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U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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 of the Administrative Appeals Office 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.

Helen E. Crawford for
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory firm. It seeks to employ the beneficiary permanently in the United States as a dental ceramist. 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.

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 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. 8 C.F.R. 204.5(d). The petition's priority date in this instance is December 28, 2000. The beneficiary's salary as stated on the labor certification is $19.56 per hour or $40,684.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 31, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the U.S. company's original computer printouts from the Internal Revenue Service (IRS) for 2000 and 2001 and quarterly wage reports (Form DE-6) accepted for the last four (4) quarters in regard to two (2) employees, acknowledged in the Immigrant Petition for Alien Worker (I-140), with a description of duties.

Counsel submitted the petitioner's 2000 and 2001 Form 1040, U.S. Individual Income Tax Returns and IRS computer printouts. The federal tax returns reflected adjusted gross income (AGI) of $27,395 for 2000 and $31,925 for 2001, less than the proffered wage. Counsel contended that Schedule C of the federal tax return included payments for commissions and fees to outside labs (contract expenses) and that the hiring of the beneficiary would eliminate contract expenses and add them to income.

The petitioner provided statements of Miscellaneous Income (Form 1099) for three (3) recipients of contract expenses. Their sums were $61,733 for 2000 and $58,591 for 2001. Counsel's response and the petitioner's letter of September 30, 2002, with the filing of the I-140, stated lesser amounts, being $50,628 in 2000 and $46,089 in 2001. The response explained neither the discrepancy with the I-140 in the number of employees, nor the conflict between Forms 1099 and the response in the amount of contract expenses.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Nonetheless, counsel added in contract expenses and created constructive income of $86,592 in 2000 and $85,295 in 2001, equal to or greater than the proffered wage. Counsel stated that all the contract expenses are services that the beneficiary might perform. The record did not, however, verify these workers' full-time employment and provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there was no evidence that the position of the named workers involve the same duties as those set forth in the Form ETA 750. The petitioner did not document the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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).

Counsel further responded to the RFE with Forms DE-6 for 2002. Instead of two (2) or three (3) employees, as previously acknowledged, each DE-6 named five (5) or six (6) employees. Counsel described one who makes dentures and other dental prostheses using porcelain paste (assistant ceramist) and another who makes metal and wax frameworks of dentures and other dental prostheses (assistant wax-metal technician).

The director considered that Citizenship and Immigration Services (CIS), formerly the Service or INS, must ascertain whether the AGI of sole proprietors suffices to maintain their family, after paying the proffered wage to the beneficiary. The director rejected the addition of contract expenses to create constructive income. Consequently, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief, the petitioner's 2002 federal tax return, 2002 Forms 1099, and 2001 IRS instructions for Form 4562, Depreciation and Amortization. Counsel points out that AGI for 2002, $47,423, was equal to, or greater than, the proffered wage.

Counsel contends on appeal that, for 2000 and 2001, the director should add amounts of depreciation under the modified accelerated cost recovery system (MACRS) to net income to arrive at the ability to pay the proffered wage. Counsel distinguishes *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989) since it refused to add back straight-line depreciation only. Counsel offers IRS Form 4562 as an authority for this distinction. Form 4562 does not support the reasoning that MACRS depreciation is "**purely** for **tax purposes**" and that, as such, CIS must add it to net income.

No published citation supports any of these contentions. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel renews the argument, for 2002, to add in contract expenses, said to be $68,880, to net income. Forms 1099, issued to five (5) recipients in 2002, state, instead, a total of $74,532.50. As with 2000 and 2001, no objective evidence identifies any services of the contract expenses or reconciles the differences in accounts.

In contrast to the claim of two (2) employees on the I-140, the response to the RFE acknowledges five (5) or six (6) employees. Further, the Form ETA 750 authorizes the hiring of a dental ceramist, and the I-140 reveals that the position is not new and that the beneficiary will replace an existing worker. Yet, the response to the RFE

acknowledges an assistant dental ceramist and an assistant wax-metal technician. It appears that the position of dental ceramist is, indeed, a new one, since the record of existing employees and contract expenses shows no dental ceramist. As with the response to the RFE, the AAO cannot determine, from the petitioner's evidence, which funds, if any, are already being expended on dental ceramist's services.

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).

Forms DE-6 suddenly and surprisingly asserted five (5) or six (6) employees, rather than two (2), including an assistant dental ceramist, an assistant wax-metal technician, a salesperson, office manager and driver. Contract expenses did not describe services for a dental ceramist and did not support the qualifications required by the Form ETA 750.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Form ETA 750, in Block 14, specifies that this petition involves job experience for a dental technician. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers. CIS cannot speculate as to which positions and contract expenses conform to the Form ETA 750 and, therefore, justify the AAO to add to AGI to prove the ability to pay the proffered wage. The record does not identify any position of a dental ceramist among the employees, whether regular or contract expense.

Ultimately, counsel's brief on appeal concedes that the petitioner is adding a new position:

> The fact that the Petitioner is seeking to employee anther [sic] worker is in itself evidence that the Petitioner plans to continue in the business.

For this additional reason, the AAO cannot assume that contract expenses, along with salaries for six (6) existing positions, represent funds available to pay the proffered wage at the priority date. Funds, once applied to other purposes, are not available to pay for yet another new position for the beneficiary.

Counsel notes the petitioner's absence of debt, frames the issue as the petitioner's intention to stay in business, and summarizes the petitioner's expectations of the continued growth of its business. Counsel sets forth the persistent increase from 2000 to 2002 of the petitioner's gross sales, gross income, AGI, wages paid, and contract expenses. Counsel, elsewhere, concedes that judicial decisions require that CIS, usually, look to the tax returns and the AGI.

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. 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. v. Sava*, 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. 623 F.Supp. at 1084. 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. v. Sava*, 632 F.Supp. at 1054.

Counsel contends that the hiring of the beneficiary creates the prospects of growth. Counsel urges that both expectations of continued growth and the intention to stay in business justify the ability to pay the proffered wage. This approach runs counter to the well-established rule in judicial and administrative decisions. Counsel would excuse it because the AAO must weigh expectations and intention to avoid the evils of standardized and mechanical adjudicative process and of boilerplate process.

The record must support the ability to pay the proffered wage with particular reference to the priority date. 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).

The petitioner does not explain, in view of the deficiency of AGI, how it plans to pay five (5) or six (6) employees, suddenly appearing on Form DE-6, rather than two (2), and still establish the ability to pay the beneficiary at the priority date. Expectations and intention are of little evidentiary value to overcome the sudden and tangible appearance of several more employees.

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel cites on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), but this reliance is misplaced. *Sonegawa* relates to 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. The petitioner's Form I-140 reveals that it was in business about one (1) year before the priority date, and its adjusted gross income was less than the proffered wage.

During the year in which the petition was filed in *Sonegawa*, 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 2000 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, Forms DE-6, Forms 1099, IRS Form 4562, I-140, response to the RFE, and briefs of counsel, 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 appeal is dismissed.