U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-03-043-50715 Office: CALIFORNIA SERVICE CENTER Date: SEP 23 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]

PUBLIC COPY

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

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 home health agency. It seeks to employ the beneficiary permanently in the United States as a billing manager. 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 properly evaluate the petitioner's entire tax returns and other 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 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 29, 2001. The proffered wage as stated on the Form ETA 750 is $22.00 per hour, which amounts to $45,760.00 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The evidence indicates that the petitioner is a corporation. The I-140 petition states that the petitioner was formed in 1994, has 35 employees and has a gross annual income of $958,000.00.

The evidence submitted initially and in response to a request for evidence (RFE) issued by the director consists of the following: an undated certification from a former employer of the beneficiary confirming the beneficiary's employment as a billing coordinator from November 1996 until November 1998; a federal income tax summary for the petitioner for 2001; copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2001 and 2002; copies of the petitioner's Form 100 California Corporation Franchise or Income Tax Return for 2001; copies of the petitioner's Form DE-6, California quarterly wage and withholding reports for 2002; a copy of the petitioner's license dated April 26, 2003 from the California Department of Health Services; a copy of the petitioner's business license dated February 3, 2003 from the City of El Segundo; a copy of the petitioner's 2003 Certificate of Membership in the California Association for Health Services at Home; and a copy of the petitioner's accreditation certificate for 2001-2004 from the Joint Commission on Accreditation of Healthcare Organizations.

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, on June 16, 2003, denied the petition.

On appeal, counsel submits a brief and additional copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2001 and 2002 and of the petitioner's Form DE-6, California quarterly wage and withholding reports for 2002.

Counsel states on appeal that the director failed to properly evaluate the petitioner's the gross income, payroll size, and carry-over deductions from previous years in evaluating the petitioner's financial ability to pay the proffered wage. Counsel also asserts that the petitioner is a growing business, and that the evidence of its ability to pay the proffered wage meets the criteria set out in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 Citizenship and Immigration Services (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 corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: -$4,712.00 for 2001 and $10,475.00 for 2002. Since the figure for 2001 is negative and since the figure for 2002 is less than the proffered wage of $45,760.00, those figures fail to establish the petitioner's ability to pay the proffered wage during 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash

within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -$30,858.00 for the beginning of 2001; -$16,643.00 for the end of 2001; and -$4,933.00 for the end of 2002. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage.

Counsel's assertion that the petitioner's low taxable income in 2001 and 2002 is the result of large loss carryovers from previous years is not supported by the figures in those returns. A taxpayer is allowed to deduct previous net operating losses only up to the amount of taxable income after other deductions, that is, only up to the amount shown on line 28 of the tax returns, for taxable income before the net operating loss deduction and special deductions. On the 2001 return the amount shown on line 28 was negative, as discussed above. Therefore in 2001 the petitioner was authorized to take no further deduction for carry-over losses from previous years. In fact, the negative taxable income amount of -$4,712.00 for 2001 was added to the losses available to be carried forward from previous years. Counsel asserts that in 2002 the petitioner deducted a carried-over net operating loss of $243,522.00. Although counsel is correct that the petitioner had that amount of net operating loss available from previous tax years, the taxable income on line 28 of the 2002 return was only $10,475.00. Therefore the amount of allowable net operating loss deduction was $10,475.00. That deduction was taken, and the petitioner's return for 2002 reports a taxable income after the net operating loss deduction of zero, shown on line 30 of the 2002 return.

In any event, the director did not base his analysis on the amounts shown on line 30 of the 2001 and 2002 returns, but on the amounts shown on line 28, for taxable income before the net operating loss deduction and special deductions. Therefore counsel's assertions on this point fail to address the financial analysis as done by the director.

Counsel asserts that the petitioner's gross income and payroll size provide sufficient evidence of the petitioner's ability to pay the proffered wage. However, the authority of CIS to rely on the net income figures as shown on the petitioner's tax returns is well established by precedent, as discussed above. Counsel has offered no evidence to indicate that in the instant case it is not appropriate for CIS to base its primary analysis on the petitioner's net income as shown on its tax returns.

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.

In his decision, the director correctly stated the figures for the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's net current assets for each of those years. The director found that those figures 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 analysis was correct, and the director's decision to deny the petition was accordingly correct.

No new evidence is submitted on appeal,. 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.