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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 198 53548 Office: CALIFORNIA SERVICE CENTER Date: JUN 3 0 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.

for 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 newspaper. It seeks to employ the beneficiary permanently in the United States as an editor. 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.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification 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 petition's priority date in this instance is October 13, 1998. The beneficiary's salary as stated on the labor certification is $47,000 per year.

Counsel initially submitted financial statements, without any audit, review, opinion, or other form of assurance, for the years ended June 30, 2000 and 2001 (unaudited financial statements). In a request for evidence (RFE) dated November 19, 2002, the director required, in part, additional evidence 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 RFE exacted, for 1998 to the present, the petitioner's signed federal income tax returns, annual reports, audited financial statements, or statement of a company with 100 or more workers.

Counsel submitted the petitioner's 1998 to 2001 Forms 1120, U.S. Corporation Income Tax Returns, beginning with the 1998 fiscal year (FY) for July 1, 1998 to June 30, 1999. The Form 1120 for FY 1998 reflected taxable income before net operating loss deduction and special deductions (taxable income) of $80,179 and net current assets of $168,759, equal to or greater than, the proffered wage.[1]

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[1] Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear on designated lines of Schedule L of Form 1120

Next, the FY 1999 Form 1120 reported taxable income as $27,361, less than the proffered wage. However, Schedule L showed net current assets of $105,541, equal to, or greater than, the proffered wage. Since net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for FY 1999.

Though Form 1120 for FY 2000 reported taxable income as a ($31,340) loss, Schedule L for FY 2000 reported net current assets of $73,182, equal to, or greater than, the proffered wage, and these demonstrate the ability to pay the proffered wage. The Form 1120 for FY 2001, however, showed a ($60,659) loss before net operating loss deduction and special deductions, less than the proffered wage. Moreover, Schedule L for FY 2001 reflected current assets of $19,852 minus current liabilities of $9,824, or net current assets of only $10,028, less than the proffered wage. No evidence supported the petitioner's payment of wages to the beneficiary in any year.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief, a letter from the petitioner's general manager and chief financial officer dated May 1, 2003 (CFO letter), and FY 1994 and 1995 Forms 1120 with Schedules L. Counsel encloses a copy of the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and the brief relies on this precedent of Citizenship and Immigration Services (CIS), formerly the Service or the INS.

The CFO letter addresses the financial situation of the petitioner and notes the demonstrated ability to pay the proffered wage in FY 1998, 1999, and 2000. The CFO letter concedes several years of negative taxable income and income less than the proffered wage, including the most recent 2001. Even the additional Forms 1120 for FY 1994 and 1995, respectively, reflect taxable income of $32,230 and $18,367, less than the proffered wage. Furthermore, they reported, respectively, deficits of net current assets, ($17,401) and ($35,828). Moreover, the omission of federal tax returns for FY 1996 and FY 1997 discredits the CFO's opinion that the petitioner's financial history justifies the continuing ability to pay the proffered wage.

The AAO may, in its discretion, use statements given as expert testimony as advisory opinions. However, when an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept, or may give less weight to, that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1998).

The additional evidence does not establish the petitioner's ability to pay the proffered wage in any years except FY 1998, 1999, and 2000. Even during these years, the financial status of the petitioner steadily declined. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989).

The CFO letter counters that:

> One reason for the difference in financial status between 1998-1999 and 2000-2001, as noted by [CIS] in its decision, is that since my arrival in 2002, we have been voluntarily pursuing a

> restructuring of our financial recordkeeping that has required showing additional negative figures in the tax returns that the newspaper [petitioner] normally would not show.

This analysis does not explain the adverse inference from tax returns presented (FY1994, FY 1995, and FY 2001) and omitted (FY 1996 and FY 1997). Moreover, the CFO letter avers no particular of the restructuring, the unusual financial recordkeeping, negative figures, or other factors, such as were carefully set out in *Matter of Sonegawa*.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel calls attention to gross revenues, but they declined from $1,368,320 to $1,052,494 FY 1998-2001. Counsel avers that payrolls average $500,000 per year and that they support the ability to pay the proffered wage. Wages once paid out to others are not available to apply to the beneficiary's salary.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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.,* 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Counsel's reliance on *Matter of Sonegawa*, 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 *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 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 *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 was an uncharacteristically unprofitable year for the petitioner. Rather, as stated above, the record reflects a steady decline in the petitioner's financial situation.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate 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 her reputation would increase the number of customers.

After a review of federal tax returns, unaudited financial statements, the CFO letter, and counsel's brief on appeal, 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.