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

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 9 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 tour operator/commercial air charter. It seeks to employ the beneficiary permanently in the United States as a travel guide. 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 evidence previously submitted.

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 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 April 8, 1999. The proffered wage as stated on the Form ETA 750 is $2,123.33 per month, which amounts to $25,479.96 annually.

With the petition, the petitioner submitted copies of the petitioner's Form 1065, U.S. Return of Partnership Income for 1999 through 2001 and its state quarterly worksheets for 2000 through 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 17, 2003, the director issued a notice of intent to deny (NOID) pertinent to that ability. The director referenced the petitioner's low ordinary (net) income, negative liabilities, and drop in gross receipts and sales to notify the petitioner of the beneficiary's apparent ineligibility for the visa classification sought based on its inability to pay the proffered wage.

In response to the NOID, the petitioner re-submitted the petitioner's Form 1065, U.S. Return of Partnership Income for 1999 through 2001. The tax returns reflect the following information for the following years:

	1999	2000	2001
Ordinary income	$5,290	$28,061	$-44,691
Current Assets	$9,809	$36,993	$64,121
Current Liabilities	$300,809	$300,983	$361,884
Net current liabilities	$291,000	$263,990	$297,763

In addition, counsel submitted copies of the petitioner's checking account statements for the period from 1998 through 2001 for two accounts held by Bank of America and Union Bank of California. The petitioner submitted W-2 forms for employees, none of whom are the beneficiary, to illustrate its payment of salaries to its employees.

Counsel, in his accompanying letter with the petitioner's response to the director's NOID, states that the petitioner's financial results from 1999 through 2001 were "uncharacteristic and unusual with reference to the normal operations of the company. The reason for this is the continuing expansion expenses that the [petitioner] has been incurring over the three specific years of 1999, 2000 and 2001." (Emphasis in original). Counsel also states the following:

> For three consecutive years of pushing for growth, [the petitioner] put extra effort and capitalization to elevate its business into the mainstream. It has incurred a lot of expenses in **advertising and promotions**. On top of that, the [petitioner] **procured machines and equipments particularly additional commercial airplanes**, which are technologically advanced, imported from Japan and Europe. Some of the existing airplanes of the [petitioner] were in need of complete overhauls. Hence, the [petitioner] was forced to purchase new airplanes.

(Emphasis in original). Counsel refers to Exhibit C for a "copy of pictures." Exhibit C contains three photographs. One is of two small white airplanes with numbers on them, N3450w and N3703W, and an unidentified man standing next to one of them. The second photograph is another white airplane with four unidentified individuals standing in front with their thumbs up. The number on the plane is covered by the individuals standing in front. The third photograph is of a white airplane with three individuals standing in front of the Los Angeles skyline with the "HOLLYWOOD" sign in the background. No evidence was submitted to corroborate the purchase of these airplanes, the connection of the airplanes in the pictures to the petitioner's ownership, the problems with the petitioner's old airplanes, and the potential realization of profit from the purchase of the airplanes. No evidence was submitted to explain how the petitioner purchased the airplanes. No evidence was submitted to corroborate counsel's description of the petitioner's expansion, such as the expenses itemized for advertising, promotions, machines, and equipments.

Additionally, the petitioner submitted a letter that reiterates its counsel's statements concerning the acquisition of new airplanes, equipment, and other business expenses related to business expansion, and states the following: "[The petitioner] presently maintains a number of Contracts with other companies with significant amounts to

assure a reasonable expectation to increase its profits." Again, no evidence was submitted to corroborate the petitioner's contracts with third-party clients and the revenue derived from them after expenses.

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 June 25, 2003, denied the petition. In addition to noting the petitioner's low net income, losses, negative liabilities, and decreasing gross receipts, the director stated the following in his decision: "The petitioner states that [it] presently maintains a number of contracts with other companies with significant amounts to assure a reasonable expectation to increase its profits. However, at the present time, the petitioner's documentation to prove its ability to pay the proffered wage has not been met."

On appeal, counsel reasserts arguments made in his response to the director's NOID and resubmits evidence already in the record of proceeding.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel cites an unpublished AAO decision that apparently issued a contrary holding with respect to bank statements. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Additionally, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 1999, 2000, or 2001.

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, CIS will next 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. 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 the Service, now CIS, should have considered income before expenses were paid rather than net income.

In the instant case, the petitioner reported net income insufficient to cover the proffered wage in 1999 and 2001, as it reported $5290 in 1999 and a loss in 2001, both lower than the amount of the proffered wage. However, the petitioner reported $28,061 in net income in 2000 and thus has demonstrated its ability to pay the proffered wage out of its net income in 2000. This does not end the analysis, however, as the petitioner must demonstrate its *continuing* ability to pay the proffered wage from the date of the priority date.

Counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 1999 and 2001, however, were negative. As such, the petitioner cannot demonstrate its ability to pay the proffered wage in 1999 or 2001 from its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, the petitioner shows a net income of only $5290 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, however, the petitioner shows a net income of $28,061, which is greater than the proffered wage, and has, therefore, demonstrated the ability to pay the proffered wage. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) applies to the facts of the petitioner's case. *Matter of Sonegawa,* however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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 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 couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999, 2000, or 2001 was an uncharacteristically unprofitable year for the petitioner. In fact, counsel states in a paragraph at the top of page 9 of his brief that "[the petitioner] has consistently earned a Gross Income of more than one million dollars ever since they began operating," but then in the very next paragraph states that "[t]he petitioner respectfully submits that years 1999, 2000 and 2001 were years, which are uncharacteristic and unusual with reference to the normal operations of the [petitioner]." There is no evidence in the record of proceeding pertaining to years other than 1999, 2000, or 2001, with which to compare the petitioner's ongoing performance. There is no evidence concerning the expenses cited by the petitioner and its counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner urges CIS to consider its contracts with third-party clients, yet provides no corroborating evidence. As such, such statements are of little evidentiary and probative value. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

Counsel also 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. The petitioner 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 has a reputation that would increase the number of customers. Any such standard or criterion or evidentiary demonstration would have had to be tempered by the expenses involved with employing the beneficiary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.