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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 137 54230

IN RE: Petitioner:
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

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 children's healthcare facility. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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.

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 February 20, 2001. The proffered wage as stated on the Form ETA 750 is $14.79 per hour, which equals $30,763.20 per year.

On the petition, the petitioner stated that it was established during 1995 and that it employs three workers. The petition states that the petitioner's gross annual income is $37,452. The space reserved for the petitioner's net annual income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from January 1998 until December 1998, and again from October 1999 until February 7, 2001, the date she completed that form. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in [redacted] California.

In support of the petition, counsel submitted a copy of a Form 4868 Application for Automatic Extension, with which the petitioner's owner, [redacted][1] ostensibly requested an extension of time during

[1] The petitioner's owner and the beneficiary share a common surname, which leads to the suspicion that they may have an undisclosed blood relationship.

which to file her 2001 personal income tax return. That form is unsigned and was accompanied by no evidence that it was filed with IRS.

Counsel also submitted the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2002. Those reports show that the petitioner employed two workers during the first quarter of 2002, one worker during the second quarter, and no workers during the third and fourth quarters. Those reports further show that the petitioner paid total wages of $6,000, $2,400, $0, and $0 during those quarters, respectively. Those reports do not show that the petitioner paid the beneficiary any wages during 2002.

Finally, counsel submitted 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary $5,712, $6,800, and $2,400 during those years, respectively.

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 May 16, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and specifically requested evidence pertinent to 2001 and 2002. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters[2] and the petitioner's W-3 transmittals for 2001 and 2002.

In response, counsel submitted a copy of the 2001 Form 1040 U.S. Individual Income Tax Return of [redacted] A Schedule C, Profit or Loss from Business, attached to that return shows that [redacted] owns the petitioner as a sole proprietorship, and that the petitioner suffered a loss of $6,376 during that year. The return shows that she had three dependents during that year and declared adjusted gross income of $17,233 during 2001.

Counsel also submitted a Form 4868 Application for Automatic Extension of time to file the petitioner's owner's 2002 tax return. That form is not signed and contains no indication that it was submitted to IRS.

Counsel submitted California Form DE-6 quarterly reports for the last three quarters of 2002 and the first quarter of 2003. The report for the first quarter of 2003 shows that the petitioner and employed one worker, the beneficiary, during that quarter and paid her $800.

Counsel submitted two 2002 Form W-2 Wage and Tax Statements. Those W-2 forms show that the petitioner paid wages of $3,600 to one employee[3] and wages of $4,800 to its other employee. That second employee is the same person shown on the Form DE-6 reports as having received $2,400 during the second quarter of

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[2] This office notes that, with the petition, the petitioner had provided Form DE-6 reports for three of the previous four quarters.

[3] That employee, [redacted], shares a surname with the petitioner's owner and the beneficiary. This is an additional indication that the petitioner's owner may be preferentially hiring relatives, which casts additional doubt on the validity of the assertion that she is attempting to hire the beneficiary because she is unable to find a U.S. worker to fill the proffered position.

2002, and no wages during the third and fourth quarters of that year. The quarterly reports and the W-2 form, taken together, indicate that the petitioner must have paid that second employee the remaining $2,400 during the first quarter of 2002. They also indicate that the petitioner must have paid the first employee the entire $3,600 during the first quarter of 2002.

Finally, counsel submitted monthly statements pertinent to the petitioner's owner's personal and business bank accounts. In support of the proposition that those statements demonstrate the petitioner's ability to pay the proffered wage, counsel submits a non-precedent decision of this office. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel did not submit the requested W-3 transmittals.

On August 20, 2002 the California Service Center issued another Request for Evidence in this matter. The Service Center again requested copies of annual reports, federal tax returns, or audited financial statements to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested evidence pertinent to 2002.

Further, the Service Center asserted that the ETA 750, Part B states that the petitioner has employed the beneficiary since January 1998.[4] The Service Center requested a copy of the 2002 W-2 form showing wages paid to the beneficiary during that year.

In response, counsel submitted a copy of the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return. The Schedule C attached to that return shows that the petitioner suffered a loss of $3,280 during that year. The return shows that the petitioner's owner had three dependents during that year and declared adjusted gross income of $20,798, including the petitioner's loss.

Counsel submits 2002 W-2 forms showing that Clickbooks.com, Incorporated paid the beneficiary $9,385 during that year and that [redacted] paid the beneficiary $4,372.95 during that year. In a letter dated November 10, 2003, counsel states that the beneficiary worked for the petitioner from September 1997 to December 1998 and again from March 2003 and continuing through the date of that letter. Counsel's statement that the beneficiary was not employed by the petitioner from December 1998 through March 2003 conflicts with the information the beneficiary gave on the Form ETA 750, Part B, dated February 7, 2001, that she also worked for the petitioner from October 1999 until "Present."

As evidence of the wages the petitioner paid to the beneficiary during 2003 counsel submitted computer printouts of wages paid from April to October of that year. The October statement shows a year-to-date total of $7,200 paid to the beneficiary.

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[4] The statement on the Request for Evidence pertinent to the beneficiary's employment for the petitioner is inaccurate. The Form ETA 750, Part B, states, as was noted above, that the petitioner employed the beneficiary from January 1998 through December 1998, and again from October 1999 through February 7, 2001, the date the beneficiary signed that form.

