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U.S. Citizenship  
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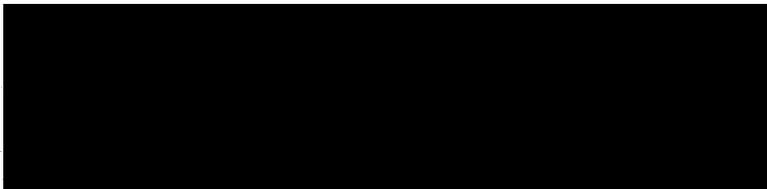


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **APR 13 2005**  
WAC-03-012-51158

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:



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 manufactures and sells sportswear. It seeks to employ the beneficiary permanently in the United States as a fashion designer. 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. The director also determined that the petitioner failed to prove the beneficiary is qualified for the proffered position.

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 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 first issue to be discussed in this case is whether or not the petitioner established its continuing ability to pay the proffered wage.

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 January 25, 2001. The proffered wage as stated on the Form ETA 750 is \$4,400 per month, which amounts to \$52,800 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to work for the petitioner since October 1998.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$11,579,314, and to currently employ 62 workers. In support of the petition, the petitioner submitted its U.S. Income Tax Return for an S Corporation on Form 1120 for 2001.

The tax return for 2001 reflects the following information:

	<u>2001</u>
Net income <sup>1</sup>	\$180,218

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

Current Assets	\$820,225
Current Liabilities	\$869,846
Net current assets	-\$49,621

The petitioner also submitted its state quarterly wage reports for the last two quarters in 2001 and the first two quarters in 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 director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 9, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested signed tax returns and evidence of wages paid to the beneficiary since he indicated employment with the petitioner on Form ETA 750B but was not on the quarterly wage reports.

In response, the petitioner submitted unaudited financial statements for 2001 and 2002, an incomplete Form 1120S corporate tax return for the year 2002, and copies of the petitioner's checking account statements. The petitioner also submitted a copy of a W-2 form issued from it to the beneficiary in 2002 proving that the petitioner paid \$6,623.90 to the beneficiary in that year. A letter from the petitioner stated that there is no W-2 form for 2001 because the beneficiary did not have employment authorization so they could not "officially" pay him. Copies of paystubs issued from the petitioner to the beneficiary in 2003 show that the beneficiary had been paid \$15,318.60 by mid-July 2003.

The tax return for 2002 reflects the following information:

	<u>2002</u>
Net income <sup>2</sup>	\$764
Current Assets	\$n/a
Current Liabilities	\$n/a
Net current assets	\$n/a

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 August 27, 2003, denied the petition.

Newly retained counsel filed both a motion to reopen and reconsider and an appeal that contain the same substantive legal arguments and evidentiary submissions. The director declined to adjudicate the appeal as a motion to reconsider so the matter is now before the AAO. On appeal, counsel asserts that Citizenship and Immigration Services (CIS) treats the petitioning entity unfairly because of its "complete lack of business understanding." Counsel asserts that amazon.com would not pass CIS's test of net income and net current assets. She also states that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) applies to the instant case and for the premise that not only net income should be used as guidance for determining a petitioning entity's continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that the beneficiary's addition to the petitioner's business would reduce waste costs since he would control inventory and oversee efficient use of

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<sup>2</sup> See *supra*, note 1.

fabric, and thus, according to the holding in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), CIS erred by failing to consider the prospective income the beneficiary's employment would generate for the petitioner. Counsel details the petitioner's gross revenues from its inception in 1993 to 2002, noting a steady rise except for 2001 and 2002, which she attributes to the terrorist attacks on September 11, 2001. Finally, counsel states that the beneficiary's former representative provided ineffective assistance of counsel resulting in erroneous employment dates being provided to CIS. Counsel states that the beneficiary has been employed by the petitioner from October 1998 to October 2000, and from February 2001 to the present.

The petitioner submits the first page of its 1999, 2000, and 2001 corporate tax return; unaudited financial statements; amazon.com's quarterly report in 2001; a letter from the petitioner's president stating that the beneficiary's employment would reduce production cost and increase the company's profits; receipts for payments from the beneficiary to a former unaccredited representative; evidence of real estate holdings by the petitioner and the petitioner's president; and a letter from the petitioner's accountants stating that the petitioner's gross sales have "increased enormously since the opening of business" and the petitioner is a financially stable company.

The unaudited financial statements that have been submitted in response to the director's request for evidence and on appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The petitioner's reliance on its balance bank account balance 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's reliance on the assets of the petitioner's president is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2001. The petitioner demonstrated that it paid \$6,623.90 to the beneficiary in 2002, which leaves a remaining proffered wage of \$46,176.10 in that year. The petitioner also demonstrated that it paid the beneficiary \$15,318.60 by mid-July 2003.

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). Contrary to counsel's assertions, 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 the Service should have considered income before expenses were paid rather than net income. The petitioner's net income in 2001 is sufficient to illustrate its ability to pay the proffered wage in that year. In 2002, however, the petitioner reported income too low to prove its ability to pay the proffered wage.

