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U.S. Citizenship
and Immigration
Services

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FILE: WAC 01 28355595 Office: CALIFORNIA SERVICE CENTER Date: **MAY 25 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 service center director denied the employment-based visa petition on October 28, 2002, and the AAO subsequently denied the appeal on December 15, 2003. The matter is now before the he Administrative Appeals Office (AAO) as a motion to reconsider, and/or reopen. The motion to reopen is granted. The appeal will be dismissed.

The petitioner is a non-profit foundation that raises funds for various international projects. It seeks to employ the beneficiary permanently in the United States as a service director. 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. Accordingly, the director denied the petition.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted new documentation with regard to the source and volume of funds raised from the Thai community. This evidence is viewed as sufficient to reopen the proceedings.

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) 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) provides 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or

employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

- (B) *Skilled worker*. If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . The minimum requirements for this classification are at least the two years of training or experience.

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 June 28, 1996. The proffered wage as stated on the Form ETA 750 is \$5,821 per month, or \$69,852 annually.

In the original petition, the petitioner stated it was established in 1985 and had no paid staff. The petitioner submitted copies of the petitioner's IRS Form 990-EZ, Return of Organization Exempt from Income Tax for the years from 1996 to 2001. The director denied the petitioner because the total revenues shown in the Forms 990-EZ were not sufficient to pay the proffered salary. On appeal, counsel cited to *Masonry Masters v. Thornburgh*, 875 F.2d, 898 (D.C.Cir., 1989) and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and stated that establishing the ability to pay a proffered wage should involve more than subtracting the proffered wage from the petitioner's income. The petitioner states that the addition of a full-time professional service director will lead to increased financial support for the petitioner that will allow it to pay the proffered wage and implement its charitable mission on a more comprehensive basis. The petitioner submitted a chart that examined direct public support received by the petitioner from 1988 to 2001 along with expenditures on either in-house staff or outside services. The petitioner also submitted IRS Forms 990 for tax years 1988 to 1992.

On December 15, 2003, the AAO determined that the instant petition was not analogous to *Matter of Sonogawa*. The director stated that the petitioner had not established any unusual circumstances to parallel those in *Sonogawa*, nor had it established that 1996 was an uncharacteristically unprofitable year for the petitioner. The AAO dismissed the appeal. The petitioner on motion states that unusual circumstances do exist with regard to the instant petition, as the petitioner is a non-profit organization with a charitable mission. The petitioner adds that decisions pertaining to its charitable mission are not determined by profit. The petitioner explained that its primary mission involves charity to Thailand, and the decline in the level of donations from the Thai community from 1990 to 1991 was uncharacteristic. The petitioner submits a document that lists donations from Thai speaking people in the aggregate from 1988 to 2002.¹ The petitioner also submits a bar graph to show the impact of Thai-speaking office manager in 1991 on the petitioner's fundraising efforts. The petitioner states that its lack of a Thai-speaking service director or office manager has affected its ability to raise donations, similar to the petitioner in *Sonogawa* who had moving costs and paid rent for two locations during one uncharacteristically unprofitable year. The petitioner notes that the AAO decision stated that the CIS would ordinarily examine the net income figure reflected on the petitioner's federal income tax to determine the petitioner's ability to pay the proffered wage. The petitioner states that its situation is not ordinary in that it involves a nonprofit organization that lacks a key employee that would directly affect its revenue.

¹ Although the document from the Celtic Catholic Church that lists the aggregate contributions lists the year 2001 twice, since the contribution amount differs, it appears that the second figure is for 2002.

The petitioner claims on motion that its nature as a non-profit group that does charity work makes its circumstances out of the ordinary, and unusual. This statement by itself does not establish any unusual circumstances that would not be faced by any other non-profit organization that seeks to prove its ability to pay a proffered wage in relation to a I-140 petition. The petitioner appears to raise its funds through the use of coin containers placed in various businesses. The petitioner's statement with regard to the loss of funds following the loss of a Thai-speaking employee in 1991 is non-persuasive. In addition, the documentation submitted by the petitioner to further substantiate this assertion is not persuasive.

First, it is not clear from the evidence in the record that the diminished support of the Thai community is based on the lack of Thai-speaking employees. Although the petitioner has stated that its primary mission is in Thailand, the petitioner's 2000 Form 990-EZ reflects that it provided funding in the amount of \$13,800 to programs in Mexico, Thailand and the Philippines, and also provides scholarships to individual students in the amount of \$24,975. It would appear reasonable that the contributions of Mexican or Filipino businesses would also be pivotal in supporting the petitioner's programs.

