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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 02 220 54646 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 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 on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 brief and additional evidence.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 March 14, 2001. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year.

With the petition counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on October 31, 2002, requested evidence pertinent

to that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center stipulated that the evidence should consist of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four. Finally, the Service Center requested that the petitioner provide its payroll summary, showing wages paid to all employees beginning in 2001.

In response, counsel submitted the petitioner's Form DE-6 reports for all four quarters of 2001 and the first two quarters of 2002. Those reports show that the petitioner employed the beneficiary and paid him $3,321.42 during the fourth quarter of 2001, $4,071.32 during the first quarter of 2002, and $4,141.98 during the second quarter of 2002. Those reports indicate that the petitioner did not employ the beneficiary during the first, second, or third quarters of 2001.

The petitioner did not provide the requested payroll summaries.

Counsel also provided the 2001 Form 1040 income tax return of the petitioner's owner and the owner's spouse, including Schedule C, Profit or Loss from Business (Sole Proprietorship). That return shows that the petitioner's owner and owner's spouse had no dependents during that year.

The Schedule C shows that the petitioner returned a profit of $45,169 during that year. The Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income, including all of the petitioner's profit, of $48,095.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on March 12, 2003, denied the petition. In the decision, the director noted that the petitioner's owner would be obliged to support his family with the balance of his adjusted gross income after paying the proffered wage. The director also noted that the petitioner has submitted a total of five I-140 petitions, including the instant petition, and that one of the other petitions has been approved.

Although counsel submitted a single brief pertinent to all four denied petitions, this decision pertains only to the petition for the beneficiary named above. With the appeal, counsel submitted the 2000 and 2002 Form 1040 of the petitioner's owner and the petitioner's owner's spouse. On appeal, counsel asserts that the petitioner's gross receipts should have been considered.

The petitioner's 2002 Schedule C shows that the petitioner returned a net profit of $45,908 during that year. The 2002 Form 1040 shows that the petitioner's owner and the owner's spouse had

no dependents during that year. It also shows that they declared an adjusted gross income, including the petitioner's entire profit offset by deductions, of $41,111 during that year.

Counsel further stated that the petitioner's 2002 Form DE-6 quarterly wage reports show that the petitioner has been paying the wages of all four denied beneficiaries. Counsel urged that the petitioner's wage expense is further evidence of the petitioner's ability to pay the proffered wage.

In support of the proposition that amounts actually paid to the beneficiary during the pendency of the petition may be considered in the determination of the ability to pay the proffered wage, counsel cites a non-precedent decision. Counsel asserts that the facts of that case are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. This office agrees, however, that the wages paid to the beneficiary should be considered.

Finally, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petition may be approved notwithstanding the fact that the petitioner's net profit during some years since the priority date was less than the proffered wage.

Sonegawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only 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 the 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 low profits during

2001 are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the evidence does not establish that the petitioner's low profits during 2001 were uncharacteristic. The petitioner must demonstrate the ability to pay the proffered wage during 2001.

Counsel's reliance on the petitioner's gross receipts and wage expense is inapposite. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid general 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 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 ordinary income.

The obvious exception to that rule is wages actually paid to the petitioner. If the petitioner paid the proffered wage to the beneficiary during a given year, that would establish the petitioner's ability to pay the proffered wage. The petitioner would not, then, be obliged to show the ability to pay the proffered wage an additional time. If the petitioner paid a portion of the proffered wage, then the petitioner would be obliged to show only the ability to pay the balance of the proffered wage.

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 in determining a petitioner's ability to pay a 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

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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.

tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that 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.

The petitioner, however, is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations out of his own income and assets if the petitioner's income and assets are insufficient for that purpose. Therefore, any income and assets the petitioner's owner had available to pay the proffered wage may also be considered. Ordinarily, for the owner's income and assets to be considered, the petitioner would have to provide evidence of its owner's expenses as well. If, during a given year, the petitioner's owner's income and assets were only sufficient to pay his expenses, then he would have been unable to contribute any amount toward payment of the proffered wage during that year. The petitioner can contribute from his income and assets only to the extent that they exceed the proffered wage.

In this case, however, the director observed that four additional petitions have been filed. Of those, one has been approved. The denials of the other three are on appeal. The proffered wage in each of those cases is $24,024 annually, as it is in this case. The total of the proffered wages in the instant case and the other three cases on appeal, therefore, is $96,096. The petitioner must show the ability to pay that amount.

Counsel observes that the petitioner is paying wages to the beneficiaries of the other three denied petitions. The beneficiaries of the other three denied petitions are named Ricardo Perez, Tomas Flores Vazquez, and Juan Flores Vazquez. The petitioner's 2001 Form DE-6 quarterly wage reports show that during 2001 the petitioner paid Ricardo Perez $5,526.25, paid Tomas Flores $4,755.67, and paid Juan Flores Vazquez $2,116.85. That form also shows that the petitioner paid the beneficiary $3,321.42 during that year. The sum of those four amounts is $15,720.19. Having demonstrated that it was able to pay that amount during 2001, the petitioner is obliged to demonstrate the ability to pay the remaining $80,375.81.

During 2001, the petitioner's owner declared an adjusted gross income, including the petitioner's profit, of $48,095. That amount is insufficient to pay the proffered wages of the four beneficiaries for whom the petitioner has petitioned even without considering the expenses of the petitioner's owner. The petitioner has not demonstrated that any other funds were available with which it might have paid those proffered wages.

The petitioner has not demonstrated the ability to pay the proffered wages during 2001.

The Form DE-6 Wage Reports for the first two quarters of 2002 show that the petitioner paid a total of $26,796.02 to all four denied beneficiaries during those quarters. The petitioner did not submit any evidence that it paid wages to those four beneficiaries during the last two quarters of 2002. Having demonstrated the ability to pay $26,796.02, the petitioner is obliged to demonstrate the ability to pay the remaining $69,119.98 balance of the proffered wage during that year.

During 2002, the petitioner's owner declared an adjusted gross income, including all of the petitioner's profit, of $41,111. That amount is insufficient to pay the balance of the proffered wages of the four beneficiaries for whom the petitioner has petitioned even without considering the expenses of the petitioner's owner. The petitioner has not demonstrated that any other funds were available with which it might have paid those proffered wages. The petitioner has not demonstrated the ability to pay the proffered wages during 2002.

The petitioner has not shown that it was able to pay the proffered wage of the instant beneficiary and the wages of the other three denied beneficiaries during 2001 or 2002. 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.