. In addition, the bank statements submitted for the first time on appeal, for January, February and March of 2003, bear the same evidentiary limitations as are discussed above concerning the bank statements submitted prior to the director's decision. Finally, the evidence pertaining to a possible second office location for the petitioner lacks sufficient detail to serve as a basis for any projections of future income increases to the petitioner from having a second office.

CIS considers evidence of a petitioner's possible future business improvements under the principles stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). That case 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 *Sonegawa* 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 *Sonegawa* 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. The evidence submitted prior to the director's decision fails to establish the petitioner's ability to pay the proffered wage in 2001 and 2002, and the evidence in the record on appeal also fails to establish that the petitioner had sufficient

financial resources in those years to pay the proffered wage or to establish that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

For the foregoing reasons, the evidence submitted for the first time on appeal fails to overcome the decision of the director.

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.