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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

B6

File: WAC 02 194 50160 Office: California Service Center Date: MAR 11 2004

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 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 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 training center. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, counsel states the petitioner has met the necessary requirements to establish it has the ability to pay the proffered wage.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner'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 and continuing until the alien is granted permanent residence. The petitioner's priority date in this instance is January 14, 1998. The beneficiary's salary as stated

on the labor certification is $29.80 per hour or $61,984 per year.

With the petition, counsel submitted copies of the petitioner's 1999 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, and 2000 Form 1120, U.S. Corporation Income Tax Return. The Form 1120-A for 1999 reflected taxable income before net operating loss deduction and special deductions of $9,461, less than the proffered wage. The Form 1120 for 2000 reflected taxable income before net operating loss deduction and special deductions of negative $3,709.

In a request for evidence (RFE) dated November 5, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage beginning at the time the priority date was established and continuing until the beneficiary obtained permanent residence.

In response, counsel submitted, in addition to the previously submitted tax returns, a copy of petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, and 1997 Form 1040, U.S. Individual Income Tax Return. Counsel stated the petitioner was a sole proprietorship that converted to an S corporation in 1999. Counsel did not submit a tax return for 1998, but included an unaudited financial statement for that year.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established and continuing until the beneficiary obtains permanent residency.

On appeal, counsel asserts that the director's decision is based "solely on opinion" and not on law and controlling precedent. Counsel states that the court in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) stated that CIS "could" rely on income tax returns to establish ability to pay, but did not mandate that it does so. He asserts that *Elatos* is inapplicable to the present case. Counsel states CIS must look beyond the tax returns in determining a petitioner's ability to pay, and notes that in the *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the Regional Commissioner looked beyond the petitioner's bottom line to her reasonable expectations of a continued increase in business and profits.

The petitioner in *Sonegawa* was a renowned couturiere with high profile clients. As a result of moving her business to a better location, she experienced a decline in profits following several years of gross income in excess of $100,000. This decline was attributed to the fact that she had to pay double rent for five months, incurred large moving costs, and was unable to conduct

regular business for a period of time. Based on her business reputation, the Regional Commissioner determined that her prospects for a resumption of successful business operations were well established.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the petitioner has suffered any uncharacteristically unprofitable years.

With the appeal, counsel submitted a brief and copies of documentary evidence previously submitted to the director, as well as monthly bank statements for November and December 2002. These statements reflect that the petitioner had maintained an average balance at the end of 2002 of $82,390.

Even though the petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that the bank statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay, as they do not identify funds that are already obligated for other purposes.

The petitioner submitted an unaudited financial statement for tax year 1998. Unaudited financial statements are of little evidentiary value as they are based solely on the representations of management. The petitioner has not provided evidence of its ability to pay the proffered wage through annual reports, federal tax returns, or <u>audited</u> financial statements as required by 8 C.F.R. § 204.5(g)(2) (emphasis added). Thus, the petitioner has submitted insufficient evidence of its ability to pay the proffered wage in 1998.

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. 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).

The petitioner's tax return for 1999 reflects a taxable income before net operating loss deduction and special deductions of $9461, and current assets of $35,910 and current liabilities of $4,525. The petitioner's 2000 tax return shows a taxable income before net operating loss deduction and special deductions of negative $3709, and current assets of $55,577 and current liabilities of $14,853. The petitioner could not have paid the proffered wage from either its net current assets or its taxable income before net operating loss deduction and special deductions during 1999 or 2000. The petitioner's 2001 tax return reflects ordinary income from trade or business activities of $19,866. The petitioner could not have paid the proffered wage from taxable income. The return also reflects current assets of $85,334 and current liabilities of $5,623. The petitioner could have paid the proffered wage from net current assets.

The petitioner is required by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner has submitted no evidence of its ability to pay the proffered wage in 1998, nor does the evidence submitted demonstrate that the petitioner was able to pay the proffered wage in 2000 and 2001. 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.