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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

*ADMINISTRATIVE APPEALS OFFICE*
*CIS, AAO, 20 Mass, 3/F*
*425 I Street N.W.*
*Washington, D.C. 20536*

[redacted]

MAR 05 2004

File: EAC 01 233 60654 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner sought 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 restaurant. It sought to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition was 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 September 19, 2002, the AAO dismissed the petitioner's appeal, concluding that the petitioner's financial and other corporate documentation contained in the record did not overcome the grounds for the director's denial.

On motion, counsel submits additional information and asserts that the petitioner's evidence establishes its ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 103.5(2) provides that a motion to reopen must present new facts and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(3) further provides that a motion to reconsider must state the reasons for reconsideration and be supported by relevant precedent decisions demonstrating that the decision was based on an incorrect application of the law or CIS policy. It must also show that the decision was incorrect based on the evidence of record at the time the initial decision was made.

In the present case, counsel has submitted new evidence consisting of an accountant's letter and partial copies of a published restaurant guide. Counsel also asserts that the analysis presented in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) should be applied to instant case. The AAO will consider counsel's motion pursuant to the regulatory parameters.

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) 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 beneficiary's salary as stated on the labor certification is $22.26 per hour or $46,300.80 annually. The petitioner is organized as a corporation. Its corporate federal tax returns for 1997 through 1999 each cover a fiscal year running from June 1st to May 31st of the following year.

On motion, counsel reiterates the claim that the value of real property owned by another corporation should be considered as part of the petitioning corporation's ability to pay the proffered wage. Counsel contends that because both corporations share the same sole shareholder, then the non-petitioner's real estate assets should be included in the equation. Counsel offers no legal authority for this assertion, but submits a letter from an accountant [redacted] dated October 7, 2002. Mr. [redacted] states that "sometimes you may find a holding corporation overseeing the operation of two distinct corporations---any one of those entities may be responsible for the transfer of funds to perpetuate the business." The AAO notes that there is no contractual documentation in the record to support the theory that these two corporations should be considered as the same entity. Although the accountant describes the creation of these two corporation as a bookkeeping convenience for the sole shareholder, corporations also provide a shield of liability. As noted in the previous AAO decision, a corporation is a separate and distinct legal entity from its owners and shareholders, and therefore the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980). The AAO notes that real estate holdings are not representative of assets that are readily available to meet a proffered wage.

Counsel also asserts that the petitioner's cash flow, as represented in its bank statements, establishes its ability to pay the proffered wage. Counsel notes that the restaurant has carried its payroll and that the labor certification shows that the beneficiary has worked for the petitioner for several years. The actual wages paid to the beneficiary could have been considered as part of the petitioner's ability to pay, but the petitioner failed to submit evidence of these payments pursuant to the director's request for evidence. Although in some cases, bank statements may be considered, it is noted that the regulation at 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 submitted, such documentation generally cannot substitute for the basic evidentiary requirements. At a minimum, it must provide independent and probative value of the petitioner's ability to pay the proffered wage to be considered competent evidence.

In this case, as noted by the previous AAO decision, the petitioner's taxable income before the net operating loss deduction and other special deductions as reflected on each of the tax returns

contained in the record, was far less than the beneficiary's proffered wage of $46,300.80. The AAO would also note that the petitioner's net current assets were -$21,536, -$35,466, and -25,443 for the fiscal years covered by its '97, '98 and '99 returns, respectively.[1] In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that the INS (now 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.

In the context of the financial information 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. *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 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. In this case, although counsel points to the submission of copies of extracts from the "Zagat" dining guide to show that the petitioner is a successful restaurant, the AAO notes that the petitioner's net income figures set forth in its corporate tax returns are very modest and its net current assets were consistently negative. The petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.*

Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate that its continuing ability to pay the proffered wage as of the priority date of the petition. As such, the petitioner's motion does not overcome the grounds of dismissal as set forth in the AAO decision of September 19, 2002.

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 AAO's decision of September 19, 2002 dismissing the petitioner's appeal is affirmed. The petition remains denied.

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[1] Net current assets are the difference between current assets and current liabilities. CIS will consider net current assets because it represents cash or cash equivalent resources that would be reasonably available to pay the proffered wage. On corporate tax returns, a petitioner's current assets and liabilities are described on Schedule L.