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U.S. Citizenship
and Immigration
Services

[redacted]

FILE: WAC-03-056-51845 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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 a general contractor. It seeks to employ the beneficiary permanently in the United States as an architectural drafter. 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 states that the director failed to consider evidence concerning the overall business situation of the petitioner, and states that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant time period.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the 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 C.F.R. § 204.5(d). The priority date in the instant petition is March 8, 2001. The proffered wage as stated on the Form ETA 750 is $11.10 per hour, which amounts to $23,088.00 annually. On the Form ETA 750B, signed by the beneficiary on March 7, 2001, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established in 1992 and to currently employ seven workers. In the item requesting the petitioner's gross income the petitioner states "[s]ee tax returns." The evidence indicates that the petitioner is structured as a sole proprietorship.

In support of the petition, the petitioner submitted a copy of the beneficiary's bachelor of science degree dated March 30, 1987 from the National University, Manila, Philippines; a copy of the beneficiary's course transcript from the National University dated January 9,1995; a letter dated October 27, 1999 from Dev and Associates, Manila, Philippines, a former employer of the beneficiary; copies of pages from the beneficiary's Republic of the Philippines passport; a copy of a Form I-797 approval notice dated December 28, 2000 for an I-129 petition filed by AIR Paynter Inc. on behalf of the beneficiary; copies of the Form 1040 U.S. individual income tax joint returns of the petitioner's owner and his wife for 1999, 2001 and 2002; a copy of a Guam builder's permit dated February 22, 2001 issued to the petitioner; a copy of the petitioner's quarterly state wage report for Guam for the first quarter of 2001; copies of construction contracts of the petitioner dated

November 14, 2002, and November 15, 2002; copies of six payroll checks dated November 29, 2002 issued by the petitioner to six of its employees; and a copy of the petitioner's contractor's licenses issued June 4, 2004 by the Contractor's License Board, Government of Guam.

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. On April 29, 2003 the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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. The director specifically requested a statement of the monthly expenses for the petitioner's family. The director also requested documentary proof of the beneficiary's foreign employment history.

In response, counsel submitted a letter dated June 27, 2003 and the following evidence: a copy of the Form 1040 U.S. individual income tax joint return for the petitioner's owner and his wife for 2000; additional copies of the Form 1040 U.S. individual income tax joint returns for the petitioner's owner and his wife for 1999, 2001 and 2002; printouts dated June 25, 2003 of pages from an Internet web site containing information about damage caused to Guam by Typhoon Pongsona in December 2002; a list of the ten contracts of the petitioner with starting dates from January 10, 2003 through May 9, 2003 with attached copies of certain pages from each of those contracts; copies of three requests for proposals from a Guam management company, two of them dated November 18, 2002 and the third dated November 26, 2002; a copy of a memorandum dated November 22, 2002 from a U.S. Air Force contracting office on Guam; a copy of a letter dated March 6, 2002 to the petitioner from the Small Business Administration; a letter dated June 16, 2003 from the petitioner's owner itemizing his monthly household expenses; copies of the petitioner's Form W-3SS transmittals of wage and tax statements for 2001 and 2002; a copy of a bank statement for May 2003 for a business checking account of the petitioner at the First Hawaiian Bank, Guam; a copy of the petitioner's quarterly state wage report for Guam for the first quarter of 2003; copies of the petitioner's Guam contractor's licenses dated June 4, 2002 and June 25, 2003; a copy of the petitioner's birth certificate issued in Guagua, Pampanga, Republic of the Philippines on January 18, 1984; an undated copy of the Curriculum Vitae of the beneficiary; and copies of letters dated May 7, 2003, May 8, 2003, and May 12, 2003 and one undated letter from four former employers of the beneficiary.

In a decision dated July 29, 2004, 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, counsel submits a brief and no additional evidence.

Counsel states on appeal that the evidence established the petitioner's reasonable expectation of future increases in income under the criteria in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and that such an analysis is consistent with U.S. Department of Labor interpretations. Counsel also asserts that Citizenship and Immigration Services (CIS) should take into account the beneficiary's ability to generate income for the petitioner, as discussed in *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989). Finally, counsel states that the director's reliance on year-end figures on the petitioner's tax returns failed to reflect the ability of the petitioner to pay the proffered wage as of the priority date.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

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 for adjusted gross income. On the Form 1040 U.S. individual income tax returns for 1999, 2000 and 2001 that figure appears on line 33. On the Form 1040 for 2002 that figure appears on line 35. The joint tax returns for the petitioner's owner and his wife show the following amounts for adjusted gross income: -$2,820.00 for 1999; -$32,348.00 for 2000; $17,495.00 for 2001 and $12,152.00 for 2002. The figures for 1999 and 2000 are not directly relevant to the instant case, because the priority date is March 8, 2001. The figures for 2001 and 2002 are less than the proffered wage of $23,088.00, and they therefore fail to establish the petitioner's ability to pay the proffered wage in those years. Moreover, the petitioner must be able to establish its ability to pay the proffered wage while also leaving sufficient funds remaining for the household expenses of the petitioner's owner and his wife. On the tax returns in the record the petitioner and his wife claim no dependents in 1999, 2000 and 2002, and claim two dependents in 2001. The petitioner's owner submitted a statement of monthly household expenses dated June 16, 2003, which lists itemized expenses totaling $1,001.49 per month, which is equivalent to $12,017.88 per year. Therefore the petitioner's evidence would need to establish the petitioner's ability to pay that amount in the owner's personal household expenses, in addition to the proffered wage of $23,088.00.

Counsel asserts that the director erred in relying on the year-end figures from the petitioner's tax returns. But counsel confuses the issue of income with the issue of assets and liabilities. The Form 1040 U.S. Individual Income Tax Return contains no schedule to itemize a taxpayer's assets and liabilities, as do the Form 1120 U.S Corporation Income Tax Return and the Form 1120S U.S. Income Tax Return of an S Corporation. In relying on the figure for adjusted gross income on the Form 1040, CIS looks to a figure which adequately measures the financial resources of the petitioner's owner during the year.

The information on the tax returns of the petitioner's owner and his wife therefore 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.

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612, is misplaced. 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, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes that the petitioner has the ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that the addition of the beneficiary to the petitioner's staff will increase the amount of work for which the petitioner will be awarded contracts.

The record also contains copies of contracts and payroll documents of the petitioner. But no evidence indicates that those documents establish any resources available to the petitioner beyond those reported on the tax returns of the petitioner's owner and his wife. The petitioner also submits a copy of a bank statement for an account of the petitioner. But that statement is for only one month, May 2003, and the information in that statement provides no evidence of the petitioner's ability to pay the proffered wage for prior years, beginning with 2001, the year of the priority date.

In his decision, the director correctly stated the adjusted gross income of the petitioner's owner and his wife for 2001 and 2002 and found those figures insufficient to pay the proffered wage and also to pay the personal household expenses of the petitioner's owner. The director also correctly analyzed the other financial evidence in the record and concluded that it failed 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 director's decision to deny the petition was therefore correct.

On appeal, counsel submits no new evidence. For the reasons discussed above, the assertions of counsel in his brief fail 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.