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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2004

WAC 03 004 54423

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 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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a jewelry wholesaler. It seeks to employ the beneficiary permanently in the United States as a jewelry model maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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 granting 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 nature, for which qualified workers are not available in the United States.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 3, 2000. The proffered wage as stated on the Form ETA 750 is $9.45 per hour, which equals $19,656 per year.

On the petition, the petitioner stated that it was established during 1997 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted the petitioner's 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation.

The 2000 return shows that the petitioner declared ordinary income of $5,911 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared a loss of $19,377 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $8,466 and current liabilities of $1,902, which yields net current assets of $6,564.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 18, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated May 12, 2003, which stated that the petitioner's losses and low profits are a result of not being able to hire and retain qualified workers, such as the beneficiary. Counsel submitted a copy of the petitioner's 1998 Form 1120S, U.S. Income Tax Return for an S Corporation, which counsel stated shows a much higher gross and net income. Counsel apparently submitted that return as evidence that the petitioner's low profit and loss during 2000 and 2001 were uncharacteristic. Counsel states that the petitioner's higher profits during 1998 were the result of having qualified part-time workers during that year.

The 1998 return shows that the petitioner declared ordinary income of $11,879 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 21, 2003, denied the petition.

On appeal counsel states that the petitioner's income during 2000 and 2001 was uncharacteristically low, and the result of its inability to hire and retain qualified employees. Counsel states that, if the petitioner is able to hire the beneficiary, "the Beneficiary's contribution to the Petitioning company will inevitably exceed the wages paid to the Beneficiary." Counsel urges that, under these circumstances, the petition should be approved pursuant to the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel submits a letter, dated June 17, 2003, from the president of another jewelry company. The president states that a model maker allows a company to realize income at least three times the model maker's wages. Finally, the president states that his company would submit more orders to the petitioner if it were able to hire the beneficiary. A letter from another jewelry company, also dated June 17, 2003, states, "we understand that [the petitioner] has been unable to accept work assignments due to shortage of skilled workers."

Counsel's sole argument is that, by hiring the beneficiary, it would the beneficiary it would realize profits in excess of the amount of his salary and other expenses incidental to employing him. One of the letters submitted on appeal offers that same opinion.

Counsel stresses the petitioner's 1998 performance. The petitioner's president asserts that during 1998, the petitioner was able to employ qualified part-time workers, who greatly contributed to its profits.

The petitioner's 2000 and 2001 tax returns show that it paid no salary and wages during those years. The petitioner's 1998 return shows salary and wage expense of $22,643. Those entries support the petitioner's assertion it employed workers during 1998, but not during 2000 or 2001.

The evidence is insufficient, however, to demonstrate that hiring the beneficiary will result in the petitioner realizing revenue greater than the amount of the wages and other expenses associated with his employment. A letter submitted on appeal states that a jeweler should realize revenue at least three times the beneficiary's wages as a result of hiring him. The difference between the petitioner's performance in 1998 and its performance during 2000 and 2001 implies that it realized only a slight increment more than the wages it paid it part-time employees during 1998. From the record, it is impossible to determine that hiring the beneficiary would produce revenue that would equal or exceed the amount of the proffered wage.

Counsel's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is unpersuasive. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the petitioner is a relatively new business, and has never posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. No unusual circumstances have been shown to exist in this case to parallel those in Sonegawa, nor has it been established that 2000 and 2001 were uncharacteristically unprofitable years for the petitioner. The evidence is at least as strong, in fact, that 1998 was uncharacteristically profitable.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $19,656 per year. The priority date is March 3, 2000.

During 2000, the petitioner declared a profit of $5,911. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner declared a loss of $19,377. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits during that year. The petitioner ended the year with net current assets of $6,564. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 and 2001.[1] Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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[1] The petitioner's finances during 1998 are not directly relevant to its ability to pay the proffered wage since the priority date. This office notes, however, that the petitioner's ordinary income during 1998 was also insufficient to pay the

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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proffered wage.