In addition, although the petitioner has submitted a document that lists the contributions from Thai speaking people from 1988 to 2002 and a graph to illustrate the contributions that show a marked drop off in contributions in 1991, these documents are inconsistent with the actual amount of contributions listed in other documents submitted by the petitioner, namely, the petitioner's lists of Thai accounts. For example, in 1995, the contributions listed on the document identified as Listing of All Thai Accounts in 1995 totaled \$3,763.39.² Nevertheless, the graph of contributions and the Celtic Church's document submitted to the record indicate that Thai-speaking people in 1995 contributed \$50,373 to the petitioner. The relationship between the petitioner's list of contributions from Thai businesses and the petitioner's graph and list of aggregate yearly contributions is not clear. In sum, the evidence submitted on motion is confusing, and not persuasive that the petitioner has experienced unusual circumstances as outlined in *Sonegawa*. It should also be noted that the petitioner has not demonstrated that it had a year with negative revenue or net assets within a period of more successful years as the petitioner in *Sonegawa* successfully established.

On appeal to the initial decision, counsel also urged the consideration of the beneficiary's proposed employment as an indication that the petitioner's income or fundraising will increase. Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Neither the director nor the AAO in its initial dismissal addressed counsel's reference. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. In the instant petition, counsel asserts that the petitioner reasonably expects that beneficiary's ability to increase the petitioner's fundraising in the Thai community. However, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). As previously stated, the evidence presented on motion is confusing, and the correlation between Thai-speaking employees and fundraising levels is not clearly established. Furthermore as established by the petitioner's tax forms, the majority of funds go towards scholarships to needy foreign students at Los Angeles-area universities. None of the evidence provided by the petitioner on motion is of

² This sum is reached by adding all the contributions from the petitioner's Thai accounts for 1995.

sufficient weight to overcome the director's decision. Therefore the director's decision will stand. However, in order to further clarify the petitioner's ability to pay the proffered wage, the AAO will examine this issue below.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 1996 and onward.

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, CIS will next 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. 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). 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*, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the IRS copy of the petitioner's 1996 tax form is considered sufficient evidence with regard to the petitioner's financial resources in 1996. The petitioner has submitted income tax forms for the years 1988 to 2001. Since the priority date for the petition is June 28, 1996, the tax documents for 1988 to 1995 are not dispositive in these proceedings. However, the AAO will examine the petitioner's tax forms for 1996 to 2001. With regard to the petitioner's income in the years 1996 to 2001, Line 1, Form 990-EZ, contributions received, on the petitioner's tax returns establish that the petitioner received the following amount of contributions: in 1996, \$52,524; in 1997, \$43,563; in 1998, \$44,825; in 1999, \$41,807; in 2000, \$49,416; and in 2001, \$45,518. None of these figures are sufficient to pay the proffered wage of \$69,892.

The petitioner's 1996 Form 990-EZ, Part II Balance Sheets, on page one, examines the petitioner's total assets and liabilities. The total net assets or fund balances based on the petitioner's assets and liabilities is noted on line 27 as \$1,787. The petitioner lists the following tax exempt purposes on page two of the form: house building in Mexico and scholarship support with a Mexican program, Futuro de Oro; helping street children in the Philippines; and a local scholarship program for needy foreign students in Los Angeles universities and colleges³. The petitioner's funds were distributed as follows: \$25,839 for local scholarships; \$12,600 for a Mexican house building project, and \$2,500 for a project with street children in the Philippines.

³ The petitioner's tax forms for the late 1980's and through 1991 do indicate greater financial support for projects in Thailand, while the more recent tax forms indicate that the petitioner funds more local scholarships

Based on the petitioner's net assets of \$1,787, the petitioner has not established its ability to pay the proffered wage as of the 1996 priority date. The petitioner's net assets as documented by the petitioner's Forms 990-EZ for the years 1997 to 2001 are as follows: \$4,168 in 1997, \$2,004 in 1998; \$1,929 in 1999, \$4,605 in 2000, and \$4,605 in 2001. The net assets described above are not sufficient to establish the petitioner's ability to pay the proffered wage based on its current net assets. In addition, the petitioner did not identify any other sources of additional assets that could be used to pay the proffered wage. Thus, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date to the present based on its net assets or net income. The director's decision with regard to the petitioner's ability to pay the proffered wage is upheld.

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.

than international projects.