Counsel submits a copy of a letter, dated November 4, 2002, from the beneficiary. In that letter the beneficiary reiterates that she worked for the petitioner from October 1999 through March 2001. Counsel submitted a letter from the petitioner's owner, dated October 4, 2003, in which she also stated that the beneficiary worked for the petitioner from October 1999 through March 2001.

In his letter, counsel quotes 8 C.F.R. § 204.5(g)(2) and states that it "unequivocally specifies bank statements as a considerable form of evidence in establishing 'ability to pay.'" Counsel again submits additional bank statements and states that the petitioner's bank statements as evidence of the petitioner's ability to pay the proffered wage. Counsel again cites the non-precedent decision previously cited as in support of the proposition that bank statements are acceptable evidence of a petitioner's continuing ability to pay additional wages.

Counsel attempts to distinguish *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986), cited in the decision of denial for the proposition that CIS may rely on the petitioner's tax returns in determining a petitioner's ability to pay the proffered wage. The difference emphasized by counsel is that the petitioner in *Elatos* did not submit tax returns, whereas the petitioner's tax returns are in the record.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petitioner may show ability to pay the proffered wage notwithstanding that its net income is less than the proffered wage during a given year.

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 December 6, 2003, denied the petition.

On appeal, counsel mischaracterized the non-precedent AAO decision described above as a published administrative decision. Again, this office notes that citation of a non-precedent decision is of no effect.

Counsel also implied that a precedent BIA decision, *In the Matter of E-M*, also supports the position that the petitioner has demonstrated the proffered wage. Counsel did not provide citations for that case or a copy of it, nor did counsel explain how it supports his position. Counsel's citation of that case will not be further addressed.

Counsel again stated that "8 C.F.R. § 204.5(g)(2) *unequivocally* specifies Bank Statements as a primary and acceptable form of evidence in establishing ability to pay."' [Emphasis provided by counsel.]

The regulation at 8 C.F.R. § 204.5(g)(2) does not, however, unconditionally state that bank statements can be used to show a petitioner's ability to pay the proffered wage. That regulation states that, "*In appropriate cases*, additional evidence, such as . . . bank statements . . . may . . . submitted by the petitioner. [Emphasis added.]

Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R.

§ 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner.[5] Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[6] Further still, 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 returns. The bank statements submitted and relied upon by counsel are of no use in determining the petitioner's ability to pay the proffered wage.

Counsel asserts that hiring the beneficiary will increase the petitioner's profits, but does not detail how. If counsel were able to demonstrate the amount by which hiring a bookkeeper would increase the petitioner's profits, then, pursuant to the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), the petitioner might have been able to demonstrate its ability to pay the proffered wage. Merely alleging, rather than demonstrating, that hiring the beneficiary would increase the petitioner's profits, however, is insufficient.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate.[7] That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

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 established that it employed and paid the beneficiary $2,400 during 2001 and $7,200 during 2003. The petitioner did not establish that it paid the beneficiary any other wages since the priority date.

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

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[5] That the petitioner's tax returns do not show that it was able to pay any additional wages is an insufficient reason to disregard them.

[6] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

[7] In fact, as the proffered position is a bookkeeping position, how filling it would increase the petitioner's gross receipts at all is difficult to imagine.

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 argues that *Elatos* is distinguishable from the instant case in that the petitioner in *Elatos* submitted no tax returns. If this distinction were controlling, it would mean that CIS is entitled to rely on tax returns in those cases in which none were submitted, but not entitled to rely upon them in cases where they are in evidence. The language of *Elatos* contains no indication that the court intended that unlikely result.

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 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.

A sole proprietorship, unlike a corporation, is not legally separate from its owner. Therefore the sole proprietor's income and assets are included in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their business on their individual (Form 1040) Federal tax return each year. The business-related income and expenses are reported on the Schedule C and the profit or loss carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents on the amount remaining. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982, *aff'd* 703 F2d 571 (7th Cir. 1983).

The proffered wage is $30,763.20 per year. The priority date is February 20, 2001.

The petitioner has demonstrated that it paid the beneficiary $2,400 during 2001 and must demonstrate the ability to pay the $28,363.20 balance of the proffered wage during that year. During that year, the petitioner's owner declared adjusted gross income of $17,233. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. The petitioner must demonstrate the ability to pay the entire proffered wage during that year. The petitioner's owner declared adjusted gross income of $20,798 during that year. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during that year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002.

The petitioner has established that it paid the beneficiary $7,200 during 2003. The petitioner must show the ability to pay the $23,563.20 balance of the proffered wage. The appeal in this case, however, was submitted on January 7, 2004. On that date, 2003 copies of annual reports, federal tax returns, or audited financial statements were probably not available. The petitioner is excused from the requirement of providing evidence pertinent to 2003.

Counsel asserts that pursuant to *Matter of Sonegawa, supra*, the petitioner may show its ability to pay the proffered wage notwithstanding that its profits were insufficient to pay the proffered wage.

Counsel's citation of *Sonegawa*, however, is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition in *Sonegawa* was filed in that case the petitioner 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 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.

Counsels 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 has never posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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 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.