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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: WAC 02 118 50080 Office: California Service Center Date: JUN 19 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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: [redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford 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 on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel submits a brief.

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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on January 13, 1998. The proffered salary as stated on the labor certification is $28.31 per hour which equals $58,884.80 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. corporation tax return. That return covers the petitioner's 2000 fiscal year, which ran from October 1, 2000 to September 30, 2001. During that fiscal year, the petitioner declared a taxable income before net operating loss deduction and special deductions of $16,887. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $41,474 and no current liabilities, which yields net current assets of $41,474.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 11, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested evidence from 1998 to the present in a form consistent with 8 C.F.R. § 204.5(g)(2). In addition, the Service Center requested that the petitioner provide copies of its California Form DE-6 quarterly wage reports for the previous four quarters with the job title and duties of each employee.

In response, counsel submitted a letter, dated June 10, 2002. That letter stated that all of the petitioner's workers are contractors and that, having no employees, the petitioner does not file a California Form DE-6.

Counsel also submitted the petitioner's 1998 and 1999 Form 1120-A U.S. corporation short-form income tax returns. Those returns contain no indication that they cover a fiscal year, rather than the 1998 and 1999 calendar years.

The 1998 return states that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of -$7,103. The accompanying Schedule L indicates that the petitioner had $8,821 in current assets and no current liabilities at the end of that year, which yields net current assets of $8,821.

The 1999 return states that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of -$9,644. The accompanying Schedule L indicates that at the end of that year the petitioner had current assets of $505 and no current liabilities, which yields net current assets of $505.

On July 9, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel implied that the petitioner's gross income, rather than its taxable income, should be considered in the calculation of the petitioner's ability to pay the proffered wage. Counsel also urged that, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) the petition should be approved notwithstanding petitioner's losses during 1998 and 1999 and low taxable income during 2000.

Matter of Sonegawa, however, relates to petitions 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. 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. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner has offered no evidence that it has ever posted a large profit. Assuming the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel also argued that additional funds will be available to pay the proffered wage in this case because the petitioner has hired a tile setter, that the tile setting was previously done by contractors, and that money will thereby be saved. Counsel offered no evidence of his assertion that this arrangement will result in greater profits and no calculation of the amount which will allegedly be saved. An unsupported statement is insufficient to

sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel appeared to imply that the petitioner's gross receipts, rather than its taxable income, should be considered in calculating the petitioner's ability to pay the proffered wage. That approach, however, would be contrary to controlling precedent.

In determining the petitioner's ability to pay the proffered wage, the Bureau will first 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 both Bureau and 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).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau 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." *Chi-Feng Chang v. Thornburgh*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

The petitioner's 1998 tax return shows that, during the period covered by that return, the petitioner suffered a loss of $7,103 and that its net current assets of $8,821 were insufficient to pay the proffered wage of $58,884.80.

The 1999 return shows that, during the period covered by that return, the petitioner suffered a loss of $9,644 and that its net current assets of $505 were insufficient to pay the proffered wage of $58,884.80.

The petitioner's 2000 tax return shows that, during the period covered by that return, the petitioner's taxable income before net operating loss deduction and special deductions of $16,887 added to the petitioner's net current assets of $41,474 equals $58,361, an

amount not quite sufficient to pay the proffered wage of $58,884.80.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage at any time during the pendency of this petition. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.