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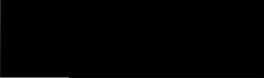
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 30 2006**

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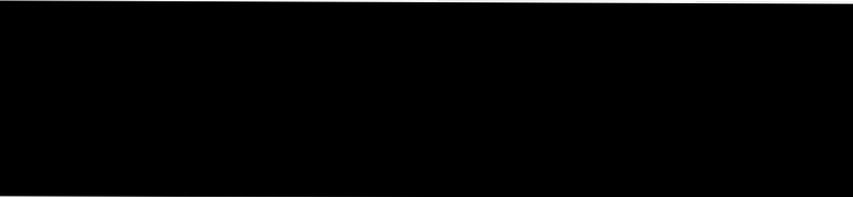
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker a Unskilled Worker 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a general contractor. The petitioner sought to employ the beneficiary permanently in the United States as a records clerk. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

On March 19, 2004, the director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and denied the petition.

The AAO dismissed the petitioner's appeal on July 12, 2004. The AAO reviewed the financial information contained in the petitioner's corporate federal tax returns for 2001 through 2003, as well as other evidence submitted to the record including state quarterly wage reports, the beneficiary's 2003 W-2, and two accountants' letters. The AAO noted found that for the three years under consideration, the petitioner's evidence failed to demonstrate that it had the ability to pay the proffered wage of \$24,897.60 in 2001 or 2002. For 2003, the AAO noted that the petitioner's reported net taxable income as shown on its 2003 corporate tax return could cover the difference between the proffered wage and the actual wages paid.

The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

In this case, counsel argues that because the petitioner has demonstrated its ability to pay the proffered wage through its actual payment of wages to the beneficiary in 2003, the petition should be approved based on a totality of the physical circumstances. Counsel cites two Board of Alien Labor Certification Appeals (BALCA) cases for this proposition, as well as *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). It is noted that while BALCA cases may be considered as guidance in some cases, they are not considered binding pursuant to 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which describes precedent decisions as those published in bound volumes or as interim decisions.

As noted in the AAO's previous decision, the regulation at 8 C.F.R. § 204.5(g)(2), as finalized in 1991, requires that a petitioner's evidence demonstrating its continuing ability to pay the proffered wage as of the priority date must include either annual reports, federal tax returns, or audited financial statements. As stated in the regulation, "the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." *Id.* The priority date is established as the date that the 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). In this case, the priority date is February 28, 2001. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

In this case, counsel asserts that CIS erred in not regarding the petitioner's ability to pay the proffered wage in 2003 as measured by its payment of wages to the beneficiary beginning in that year, as the determinative evidence in demonstrating its ability to pay the certified wage.

We do not agree. As noted in *Matter of Great Wall*, 16 I&N Dec. at 144-145:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

As noted above, federal tax returns are one of the three required forms of evidence that CIS reviews in making the determination of a petitioner's ability to pay a given wage. In this case, the petitioner elected to submit its federal tax returns rather than one of the other forms of documentation. As noted in the previous AAO decision, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. See *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985). 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

It is noted that we do not believe that the Acting Regional Commissioner's dismissal of the appeal in *Matter of Great Wall*, *supra*, or the Regional Commissioner's sustaining the appeal in *Matter of Sonogawa*, *supra*, necessarily mandates the approval in this case. The Acting Regional Commissioner in *Matter of Great Wall* found that the burden of proof remains with the petitioner and that the evidence in that case reflected that the petitioner did not and could not pay the offered wage at the time the petition was filed despite consideration that the petitioner might sometime in the future be able to pay the certified wage.

*Matter of Sonogawa*, may be applicable where the expectations of increasing business and profits support a petitioner's ability to pay the proffered wage. The *Sonogawa* case, however, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, with the exception of the 2003 corporate tax return, the petitioner's other returns reflected fairly modest net income (all less than the proffered wage) and do not indicate the kind of framework of profitability, which parallel the circumstances prevailing in *Sonogawa*, or that these years were uncharacteristic in the petitioner's business operation.

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated that its continuing ability to pay the proffered wage as of the priority date

of the petition. As such, the petitioner's motion does not overcome the grounds of dismissal as set forth in the AAO decision of July 12, 2004.

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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.