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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

File: [REDACTED]
WAC 99 255 50263

Office: CALIFORNIA SERVICE CENTER Date:

AUG 27 2003

IN RE: Petitioner: [REDACTED]
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:

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with Notice of Intent to Revoke (NITR) the approval of the petition and Notice of Revocation of the petition. The director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom tailoring firm. It seeks to employ the beneficiary permanently in the United States as a custom tailor. 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is February 28, 1996. The beneficiary's salary as stated

on the labor certification is \$12.50 per hour or \$26,000 per year.

Counsel initially submitted insufficient evidence, and the record contains three requests for evidence, dated July 26, 2001 (RFE 1), December 7, 2001 (RFE 2), and May 3, 2002, the NITR. RFE 1 required federal tax returns for 1998-2000 of the entity (S & A Sewing, herein the petitioner), which filed the I-140 received on September 27, 1999. RFE 1 exacted, further to the ability to pay the proffered wage, the petitioner's quarterly wage statements (Form DE-6), Wage and Tax Statement (Form W-2) and pay stubs for wages paid to the beneficiary, and a recent offer of employment from the petitioner to the beneficiary, with certain specifics. RFE 1 included also a demand for Medical Examination (Form I-693).

Several parties, in response to RFE 1, RFE 2, and the NITR, claimed sole proprietorship interest in the petitioner. The final digits of the various social security numbers and initial ones of employer identification numbers (EIN) are used for abbreviations.

Single filer 0006 submitted, in the petitioner's name, the 1996 Form 1040, U.S. Individual Income Tax Return. It reported adjusted gross income (AGI) of \$20,415, less than the proffered wage. In response to the NITR, counsel set forth the 1996 Form 1040 of joint filers 5678, but the name, address, and EIN in Schedule C did not correspond to the petitioner's. Furthermore, the AGI was \$18,972, less than the proffered wage.

In response to RFE 2, the petitioner submitted a paper, said to document a merger of the predecessor business, 0006, and a successor, 5678. This merger fragment omitted any pages with evidence of its filing, began with "Article 2. Merger," and was, incomprehensibly, dated "10/11/200."

The director considered the AGI set forth in each tax return and counsel's contention that gross income established the ability to pay the proffered wage. The director determined that the approval of the petition was in error, that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and revoked the approval of the petition in the Notice of Revocation, dated June 6, 2002.

On appeal, counsel points to no federal tax return showing AGI equal to, or greater than, the proffered wage. Rather, counsel reasons at length that Citizenship and Immigration Services (CIS) must base the ability to pay the proffered wage on gross income rather than taxable income. The argument is not persuasive.

In determining the petitioner's ability to pay the proffered wage, CIS (formerly the Service or INS) 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, next contends [exhibit references omitted] that:

The income tax returns of the successor in interest, [5678], reflect a gross income of \$127,975 for 1996; \$143,899 for 1997; \$170,972 for 1998; \$119,307 for 1999 and \$97,488 for 2000. However, the petitioner [sic] is submitting the Profit and Loss Statement for 2001 which indicates the gross profit for 2001 is \$124,495.

The unaudited financial statement for 2001 does not pertain to the petitioner, as stated, but to 5678. The NITR explicitly requested Form 1040 for 2001. Instead, counsel offered unaudited financial statements, as proof of the ability to pay the proffered wage. They are of little evidentiary value, being based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel contends that the tax returns of the successor in interest may be used to prove the ability to pay for 1996 to 2000, years in which 5678 has established no interest as a successor. This status requires documentary evidence that 5678 has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the prospective petitioner is doing business at the same location as the predecessor does not establish that the prospective petitioner is a successor in interest. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the

predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

RFE 2 explicitly requested evidence of the merger of 0006 and 5678. In response, the merger fragment lacks any sensible date. It bears no evidence of ever having been effected by filing with the appropriate repository of the State of California. It establishes no status as a successor at the priority date or continuing until the beneficiary obtains lawful permanent residence.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. It 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 *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 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, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 1996-2000 were uncharacteristically unprofitable years for the petitioner.

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 her reputation would increase the number of customers.

The director required, in particular, the federal tax return for 2001 and evidence of the status as a successor in interest of 5678. Their absence creates a presumption of ineligibility.

8 C.F.R. § 103.2 (b) states in part:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

(2) Submitting secondary evidence and affidavits - (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

For this additional reason, the petition must be revoked. Counsel cites no authority for the proposition that the petition must be approved because the beneficiary and her family relied to their detriment on the erroneous approval of the petition. The director may revoke any petition for good and sufficient cause, such as an error in the initial approval. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

After a review of the federal tax returns, briefs, merger fragment, and the documents, 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.