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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: EAC 00 244 51799 Office: VERMONT SERVICE CENTER Date: MAR 24 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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, Vermont Service Center, and the petitioner appealed to the Administrative Appeals Office (AAO), which, subsequently, dismissed the appeal. The petitioner filed a motion to reopen (MTR 1) on February 13, 2002, and the AAO affirmed the dismissal of the appeal and the denial of the petition on September 4, 2002. Again the petitioner filed a motion to reopen (MTR2) on October 17, 2002, which was rejected as an improper filing. The petitioner claimed, in resubmitting a properly constituted MTR2 on October 20, 2002, that substituted counsel (counsel) had, indeed, filed a Notice of Entry of Appearance as Attorney or Representative (Form G-28).

Although the record, as constituted, lacks any G-28 received earlier than October 20, 2002, the motion in MTR2 will be granted in the discretion of the AAO, and, again, the petition will be denied. After stating the case, the discussion will resume with the petitioner's burden to establish the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel bases MTR2, in part, on errors of law, said to be made in the application of several authorities. 8 C.F.R. § 103.5(b)(3). Also, counsel urges that Citizenship and Immigration Services (CIS), formerly the Service or the INS, was mistaken as to specified financial data and must consider an analysis related to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). 8 C.F.R. § 103.5(b)(2). In this case, the AAO will exercise its discretion to reopen and reconsider, even though the filing of MTR2 was demonstrably late. 8 C.F.R. § 103.5(a)(1)(i).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 petition'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. The petition's priority date in this instance is January 12, 1998. The beneficiary's salary as stated on the labor certification is $13.75 per hour or $28,600 per year.

Former counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a response to a request for evidence (RFE) dated November 25, 2000, the petitioner provided its 1998 Form 1120, U.S. Corporation Income Tax Return. It reported taxable income before net operating loss deduction and special deductions of $10,752, less than the proffered wage. Further, the director calculated, from Schedule L, that current assets of $14,560 minus current liabilities of $22,236 left a deficit of ($7,676) of net current assets, less than the proffered wage. The beneficiary's 1999 Wage and Tax Statement (Form W-2) showed wages from the petitioner of $9,200, 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 at the priority date and denied the petition in a decision dated May 1, 2001. Former counsel responded with an appeal on May 29, 2001 and a brief, dated June 27, 2001.

On appeal, the corporate vice-President supplied "the actual pay structure and nature of compensation for the Petitioner." This analysis evaluated eleven (11) part-time and lower paid workers' wages for 1998. Computations resulted in a remainder for the beneficiary of either $5,270 or $6,518, less than the proffered wage. Former counsel argued, without authority, that gross receipts required the approval of the petition.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Nonetheless, the AAO considered the representations as an offer to prove that the employment of the beneficiary might eliminate part time workers or sub-contractors. The evidence did not name workers for replacement or verify their full-time employment. Sums already paid to others are not available to prove the ability to pay the proffered to the beneficiary at the priority date of the petition and continuing to the present. Otherwise, the brief disclosed only assets already stated in tax returns and financial statements. Consequently, the AAO dismissed the appeal in a decision issued January 11, 2002.

Former counsel responded with a Motion to Reopen (MTR1), dated February 12, 2002, and a brief. It restated that the elimination of sub-contractors might justify the proffered wage of the beneficiary. Further, MTR1 postulated that cash flow best indicates the viability of a small business, not year-end data contained in tax returns. Finally, former counsel conceded that these suppositions required substantiation. None was forthcoming.

The AAO reviewed the 1998 Form 1120 taxable income before net operating loss deduction and special deductions and found that it was $10,752, less than the proffered wage. The AAO noted the absence of additional evidence, affirmed its prior decision, and denied the petition in a decision issued September 4, 2002.

Substituted counsel (counsel) submits a motion to reconsider (MTR2), dated October 2, 2002. Counsel challenges the authority for the proposition that the petitioner must prove the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. Regulations, however, affirm it. *See* 8 C.F.R. § 204.5(g)(2).

Counsel asserts that CIS may base its approval on gross receipts. On the contrary, in determining the petitioner's ability to pay the proffered wage, Citizenship CIS will examine the net income figure 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 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); *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.*, 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Counsel, in the alternative, depicts retained earnings of $26,433 on Schedule M of the 1998 Form 1120 as a current asset available to pay the proffered wage. Counsel's definition of retained earnings, however, does not prove an asset currently available to pay the proffered wage.

The definition in the record states:

> **Retained Earnings** The portion of net income retained for reinvestment in the company rather than being paid in dividends to shareholders. But remember, retained earnings of [$X] doesn't [sic] mean the company has [$X] sitting around in cash. Instead it means that over the years the company has held back [$X] in profits which, in all likelihood, it invested in new factories, trucks and so forth in furtherance of its business. So retained earnings are really just another stockholder claim on assets, rather than any specific asset in and of themselves.

The record reflects no action of the stockholders appropriating the retained earnings. The petitioner offers no proof of the availability of retained earnings. The examples in the definition do not include current assets. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Net current assets reflect the preferred measure of assets currently available to pay the debts of the corporate petitioner. For 1998, they were a deficit ($7,676), as noted above. Counsel proposes that the petitioner might pay the proffered wage from its "capital," but offers no authority to the effect that the dissipation of net worth justifies the ability to pay the

proffered wage.

Counsel further amasses gross receipts, wages paid, and taxable income for 1998-2000. Counsel deduces that their magnitude justifies the AAO to approve the petition, but offers no precedent for that. The petitioner has failed to establish its ability to pay the proffered wage from 1998-2000, whether out of its taxable income before net operating loss deduction and special deductions or out of its net current assets.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel mistakenly relies on *Matter of Sonegawa, supra*. That case involved a petition 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 and routinely earned a gross annual income of about $100,000. 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. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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 couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner since its founding in 1992.

After a review of the federal tax returns, the briefs, MTR1, and MTR2, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 motion to reopen is granted, prior decisions of the AAO and the director are affirmed, and the petition is denied.