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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date **JUL 12 2004**

IN RE:

Petitioner:  
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:

[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 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 home remodeling and construction firm. It seeks to employ the beneficiary permanently in the United States as a project cost estimator. 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.

The director determined that the evidence failed 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. On appeal counsel states that the director erred in relying only on the evidence in the petitioner's tax returns, and that other evidence establishes the petitioner's ability to pay the proffered wage.

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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is December 14, 1999. The beneficiary's salary as stated on the labor certification is \$4,560.31 per month or \$54,723.72 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. The evidence relevant to the petitioner's ability to pay the proffered wage consisted of a copy of the petitioner's California Fictitious Business Name Statement dated December 8, 1998; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2000 and 2001; copies of the petitioner's Form 100S California S corporation franchise or income tax returns for 2000 and 2001; a letter dated September 24, 2002 from the petitioner's owner; and five identical originals of an undated promotional flyer of the petitioner.

In a request for evidence (RFE) dated December 30, 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, and additional evidence of the beneficiary's experience.

In response to the RFE counsel submitted a letter dated February 24, 2003, accompanied by the following evidence: a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and his wife for 1999; a copy of the Form 540 California Resident Income Tax Return of the petitioner's owner and his wife for 1999; additional copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for 2000 and 2001; additional copies of the petitioner's Form 100S California S corporation franchise or income tax returns for 2000 and 2001; five copies of the first page of the petitioner's promotional flyer previously submitted; copies of twelve home remodeling contracts between the petitioner and various individuals with dates ranging from February 7, 2000 to February 15, 2003; copies of seven invoices of the petitioner with dates ranging from November 17, 2000 to September 18, 2002; a copy of the petitioner's Form 1096 Annual Summary and Transmittal of U.S. Information Returns for 2002; copies of seven Forms 1099-Misc. from the petitioner showing payments to individuals and companies in 2002; and a letter dated February 27, 2003 from a former employer of the beneficiary in Israel confirming the beneficiary's experience as a cost estimator from June 1991 until March 1998.

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 evidence. Some of the evidence submitted on appeal consists of additional copies of documents already in the record. Newly submitted on appeal are the following: copies of monthly bank statements for an account of the petitioner at Washington Mutual Bank, with no address given of that bank, for the years 2001 and 2002; and copies of monthly bank statements for an account of the petitioner's owner at Universal Bank, with no address given of that bank, for the year 2000.

Counsel also submits copies of documents which were apparently submitted by the petitioner in support of the labor certification application, consisting of a letter dated June 6, 2000 from the California Employment Development Department to counsel; copies of newspaper advertisements for the offered position; copies of letter dated September 1, 2000 and September 2, 2000 from counsel to the California Employment Development Department; and a copy of a job notice for the offered position.

Counsel states on appeal that the director erred in relying only on the petitioner's tax returns when evaluating the petitioner's ability to pay the proffered wage, and states that other evidence in the record establishes the petitioner's ability to pay the proffered wage. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the 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. 623 F.Supp at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp., at 1054.

For an individual, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040 U.S. Individual Income Tax Return. In the instant petition, the Form 1040 of the petitioner's owner and his wife for 1999 shows adjusted gross income as \$26,034.00. That amount is less than the proffered wage of \$54,723.72. While the priority date is December 1999, we will not consider 12 months of income towards an ability to pay a few weeks of the proffered wage. The record contains no evidence that at least \$2,400 of the proprietor's adjusted gross income (the pro rated share of the proffered wage after the priority date) was earned after December 14, 1999. Moreover, the petitioner did not submit a statement of monthly household expenses, which would need to be considered. *See Ubeda*, 539 F. Supp. 647. Even if we were to begin looking at ability to pay in 2000, given the priority date in December of 1999, the petitioner's finances did not sufficiently improve in 2000.

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: \$21,482.00 for 2000; and \$53,419.00 for 2001. Each of those figures is less than the proffered annual wage of \$54,723.72, and they therefore fail to establish the petitioner's ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns for 2000 and 2001 yield the following amounts for net current assets: \$21,708.00 for the end of 2000; and \$12,005.00 for the end of 2001. Since each of those figures is less than the proffered wage of \$54,723.72, those figures also fail to establish the ability of the petitioner to pay the proffered wage.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. That case 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 *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 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, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that the years 1999 through 2001 were uncharacteristically unprofitable years for the petitioner.

