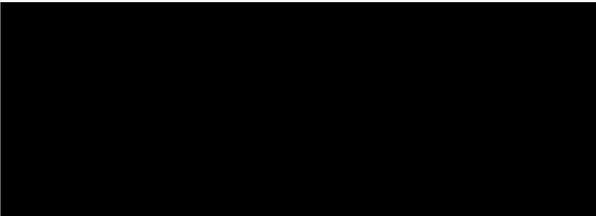


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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



FILE: WAC-02-129-50325 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2004

IN RE: Petitioner: [Redacted]  
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:



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prevent clearly unwarranted  
invasion of personal privacy

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.

*Robert P. Wiemann*  
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 law office. It seeks to employ the beneficiary permanently in the United States as a senior administrative assistant. 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this matter turns, in part, 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 September 1, 1998. The beneficiary's salary as stated on the labor certification is \$4,929.60 per month or \$59,155.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 25, 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 acknowledged receipt of the petitioner's U.S. federal tax returns for 1998 through 2000, but said that the returns indicated that the petitioner does not have the ability to pay the beneficiary's proffered wage, since the returns showed neither ordinary income nor net current assets in any of those years sufficient to pay the beneficiary's proffered wage.

In response to the RFE the petitioner submitted a letter dated July 8, 2002 accompanied by a letter from a certified public accountant and supporting documents. The documents from the CPA included an unaudited financial statement for the petitioner.

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 continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence, consisting of copies of W-3 transmittal forms of the petitioner for the years 1998 through 2001, W-2 forms for all employees of the petitioner for the years 1998 through 2001, a copy of the petitioner's Form 1120S U.S. federal tax return for an S corporation for 2001, and a

bank statement dated August 20, 2002 from Wells Fargo Bank for a business checking account of the petitioner. All of this evidence is submitted for the first time on appeal.

Counsel states on appeal that the beneficiary will be replacing a current employee and that the salary amounts received by that employee should be taken into account when calculating the increased cost to the petitioner of hiring the beneficiary at the proffered wage. Counsel states that the evidence establishes the ability of the petitioner to pay the amounts needed to raise the salary level for the position up to the proffered wage during the relevant time period.

The AAO will first consider the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted on appeal will then be considered.

The director correctly summarized the figures for ordinary income as shown on the Form 1120S U.S. income tax returns for an S corporation submitted by the petitioner. The ordinary income figures were \$16,463 for 1998, -\$3,037 for 1999, and -\$436 for 2000. The director also calculated the petitioner's net current assets based on the Schedule L's submitted with each return. The director's calculations of net current assets were correct for 1998 and for 2000. However, the director incorrectly stated net current assets for the end of 1999 as \$8,289, failing to subtract the amount of \$1,729 for "other current liabilities" shown on Line 18 of the schedule L for 1999. This error did not significantly affect the director's analysis. The correct calculations of net current assets yield the figures of \$35,241 for the end of 1998, \$6,560 for the end of 1999, and \$2,646 for the end of 2000.

The director found that the figures for ordinary income and for net current assets for each of the years in question were less than the proffered wage of \$59,155.20. The director was correct in this conclusion.

The director found that the financial information submitted in evidence was unaudited. The director did not rely on that information, and the director was correct in not doing so, since the regulation at 8 C.F.R. § 204.5(g)(2) mentions audited financial statements as acceptable evidence, but not unaudited financial statements.

The letter in evidence from a certified public accountant states that the beneficiary's wage could have been paid from amounts shown on each return for compensation to the petitioner's owner. On the returns for 1998 and 1999 those amounts were shown on line seven as compensation of officers. On the return for 2000 line seven shows no amounts paid to officers, but the payments to the owner are apparently included on line eight for salaries and wages.

The CPA's letter uses inaccurate language in referring to the petitioner's "taxable income." The petitioner is an S corporation, and as such pays no taxes on its income. Taxes on the income of S corporations are paid by the shareholders, in proportion to their shareholdings. The correct term in describing the income of an S corporation after deductions is "ordinary income."

The CPA's letter includes assertions that the ordinary income of the petitioner would have been sufficient to pay the proffered wage for the years 1998, 1999, 2000 and 2001 had not salary payments been made to the owner of the petitioner. According to the CPA's letter, the salary payments to the owner were \$63,000 in 1998, \$71,450 in 1999, \$67,657 in 2000 and \$68,024 in 2001. The petitioner is a law office bearing the name of the owner and no other person's name. The owner appears to have been working as the petitioner's only lawyer during the relevant time period. The record lacks any evidence that the owner would have been willing to work without compensation during that period. The director was therefore correct in rejecting the suggestion that compensation paid to the owner should be considered as a resource available to pay the proffered wage to the beneficiary.

