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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

File: [Redacted]  
SRC 01 150 57090

Office: TEXAS SERVICE CENTER

Date: DEC 26 2002

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)

IN BEHALF OF PETITIONER:

[Redacted]

**PUBLIC COPY**

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a business consulting firm. It seeks to employ the beneficiary permanently in the United States as a project manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of 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 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is April 14, 2000. The beneficiary's salary as stated on the labor certification is \$35,500 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On January 8, 2002, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of April 14, 2000.

In response, counsel submitted copies of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return for the fiscal year September 1, 1999 to August 31, 2000. It reflected a taxable income before net operating loss deduction and special deductions of -\$115, a loss.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a brief and evidence pertaining to several objections. They are not persuasive.

Counsel states on appeal,

... the Denial concluded that IBS lacked the financial ability to pay Ms. DeGalassus the proffered wage because its net income figure would not support her salary. However, the Denial failed to consider that Ms. DeGalassus has been working for IBS in valid H-1B status since 1997 and is already receiving more than the proffered wage, again as fully supported by the attached documentation.

Forms W-2 for 1997-2001 show compensation less than the proffered wage. Counsel concedes that the petitioner "... had raised her salary to \$36,000, exceeding the proffered wage for the Project Manager position, after the labor certification application had been filed." (emphasis added). The petitioner must show that it had the ability to pay the proffered wage on the priority date of the petition. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I & N Dec. 45, 49 (Comm. 1971).

Counsel asserts that the use of a company car before the priority date makes up the deficit between previous compensation and the proffered wage on the priority date of the petition. Counsel neither documents the company car nor cites authority for its use in determining compensation under this labor certification. 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 considers as controlling an unpublished decision of the Administrative Appeals Office (AAO). Counsel says that the AAO approved a nonimmigrant H1B petition when the employer was paying the proffered wage "currently." Counsel does not specify how it is apposite to the ability to pay in this third preference immigrant petition.

Counsel objects because the director's decision adopted the petitioner's claim, viz., that the petitioner had three (3) employees. On appeal, counsel documents only two (2), but, further, explains that the business has always had two (2) or three (3), with, sometimes, an unpaid volunteer. The director's decision rested on the inability to pay the proffered wage, unrelated to the number of employees.

Exhibits of the brief include a letter and bank statements for September 1, 1999 to March 31, 2002 from SunTrust to show the petitioner's cash flow and ability to pay. Even though the petitioner submitted commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. 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).

Counsel offers several media notices, the petitioner's registration as a Georgia Corporation, and its client list with prominent corporate names, and several marketing agreements and invoices. Counsel interprets these to attest to the petitioner's proven financial strength, continuing success, and international reputation for 20 years of global operations as one of the premier international business consultancy firms for companies and governmental agencies in the U.S., France, and Canada.

In support, counsel cites Matter of Sonogawa, 12 I & N Dec. 612:

... even if a petitioning employer has a slightly bad year, that can still be overcome to show financial ability to pay if the company can demonstrate that it has been in business for several years, that the employer has been making a living and employing other persons without any evidence of financial difficulties, that its financial downturn was temporary in nature and that it has well established clients....

Matter of Sonogawa, *supra*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in Sonogawa 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 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 Sonogawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in Sonogawa, nor has it been established that fiscal year 1999 was an uncharacteristically unprofitable year for the petitioner. Several media submissions and invoices and a marketing agreement are in French, and none has the requisite translation. 8 C.F.R. 103.2(b)(3). Media submissions largely lack any date or attribution. The evidence does not establish the petitioner as a premier business consulting firm at the pinnacle envisaged by Sonogawa.

The petitioner could not pay the proffered wage from taxable income. The petitioner offered no history of high gross receipts and taxable income to justify a finding that the 1999 fiscal year return was uncharacteristic.

Accordingly, 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 to present.

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.