For the foregoing reasons 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.

Beyond the decision of the director, the evidence raises the issue of whether the petitioner is the successor in interest to the business which filed the ETA 750 labor certification application. The name of the business on the ETA 750 is Pioneer Construction, and its address is stated as 6277 Variel Avenue #A, Warner Center, Woodland Hills, CA 91637. That name and address are different than the name and address of the petitioner on the Form I-140 petition. The status of successor in interest requires documentary evidence that successor has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

On the Form I-140 petition the petitioner's name is followed by the parenthetical "(formerly Pioneer Construction)."

In his letter dated September 24, 2002 the petitioner's owner repeatedly refers to the petitioner by the name which appears on the I-140 petition. In the final section of that letter the owner adds the parenthetical "(formerly Pioneer Construction)" after the petitioner's name, and in the signature block the owner also adds the same parenthetical after the petitioner's name. But the letter gives no explanation of the relationship between the petitioner and Pioneer Construction.

Other evidence in the file fails to clarify the relationship between the petitioner and Pioneer Construction.

On the Form ETA 750, Part B the beneficiary states that he is presently employed as a market research analyst by Troy Brothers, at 6277 Variel Avenue, #A, Woodland Hills, CA 91637. That address is the same as Pioneer Construction's address, though the words "Warner Center" do not appear in the address for Troy Brothers. But nothing in the record indicates the relationship, if any, between Troy Brothers and Pioneer Construction or the relationship, if any, between Troy Brothers and the petitioner.

The petitioner's address on the I-140 petition is stated as 6520 Platt Ave. # 127, West Hills, CA 91307. The owner's address on the Form 1040 federal and state tax returns is 5746 Ostrom Ave., Encino, CA 91316. The petitioner's address on the Form 1120S and Form 100S federal and state corporate tax returns is also the

address on Ostrom Avenue. But neither the Platt Avenue address nor the Ostrom Avenue address matches the address of Pioneer Construction.

The name of the owner's business which appears on the Schedule C attached to the Form 1040 for 1999 is not Pioneer Construction, but "Metro Builders and Remodeling," a name which is similar to the petitioner's name, but not identical to it. The name "Metro Builders and Remodeling" also appears on the California Fictitious Business Name Statement dated December 8, 1998. Entries in blocks number 5 and number 8 of that statement indicate that the business is a sole proprietorship.

The record contains no other evidence relevant to the relationship between the petitioner and Pioneer Construction. The evidence above lacks any information on the legal identity of Pioneer Construction, or on whether the petitioner has assumed all the rights, duties and obligations of Pioneer Construction. The evidence is therefore insufficient to establish that the petitioner is a successor in interest to the business which filed the ETA 750B. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482-83.

In the director's decision the director made no reference to the issue of a successor in interest. Rather, the director analyzed the Form 1040 U.S. Individual Income Tax Return for 1999 and the Forms 1120S U.S. Income Tax Return for an S Corporation for 2000 and 2001 and found that the net income shown on each of those returns failed to establish the ability of the petitioner to pay the proffered wage as of the priority date and continuing until the petitioner obtains lawful permanent residence. The director erred in his analysis of the tax returns in failing to consider the net current assets of the petitioner. Furthermore, the director erred in not considering the issue of a successor in interest. Nonetheless, despite those errors, the director's decision to deny the petition was correct. As shown above, the evidence submitted prior to the director's decision fails 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, and the record also fails to establish that the petitioner is a successor in interest to the business which filed the ETA 750 labor certification application

On appeal counsel submits new evidence consisting of copies of monthly bank statements for an account of the petitioner at Washington Mutual Bank for the years 2001 and 2002; and copies of monthly bank statements for an account of the petitioner's owner at Universal Bank for the year 2000. Counsel also submits copies of documents which were apparently submitted by the petitioner in support of the labor certification application. The latter group of documents does not contain information relevant to the petitioner's ability to pay the proffered wage.

Concerning the petitioner's bank statements, which are submitted to demonstrate that the petitioner had sufficient cash flow to pay the proffered wage, there is no evidence that the funds in those accounts represent additional funds beyond those shown on the tax returns. 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). The evidence submitted on appeal also fails to establish that the petitioner is a successor in interest to the business which filed the ETA 750 labor certification application. For these reasons, the evidence submitted for the first time on appeal fails to overcome the decision of the director.

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.