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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 Street N.W.
Washington, D.C. 20536

[redacted]

MAR 1 2004

File: EAC 01 086 52534 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]

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 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 Hispanic news journal. It sought to employ the beneficiary permanently in the United States as a personal assistant/secretary. 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 appeal, counsel submits additional information and asserts that the petitioner's evidence establishes its ability to pay the beneficiary's proffered wage.

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 Service.

The disputed issue on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. This eligibility must be demonstrated as of the petition's priority date. 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 October 20, 2000. The beneficiary's salary as stated on the approved labor certification is $14.85 per hour or $27,027 annually (based on a 35 hour week).

The record indicates that the petitioner is organized as a corporation. As evidence of its ability to pay the beneficiary's offered salary of $27,027, it initially submitted copies of its balance sheets for the periods ending January 31, 1999 and January 31, 2000, and copies of profit and loss statements for the periods from February 1998 to January 1999 and from February 1999 through January 2000. Both

balance sheets show that the petitioner's total current liabilities exceeded its total current assets. There is no indication, however, that these statements had been reviewed or audited, and as such, have little evidentiary value as they are based solely on the representations of the petitioner's management.

In order to gather more information pertinent to the petitioner's ability to pay the proffered salary, the director issued a request for further evidence on August 8, 2001. The director instructed the petitioner to submit evidence of its continuing ability to pay the beneficiary's proposed salary as of the visa petition's priority date of October 20, 2000. The director specifically requested a copy of the petitioner's 2000 federal income tax return.

In response, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for the year 2000. It covers a fiscal year running from February 1, 2000 until January 31, 2001. This tax return reflects that the petitioner declared taxable income before net operating loss deduction (NOL) and special deductions of -$11,874. Schedule L of the return indicates that the petitioner had $236,579 in current assets and $256,142 in current liabilities, resulting in -$19,563 in net current assets.

On August 2, 2002, the director denied the petition, citing the petitioner's figures reflected on its 2000 corporate tax return. We concur with the director's decision. Neither the loss shown as taxable income, nor the negative net current assets figure was sufficient to cover the beneficiary's proposed salary.

On appeal, counsel submits a letter from the petitioner's secretary/treasurer, a copy of the petitioner's 2001 corporate tax return, a partial copy of the 1999 tax return, and a copy of a line of credit agreement from Wachovia Bank in support of her assertion that the petitioner has established its ability to pay the beneficiary's proposed salary of $27,027.

The petitioner's Form 1120 corporate tax return for the fiscal year 2001 shows that the petitioner declared a taxable income before NOL and special deductions of $22,335. Schedule L reflects that the petitioner had $1,427 in net current assets. Neither sum covers the beneficiary's proposed salary of $27,027. The petitioner's 1999 tax return also shows -$8,153 in taxable income before NOL and special deductions. Schedule L was not provided with this tax return.

The petitioner's commercial line of credit agreement with Wachovia bank is emphasized as a source of working capital. While this may be an accurate description of its positive function for the petitioner as described in the secretary/treasurer's letter, it also represents a liability that must be repaid according to the terms of the agreement. 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).

Counsel and the secretary/treasurer both urge the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh,* 875 F.2nd 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the proposed beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a personal assistant/secretary will significantly increase profits for a news journal. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

In the context of the financial information contained in the record, counsel also argues 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. 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.

In this case, financial information for three years has been submitted. Two out of the three years reflect negative taxable income figures. The explanation cited by the petitioner's secretary/treasurer is that it is typical for a company owned by an individual to payout sums to the owner to avoid taxation. It remains that the petitioner has not established 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.

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.