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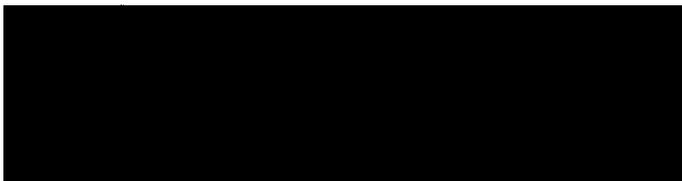
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Washington, DC 20529



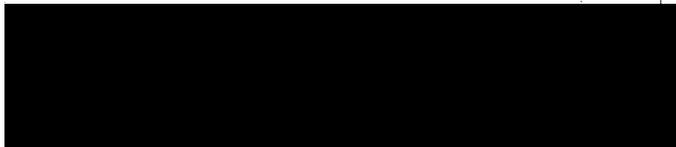
U.S. Citizenship
and Immigration
Services



FILE: WAC 03 043 51235 Office: CALIFORNIA SERVICE CENTER

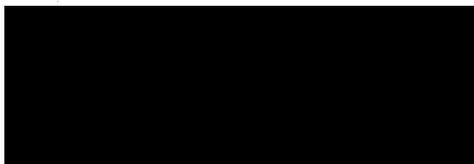
Date: SEP 03 2004

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:



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 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 is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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 granting 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 the continuing ability to pay the proffered wage 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

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 stated that it was established during 1989 and that it employs four workers.

In support of the petition, counsel submitted an undated letter from the petitioner's owner stating that the petitioner has the ability to pay the proffered wage. The owner stressed the amount of the petitioner's gross and net income during 2001 as evidence of that ability.

Counsel submitted the 1998 and 1999 Form 1040, Joint U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Accompanying Schedules C, Profit or Loss from Business, show that the petitioner was a sole proprietorship during those years.

During 1998, the petitioner's owner and owner's spouse declared a loss of \$11,530 as their adjusted gross income, which included a \$16,332 loss by the petitioner, partially offset by other income. During 1999, the petitioner's owner and owner's spouse declared adjusted gross income of \$27,965, including the petitioner's profit of \$8,926. During 1999, the petitioner's owner and owner's spouse declared adjusted gross income of \$27,965, including the petitioner's profit of \$8,926.

Counsel also submitted copies of the petitioner's 2000 and 2001 Form 1120 U.S. Corporation Income Tax Returns. That the petitioner filed corporate income tax returns shows that the petitioner operated as a corporation during those years.

The petitioner's 2000 return shows that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of \$19,171. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2001 return shows that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of \$34,535. The corresponding Schedule L is blank, precluding a determination of the net current assets as of the end of that year.

Counsel submitted Form 1099 miscellaneous income forms showing that the petitioner made non-wage payments of between \$5,200 and \$7,920 to nine people during that year. The beneficiary was not one of those nine people.

Finally, counsel submitted the petitioner's March, May, and June 2002 checking account statements, the petitioner's owner and owner's spouse's May and June 2002 bank account statements, the petitioner's owner's and owner's spouse's June 2002 credit union account statements, the June 2002 statement of an investment account of the petitioner's owner, and the February 2002 and June 2002 statements of a mortgage on the petitioner's owner's and owner's spouse's house.

On May 28, 2003, the California Service Center requested additional evidence in this matter. The request for evidence, however, did not pertain to ability to pay the proffered wage. The petitioner submitted evidence in response to that request.

On June 21, 2003, 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 on denied the petition.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a approval of a visa petition is not necessarily precluded by the fact that the petitioner's net profit for the previous year is less than the proffered wage. Counsel further argues that the instant petitioner's tax returns are a poor index of its ability to discharge its obligations and, more specifically, that its losses and low profits during 1998, 1999, and 2000 were uncharacteristic.

Counsel cited *In the Matter of E-M*, 20 I&N Dec. 77 (Comm. 1989), relating to an alien's burden of proof under Section 245 of the Act.

Counsel also submitted a redacted copy of a non-precedent decision of this office, apparently for the proposition that the petitioner's monthly bank balances should be considered in the determination of its ability to pay the proffered wage. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Finally, counsel argues that to deny the instant petition would result in hardship to the petitioner.

Counsel's citation of *Matter of Sonogawa*, supra, is unconvincing. *Sonogawa* relates to petitions 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. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, 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 *Sonogawa* was based in part on the wealth of evidence pertinent to the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, counsel asserts that the petitioner's losses and low profits are uncharacteristic, but provides no evidence of that assertion. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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, such as cash on Schedule L.

Reliance on the petitioner's gross income is also misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, 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).

As stated above, showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 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*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,024 per year. The priority date is January 14, 1998. During 1998, the petitioner incurred a loss of \$16,332. The petitioner was unable to pay any portion of the proffered wage during that year out of its profits. The petitioner was a sole proprietorship during that year. Because the owner of a sole proprietorship is obliged to pay the debts and obligations of the business out of his own income and assets, the personal income and assets of the owner during those years that the petitioner was a sole proprietorship is considered available toward payment of the proffered wage. During 1998, however, the petitioner's owner and owner's spouse declared a loss of \$11,530 as their adjusted gross income. The petitioner's owner was unable to pay any portion of the proffered wage out of his personal income during that year. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner was operated as a sole proprietorship and made a profit of \$8,926. That amount is insufficient to pay the proffered wage. The petitioner's owner and owner's spouse declared adjusted gross income of \$27,965, including the petitioner's profit. Although that amount is greater than the proffered wage of \$24,024, to believe that the petitioner's owner could support himself and the three other members of his family during that year on the \$3,941 difference is clearly unreasonable. No evidence was submitted to demonstrate that the petitioner's owner had any other income or assets with which to support his family during that year or with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner was a corporation and declared a taxable income before net operating loss deduction and special deductions of \$19,171. That amount is insufficient to pay the proffered wage. The petitioner ended that year with no documented net current assets. The petitioner was unable, therefore, to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$34,535. That amount was sufficient to pay the proffered wage. The petitioner has demonstrated the 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 1998, 1999, and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's final argument is that to deny the petition would result in hardship to the petitioner. The regulations contain no hardship exception to the petitioner's obligation to demonstrate its ability to pay the proffered wage.

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.