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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, DC 20536

[redacted]

File: WAC 02 176 52153 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Other Worker pursuant to § 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 on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sewing machine operator, semiautomatic. 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 submits a statement and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are not available.

8 C.F.R. § 204.5(g)(2) states:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 13, 1998. The

proffered wage as stated on the Form ETA 750 is $7.70 per hour, which equals $16,016 per year. An entry on Part B of the Form ETA 750 states that the petitioner employed the beneficiary from March of 1993 to "present."

The petition, which was filed on May 3, 2002, states that the petitioner then employed 40 workers. With the petition counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner declared a loss of $19,215 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $2,133 and no current liabilities, which equals net current assets of $2,133.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 29, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence must be copies of annual reports, federal tax returns, or audited financial statements. The Service Center further stated that the evidence must cover each year beginning in 1998.

The Service Center also noted that the petitioner claimed to be employing the beneficiary and requested copies of the Form W-2 Wage and Tax Statements showing wages paid to the beneficiary beginning in 1998.

In response, counsel submitted copies of 1998, 1999, 2000, and 2001 W-2 forms. Those forms show that the petitioner paid the beneficiary $5,684.25, $11,854.76, $12,872.95, and $11,539.64 during those years, respectively. The petitioner also submitted unaudited financial statements for 1998, 1999, 2000, and 2001.

The director determined that the evidence submitted did not credibly establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on December 4, 2002, denied the petition.

On appeal, counsel submitted the petitioner's 1998 and 1999 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a loss of $100,414 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had $12,213 in current assets and no current liabilities, which yields $12,213 in net current assets.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $149,372 during that year. The corresponding Schedule L shows

that at the end of that year the petitioner had current assets of $0 and current liabilities of $0, which yields net current assets of $0.

Counsel asserted that the officer who issued the decision of denial is not an accountant, and is incompetent to render a decision on matters pertinent to the petitioner's ability to pay the proffered wage. Counsel submitted no evidence pertinent to either of those assertions. Counsel further stated that the petitioner, as recently as June 2001, employed more than 100 employees, but reduced its work force by almost 50% due to economic pressures. Counsel provided no evidence in support of that assertion.

The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence that the petitioner ever employed 100 or more employees. Further, this office notes that counsel's statement that the petitioner "reduced its work force by almost 50% from the over 100 employees it employed in the previous years" appears to be inconsistent with the statement on the petition, that the petitioner employs only 40 employees.

In response to counsel's assertions pertinent to the qualifications of the officer who decided this case, this office notes that counsel would be well advised to restrict her argument to whether the decision was correct on the law and on the facts. The inquiry of this office begins and ends there. Unless counsel can show that the decision is incorrect, whether the officer who issued the decision is an accountant is irrelevant to this appeal.

In support of her assertion that the petitioner's business has suffered from outside economic pressures, counsel provided a report prepared by the American Textile Manufacturers Institute. That report, entitled *Crisis in U.S. Textiles*, details the institute's view of the impact of Asian currency devaluation on the domestic textile industry.

Initially, this office notes that the petitioner is not a textile plant, but a garment manufacturer. Counsel offered no evidence that the importation of inexpensive foreign textiles has damaged the petitioner's business. Even assuming that it has, the petitioner is not automatically excused from demonstrating the ability to pay the proffered wage.

If counsel meant to argue that the petitioner's losses were uncharacteristic, then counsel was obliged to demonstrate the truth of that assertion.

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the petitioner's losses and poor performance are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses and poor performance might be overlooked in determining ability to pay the proffered wage. Here, counsel has not demonstrated that the petitioner has ever posted a profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Counsel also cited the petitioner's gross receipts and wage expenses as evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on those figures is misplaced.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay the proffered wage. *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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS (now CIS) should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, and audited financial statements are the preferred evidence of a petitioner's ability to pay the proffered wage. In the request for evidence issued July 29, 2002, the Service Center, consistent with 8 C.F.R. § 204.5(g)(2), requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements as evidence of its ability to pay the proffered wage.

Counsel submitted no copies of annual reports and no audited financial statements. Counsel submitted the petitioner's tax return for 1998, 1999, and 2000. Counsel submitted unaudited financial statements for 1998, 1999, 2000, and 2001.

8 C.F.R. § 204.5(g)(2) states that, in appropriate cases, additional evidence, other than copies of annual reports, federal tax returns, or audited financial statements, may be submitted by the petitioner or requested by the Service. Counsel provided no reason to believe, however, that this is an appropriate case in which to eschew preferred evidence in favor of other evidence. Further, absent evidence that an independent accountant audited the financial statements, they are the representations of the petitioner and nothing more. The petitioner's unsupported

representations are not competent evidence of its ability to pay the proffered wage. The unaudited financial statements will not be considered.

The priority date is January 13, 1998. The proffered wage is $16,016 per year. The W-2 forms submitted show that the petitioner paid the beneficiary $5,684.25, $11,854.76, and $12,872.95 during 1998, 1999, and 2000, respectively.

During 1998, the petitioner declared a loss of $100,414. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. The petitioner paid the beneficiary $5,684.25 during that year. That amount is insufficient to pay the proffered wage. The petitioner ended the year with $12,213 in net current assets. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available to it with which to pay the proffered wage during 1998. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner declared a taxable income before net operating loss deduction and special deductions of $149,372. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage the proffered wage during 1999.

During 2000, the petitioner declared a loss of $19,215. The petitioner has not shown the ability to pay any portion of the proffered wage out of its income during 2000. The 2000 W-2 form submitted shows that the petitioner paid the beneficiary $12,872.95 during that year. That amount is insufficient to pay the proffered wage. The petitioner had year-end net current assets of $2,133. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

The request for evidence in this matter was issued on July 29, 2002. In that request, the Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date, the petitioner's 2001 income tax return should have been available. The petitioner neither provided that return nor any reason for its omission. The only evidence submitted pertinent to the petitioner's income during 2001 is the unaudited 2001 financial statement, which is insufficient for reasons stated above. The petitioner also submitted a W-2 for the beneficiary showing that the petitioner paid her $11,539.94, a figure less than the proffered wage. The petitioner provided insufficient evidence of its ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.