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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File [redacted] Office: California Service Center Date: MAR 12 2004

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]

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 general building contractor. It seeks to employ the beneficiary permanently in the United States as a dry wall applicator. 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 argues that the director erred in basing his decision "solely" on opinion instead of controlling law and precedent.

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 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 April 11, 1997. The beneficiary's salary as stated on

the labor certification is $19.50 per hour or $40,560 per year.

With the petition, counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1140, U.S. Individual Income Tax Return, and the petitioner's personal statement of his financial worth. The Form 1040 for 1998 reflected adjusted gross income of $60,154, more than the proffered wage. The Form 1040 for 1999 reflected adjusted gross income of $53,654, more than the proffered wage. The Form 1040 for 2000 reflected adjusted gross income of $22,731, less than the proffered wage.

In a request for evidence (RFE) dated May 15, 2002, the director asked for evidence of the beneficiary's income from the petitioner, as the ETA 750 indicated the beneficiary had worked for the petitioner since 1990. The director also requested evidence of the petitioner's ability to pay the proffered wage beginning at the time the priority date was established, and requested signed and certified copies of the petitioner's 2001 income tax return, or proof it had been filed with the Internal Revenue Service.

In response, counsel submitted a copy of petitioner's 2001 Form 1040, signed in July 2002. Counsel also stated that the beneficiary had not filed a tax return, as he was not "qualified for a social security number." Counsel submitted copies of three bank checks made payable to the beneficiary by the petitioner in the month of August 1997, one check for 1995 and several for 1994.

In a second RFE dated September 27, 2002, the director requested Schedule C from the petitioner's 2001 tax return. In response, counsel submitted a notarized statement from the petitioner attesting that his 2001 tax return did not include a Schedule C. Counsel also submitted a copy of the petitioner's 1997 Form 1040, which reflected adjusted gross income of $34,239, less than the proffered wage.

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 lawful residency. He specifically determined that the petitioner had not established an ability to pay the proffered wage in 1997 and 2000, or that the petitioner had sufficient income in the other pertinent years to meet living expenses and pay the beneficiary the proffered wage.

On appeal, counsel asserts that the court in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) stated CIS "could" rely on income tax returns to establish ability to pay, but did not mandate that it does so. Counsel states CIS must look

beyond the tax returns in determining a petitioner's ability to pay. He 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 was well established.

Counsel has not shown that 1997 and 2000 were uncharacteristically unprofitable years for the petitioner. Although citing the events of September 11, 2001, as negatively impacting the petitioner's business, counsel does not explain how those events affected profits in 1997 and 2000.

With the appeal, counsel submitted a brief and copies of documentary evidence previously submitted to the service center. Although counsel refers to the petitioner's bank report, which allegedly shows he maintains a balance of $80,000, the only evidence submitted is an unsigned and undated personal financial statement apparently required by the bank in support of a loan application. Additionally, although stating the beneficiary has worked for the petitioner since 1990, earning at least $16.50 per hour, counsel provides very limited documentary evidence of this and no evidence of the annual wages actually paid to the beneficiary. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 CIS 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).

The petitioner is obliged 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 evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1997 and 2000. 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.