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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

MAR 3 1 2004

File: WAC-02-253-53042 Office: California Service Center Date:

IN RE: Petitioner: [redacted]

Beneficiary:

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

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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 wholesale florist. It seeks to employ the beneficiary permanently in the United States as a bookkeeper/accountant. 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.

On appeal, counsel argues that he the petitioner has the ability to pay the proffered wage.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is October 6, 1999. The beneficiary's salary as stated on the labor certification is $2,300 per month or $27,600 per year.

Counsel did not submit any evidence of the petitioner's ability to pay with the petition.

Because the petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 2000 and 2001.

In response to the RFE, counsel stated that he was submitting tax documentation for the years 200 and 2001. However, a review of the

record reveals that counsel submitted two copies of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. The record as presently constituted does not contain any tax records for the year 2000. The tax return for 2001 reflected gross receipts of $1,076,835; gross profit of $203,518; compensation of officers of $48,000; salaries and wages paid of $57,564; and a taxable income before net operating loss deduction and special deductions of - $72,944. Schedule L reveals assets of $183,729, liabilities of $264,682, and total current assets of - $80,753.

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 states that the petitioner's 1999 tax documents, being submitted on appeal, reflect the ability to pay the proffered wage at the time of filing. Counsel furthers states that sufficient funds in his bank account for 1999 and 2001 to pay the proffered wage. Counsel cites *Matter of Sonegawa,* 12 I & N Dec. 612 (Reg. comm. 1967), as applicable precedent that the petitioner has established itself in the marketplace and therefore, has the ability to pay the proffered wage.

On appeal, counsel submits a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1999 reflected gross receipts of $884,295; gross profit of $162,720; compensation of officers of $33,000; salaries and wages paid of $45,223; and a taxable income before net operating loss deduction and special deductions of - $18,377. Schedule L reveals current assets of $81,625, current liabilities of $65,311, and total current assets of $16,914. In addition, counsel submitted the petitioner's consolidated Scudder Investment statements for 1999 and the period January 1, 2001 through September 30, 2001. The statements reflected a total of $71,934.02 in Money Market Funds and U.S. Treasury Money Fund during 1999 and $36,710.49 during the aforementioned period in 2001.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M,* 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited,* 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel,* 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). Therefore, the petitioning owner's investment funds may not be considered as funds available to pay the beneficiary's salary.

Counsel's reliance on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) 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. 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 1999, 2000, and 2001 were uncharacteristically unprofitable years for the petitioner.

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, not gross receipts, 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. 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 CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Additionally, although requested to do so, the petitioner has submitted no documentary evidence regarding the proffered wage during the year 2000. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's Form 1120 for calendar years 1999 and 2001 shows an ordinary income of - $18,377 - $72,944, respectively. The petitioner could not pay a proffered salary of $27,600 out of either figure. The petitioner also could not pay the proffered wage out of its current net assets for 1999 and 2001, which are $16,914 and - $80,753, respectively.

After a review of the federal tax returns, 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.