Counsel on appeal asserts that the petitioner's financial documents show a history of consistent increases in profits, business and employment which are sufficient to establish the continuing ability to pay the proffered wage, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, 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 the years 1998 through 2000 were ones of uncharacteristically low profits for the petitioner.

For the foregoing reasons, the decision of the director was correct, based on the evidence in the record before the director.

The AAO will next examine the evidence submitted on appeal. That evidence consists of copies of W-3 Transmittal of Wage and Tax Statements of the petitioner for the years 1998 through 2001, W-2 forms for all employees of the petitioner for the years 1998 through 2001, a copy of the petitioner's Form 1120S U.S. federal tax return for an S corporation for 2001, and a bank statement dated August 20, 2002 from Wells Fargo Bank for a business checking account of the petitioner.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the petitioner was put on notice of the need for evidence on its ability to pay the proffered wage by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above.

In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the Administrative Appeals Office and its predecessor agencies, including *Matter of Sonogawa*, *supra*.

Moreover, in the instant case, the petitioner was put on notice by the director in the RFE dated April 25, 2002 that the evidence which it submitted with its I-140 petition was insufficient concerning the petitioner's ability to pay the proffered wage. The RFE mentioned that the evidence in the tax returns for 1998 through 2002 indicated that the petitioner lacked the ability to pay the proffered wage during those years.

The RFE did not mention any of the newly-submitted documents by name or category. But the director would have had no way of knowing of the existence or the relevance of specific documents prior to receiving them as evidentiary submissions. Therefore the fact that the RFE did not mention by name certain documents or types of documents, such as W-2 forms or bank statements, does not relieve the petitioner from its burden of proving its

case before the director. The RFE was sufficiently detailed to put the petitioner on notice of the types of evidence needed.

Counsel makes no claim that the evidence submitted on appeal was not available prior to the August 8, 2002 date of the director's decision. With regard to the tax documents, the petitioner's tax year is the calendar year, therefore the tax returns and other tax documents for 2001 should have been available by April 15, 2002. The director issued the RFE on April 25, 2002. The petitioner responded with a letter dated July 8, 2002 accompanied by financial information and the letter from the CPA, but the petitioner failed to include the Form 1120S tax return for 2001 or the W-3 and W-2 forms for 1998 through 2001. The petitioner now submits those documents for the first time on appeal.

Concerning the bank statement dated August 20, 2002, the petitioner makes no assertion that a similar bank statement could not have been obtained earlier and submitted with the petitioner's response to the RFE.

The petitioner was given reasonable notice by regulation, by case law, and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted for the first time on appeal will not be considered for any purpose.

Counsel in his brief on appeal asserts that the beneficiary will be replacing a current employee, and that the salary amounts paid to that current employee during the relevant time period should be taken into account when evaluating the petitioner's ability to pay the proffered wage. Counsel asserts that the petitioner's evidence shows that the petitioner had the ability to pay the difference between the actual salary amount paid to the departing employee and the proffered wage for the beneficiary.

Counsel's assertion that the beneficiary will be replacing a current employee is not supported by any evidence in the record. 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). Therefore the record lacks evidence that the beneficiary will be replacing a current employee.

For the foregoing reasons, the evidence fails to establish the ability of the petitioner to pay the proffered wage from the priority date and continuing until the beneficiary obtains permanent residence.

Beyond the decision of the director, the record lacks evidence that the beneficiary has the required experience for the position offered. On the ETA 750, block fourteen requires four years of experience in the job offered, and block fifteen contains the following special requirement: "Must have the 4 years [sic] experience as a Senior Administrative Assistant in the company."

The ETA 750B showing the beneficiary's experience shows no experience in a position of senior administrative assistant, and no experience working with the petitioner. The only letter in the record confirming the beneficiary's prior work experience is a letter dated May 21, 1998 from the Ministry of Foreign Affairs, Republic of China (Taiwan). That letter states that the beneficiary joined the Ministry of Foreign Affairs and currently serves as administrative officer in the office of telecommunications services. No further information is given about the responsibilities of the beneficiary.

The petitioner's evidence therefore is insufficient to establish that the beneficiary possesses the required experience for the position offered.

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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.