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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
42[illegible] Street [illegible]
Washington, DC. 20536

B6

[redacted]

MAR 17 2004

File: WAC 02 116 54206 Office: CALIFORNIA SERVICE CENTER Date:

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 employment based immigrant 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 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 or professional. The petitioner is an insurance agency. It seeks to employ the beneficiary permanently in the United States as an office 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, the petitioner submits additional evidence and asserts that the continuing ability to pay the beneficiary's proffered wage has been established.

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 the [CIS].

The issue raised on appeal is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 24, 2001. The beneficiary's salary as stated on the labor certification is $32.90 per hour or $68,432 annually. The petitioner is organized as a sole proprietorship.

The petitioner initially submitted a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the year 2000 in support of its financial ability to pay the beneficiary's proffered salary of $68,432. This tax return reflected that the sole proprietor declared an adjusted gross

income of $38,516 including business income of $49,122.
On April 12, 2002, the director instructed the petitioner to submit additional information to support its ability to pay the beneficiary's proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that it should submit either federal tax returns, annual reports, or audited financial statements covering the period from 2000 through the present.

The petitioner resubmitted a copy of its owner's 2000 individual tax return and advised that the 2001 tax return was not available because it had not yet been filed. Instead, the petitioner submitted a copy of a Form 1099, Miscellaneous Income for 2001, issued by the Farmers Insurance Exchange showing $209,486.30 in agent commissions generated by the petitioner. The petitioner also submitted an internal document titled "statement of operations" which also showed commission totals for January, May and June 2002.

The director subsequently denied the petition, determining that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the visa petition because its owner's tax return showed insufficient income to cover the beneficiary's proposed salary of $68,432. The director also found that the petitioner's internal operations statement for certain months in 2002 and its Form 1099 for 2001 showing commission totals were not relevant because the beneficiary's position of office manager was not one that was being compensated by commissions.

On appeal, counsel submits a copy of the sole proprietor's Form 2688, Application for Additional Extension of Time to File U.S. Individual Income Tax Return for the year 2001, copies of the petitioner's bank statements for the period between May 7, 2002 through September 5, 2002, and several copies of business correspondence from Farmer's Insurance Group indicating that the petitioner's owner is a high producing insurance agent.

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).

Here, counsel initially asserts that because the petitioner is a sole proprietorship, then the sole proprietor can adjust expenditure deductions and pay the beneficiary's salary out of the gross income of the business. This may be a persuasive argument on a limited prospective basis, but the tax return submitted shows that the business had a myriad of expenses as reflected on Schedule C. Its net income was $49,122 and was carried over to page 1 of the sole proprietor's individual tax return. In reviewing a sole proprietor's ability to pay the proffered wage, all income and expenses may be evaluated because a sole proprietorship is not a legally separate entity from its owner. Therefore, the sole proprietor's income, liabilities, and personal assets may be considered when looking at the petitioner's ability to pay the beneficiary's proffered salary. In this case, in the year 2000, neither the sole proprietor's business income, nor her adjusted gross income was sufficient to

cover the proffered wage. Additionally, rather than submit an audited (or even reviewed) financial statement for 2001, pursuant to 8 C.F.R. 204.5(g)(2), the petitioner's sole proprietor elected to submit copies of commission income which represents only a partial picture of the petitioner's earnings. It doesn't reflect the expenses incurred necessary to generate such earnings.

Of more interest, and consistent with counsel's assertion, it is noted that the petitioner's bank balances for the four months of 2002 showed an average balance of approximately $12,000. It is noted, however, that this represents only four months out of over twelve months that had elapsed since the priority date of April 24, 2001. The petitioner must establish an ongoing ability to pay the proffered salary as of the priority date.

Counsel also suggests that the petitioner's financial status is similar to the circumstances set forth in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). That case is applicable is some cases where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. That case 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. Contrary to counsel's argument, no unusual circumstances have been shown to exist in this case that are comparable to those described in *Sonegawa.* The owner's status as a high producing insurance agent and limited financial documentation submitted for periods preceding and subsequent to 2001 do not sufficiently support a *Sonegawa* analogy. Nor has it been shown that 2001 was an uncharacteristically unprofitable year for the petitioner.

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

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.