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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

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FEB 26 2004

File: WAC 02 155 51267 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a computer sales and services firm. It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. 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.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's tax return and other financial information.

Section 203(b)(3)(A)(i) of 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) also provides in pertinent part:

> (2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The sole issue on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is September 22, 1998. The beneficiary's salary as stated on the approved labor certification is $6,165.80 per month or $73,989.60 annually.

The petitioner initially submitted insufficient information to establish its continuing ability to pay the beneficiary's proposed salary.

On June 12, 2002, the director requested additional evidence from the petitioner to support its

ability to pay the beneficiary's salary of $73,989.60 from the visa priority date to the present.

The petitioner responded by submitting its Form 1120S U.S. Income Tax Return for an S Corporation for the years 1998 through 2000. The petitioner also submitted a copy of its application for an extension of time to file its 2001 corporate federal tax return as well as a copies of its Form 941 quarterly federal tax returns for 2001 and state quarterly wage reports.

The information presented in the petitioner's 1998 tax return shows that it declared gross receipts or sales of $3,283,168, officer compensation of $96,000, $16,000 in salaries and wages and an ordinary income of $37,354. Schedule L of this tax return also reflected that the petitioner had $41,163 in net current assets. Net current assets measure a petitioner's liquidity as of a given date. CIS will review a petitioner's net current assets because it represents the level of cash or cash equivalent assets that could reasonably be used to pay the proffered wage. It is calculated as the difference between current assets and current liabilities. In this case, if the proffered wage is prorated from the priority date of September 22nd until the end of the 1998 calendar year, then the figures reflect that the petitioner could meet the beneficiary's prorated 1998 salary of approximately $20,300 out of either its net current assets or its ordinary income.

The petitioner's 1999 federal corporate tax return indicates that the petitioner declared $4,765,908 in gross receipts/sales, $117,000 officer compensation, $39,974 in salaries and wages, and ordinary income of $25,664. Schedule L of the tax return shows that the petitioner had $51,886 in net current assets. The petitioner could not have paid the offered salary of $73,989.60 in 1999 from either its ordinary income or its net current assets.

The petitioner's 2000 tax return shows that the petitioner declared $3,845,456 in gross receipts or sales, $108,000 as officer compensation, $213,740 as salaries and wages, and showed an ordinary income of -$57,126. Schedule L reflects that the petitioner's net current assets were -$11,661. Neither the petitioner's income nor net current assets were sufficient to meet the beneficiary's offered salary during this year.

The director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present. The director found that the petitioner's net income as shown in each of its tax returns was insufficient to cover the beneficiary's proposed salary.

On appeal, counsel submits a letter from an accountant dated August 30, 2002. The accountant notes that the petitioner's gross profit has increased in the three years covered by the tax returns. He also states that the petitioner's current assets also increased from $270,502 in 1998 to $885,857 in 2000. It is noted that the consideration of gross income reflects only a partial picture of the information presented in that the expenses incurred in order to generate such income must also be considered. Similarly, while the data presented in the petitioner's Schedule L for 1998 and 2000 indicates that the petitioner's current assets have increased, the figures also show that the petitioner had a significant increase in current liabilities. In 1998, its current liabilities were $229,339. In 2000, Schedule L indicates that they had increased to $897,518.

The accountant also states that if the compensation of $321,000 paid to the shareholder over the three years covered by the petitioner's tax return were added back to the petitioner's net income, the resulting figure would be sufficient to cover the beneficiary's wage. This figure is represented by the total of the amounts shown as officer compensation on the tax returns which were already distributed to the 100% shareholder. It is noted that the evidence must demonstrate that a petitioner has established eligibility for the benefit sought at the time of filing the visa petition. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). 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. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). Thus, the AAO will not consider gross profit without consideration of expenses and the AAO will not add compensation already paid as expenses back to the petitioner's net income.

Counsel also submits copies of the petitioner's monthly bank statements in support of his assertion that the petitioner has sufficient cash flow available to pay the beneficiary's offered wage. These bank statements cover a recent period from February 2002 to July 31, 2002. As such, they cannot show a sustainable ability to pay a proffered wage as they represent an amount in an account on a given date, rather than a complete reflection of assets and liabilities. As noted previously, 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally cannot substitute for the basic evidentiary requirements.

In the context of the financial records contained in the record, counsel asserts that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. Counsel's assertion is not persuasive. *Sonegawa* 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 *Sonegawa* 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 had been in business for over 11 years and 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in the petitioner's

case, which parallel those in *Sonegawa*. The petitioner in this case submitted only three years of complete tax returns. They do not establish a framework of profitable years, but rather show that the petitioner's net income declined from $37,354 to -$57,126, and its net current assets declined from $41,163 to -$11,661 during the period covered by the federal tax returns.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

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.