Nevertheless, 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.<sup>3</sup> 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 16 through 18. 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 failed to present evidence of its net current assets in 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001, but demonstrated that it paid the beneficiary \$6,623.90 in 2002. In 2001, the petitioner shows a net income of \$108,218, but negative net current assets, and has, therefore, demonstrated the ability to pay the proffered wage out of its net income. In 2002, the petitioner shows a net income of \$764, and did not provide its net current assets, and cannot, therefore, demonstrate the ability to pay the proffered wage out of its net income or net current assets in 2002.

Counsel urges the AAO to apply *Matter of Sonogawa's* holding to the instant case. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 2002 was an uncharacteristically unprofitable year for the petitioner.<sup>4</sup>

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. 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. Counsel and the petitioner state that the beneficiary will help reduce waste and increase efficient use of fabric thereby reducing production costs and increasing profits. However, no evidence was provided to substantiate that claim, and the AAO notes that the beneficiary is already purportedly employed by the petitioner, so it should have some clear indication of the beneficiary's impact on its business. 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).

Counsel's citation of *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion is without merit. Contrary to counsel's assertion, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. The petitioner's speculation about the beneficiary's potential ability to generate revenue cannot be concluded to outweigh the evidence presented in the corporate tax returns and lack thereof. Additionally, the petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's reference to amazon.com is without merit. Amazon.com is not a party to these proceedings and the AAO will not speculate about amazon.com's hypothetical showing of its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's suggestion that the petitioner has real estate holdings is also without merit. Real estate is not the type of easily liquefiable assets used by employers to pay employee wages.

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<sup>4</sup> The petitioner's accountant states that the events on September 11, 2001 affected all business in the United States, not just the petitioner's business. Regardless, the petitioner has not demonstrated a precise nexus between those events and its business.

Finally, although counsel notes that the petitioner was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The petitioner has established that it has the ability to pay the proffered wage beginning on the priority date in 2001 but not in 2002. The petitioner's net income in 2001 is sufficient to cover the proffered wage. The petitioner's net income was too low to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2002 and the petitioner failed to present regulatory-prescribed evidence of its net current assets. Thus, the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 25, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |                         |              |
|-------------------------|--------------|
| 14. Education           |              |
| Grade School            | Not required |
| High School             | Not required |
| College                 | Not required |
| College Degree Required | Not required |
| Major Field of Study    | Not required |

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Design, cutting fabrics, samples making and sewing of oriental sportswear of Taekwondo, Judo, Karade [sic] and etc. Making special logos and accessories for oriental sportswear. Select and order for fabrics according to manufacturing schedules. Alteration to remade sportswear." Item 15 indicates that there are no special requirements other than detailing break times and business hours.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated employment with the petitioner since October 1998 to January 17, 2001 (present) in the same position with similar duties as the proffered position, and unemployment from January to October of 1998.

With the initial petition, the petitioner submitted a letter, dated September 21, 2002, stating that it employed the beneficiary in the proffered position, performing the duties as listed on the Form ETA 750A.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on May 9, 2003. The director specifically requested a letter certifying the beginning and ending date of any qualifying employment experience and verification of the petitioner's actual employment of the beneficiary.

In response to the director's request for evidence, the petitioner provided a similar letter as the one previously submitted with clarification about the beneficiary's dates of employment. The petitioner stated the following: "[The beneficiary] has been worked [sic] from 10-1998 without work permit from [CIS] therefore he did not file [sic] income tax return till [sic] 2001[.]" and confirmed that the beneficiary has been working for the petitioner since October 1998.

The director's decision stated that the evidence contained in the record of proceeding illustrated inconsistencies since the petitioner could not provide corroborative evidence of the beneficiary's purported employment with the petitioner since October 1998. The director noted the partial wages paid in 2002 illustrated by the beneficiary's form W-2 for that year and omission of the beneficiary's name on quarterly state wage reports.

On appeal, counsel asserts that the petitioner's reliance upon Jeil Service Company, an unaccredited representative, resulted in the inconsistencies concerning the representations made about the beneficiary's employment dates with the petitioner. She states that the petitioner did not read the director's request for evidence or the letter it signed and submitted in response to the request. As noted above, she asserts that the beneficiary was employed by the petitioner from October 1998 to October 2000 and February 2001 to present.

As noted above, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. at 637, *aff'd*, 857 F.2d at 10. The AAO concurs with the director that the evidence contained in the record of proceeding includes inconsistent information concerning the beneficiary's employment with the petitioner, and the explanation provided by counsel on appeal is inadequate. 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).

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

There is no evidence that the beneficiary has two years of qualifying experience as asserted by counsel, the petitioner, or the beneficiary. The various dates asserted in the record of proceeding cast doubt on the authenticity of the claim that the beneficiary has two years of qualifying experience with the petitioner. The petitioner has failed to provide corroborating evidence of its employment of the beneficiary for the various date schemes asserted. In light of the use of admitted inconsistencies in the record of proceeding, independent corroborating evidence is critical to the petitioner proving this material fact in the case. 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). Thus, the letters presented into

the record of proceeding are not probative evidence of the beneficiary's qualifications for the proffered position for failure to conform to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)<sup>5</sup>.

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.

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<sup>5</sup> The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.