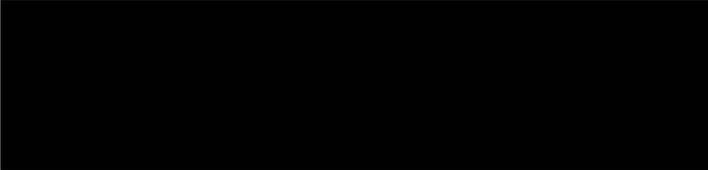




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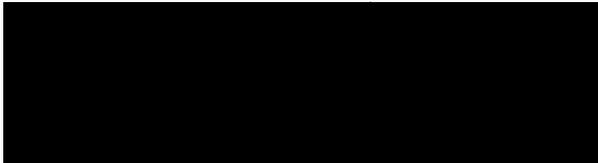
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FILE: WAC-02-250-50357 Office: CALIFORNIA SERVICE CENTER Date: **AUG 30 2005**

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 sustained. The petition will be approved.

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

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$3,500 per month, which amounts to \$42,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1994.

On the petition, the petitioner claimed to have been established in 1969, to have a gross annual income of \$1.2 million, and to currently employ 25 workers. In support of the petition, the petitioner submitted an unaudited cash flow chart and the first pages of its Forms 1120, U.S. Corporation Income Tax Returns, for 1996 through 1999, and a complete return for 2000.

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 October 16, 2002, 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, *inter alia*, signed and certified copies of the petitioner's complete tax returns for 1998 through 2001, quarterly wage reports, and any evidence of wages actually paid by the petitioner to the beneficiary such as a W-2 Wage and Tax Statement for any relevant year.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the petitioner for the years 1998 through 2001 with IRS certifications.

The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income ¹	-\$92,440	-\$75,990	-\$66,964	-\$119,302
Current Assets	\$47,696	\$17,701	\$116,513	\$4,569
Current Liabilities	\$0	\$0	\$0	\$4,586
Net current assets	\$47,696	\$17,701	\$116,513	-\$17

In addition, counsel submitted a letter from [REDACTED] the petitioner's certified public accountant, who stated that the beneficiary was not required to include the meals and lodging he received as compensation while employed at motels and states in her own accompanying letter that "[the beneficiary] had no pay statement before 2002 for he was compensated with room and board by the previous and current employers." In addition, counsel submitted copies of the petitioner's quarterly wage reports for all four quarters of 2002 and Form W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2002. The quarterly wage reports and Form W-2 reflect wages of \$37,500 paid by the petitioner to the beneficiary, which is \$4,500 less than the proffered wage.

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 March 16, 2004, denied the petition, finding that the petitioner's net income was less than the proffered wage and there was no evidence the beneficiary received compensation from the petitioner in the form of room and board for the years prior to 2002.

On appeal, counsel asserts that the compensation received by the beneficiary in room and board, as well as actual wages received in 2002 and 2003 evidence the petitioner's continuing ability to pay the proffered wage. She also asserts that depreciation is a non-cash expense that should be added back to the petitioner's net income. She also references the attack on September 11, 2001 as a bad year for the petitioner's revenues. The petitioner resubmits many items previously submitted as well as new evidence such as a new letter from another certified public accountant, authored by [REDACTED] who states that the petitioner's hotel is located in Anaheim, California, which is close to the Disneyland/California Adventure resort district and has been continuously owned and operated under the Best Western franchise license. Additionally, [REDACTED] states that the petitioner has had a steady rise in gross revenues despite the terrorist attacks in 2001 that adversely impacted the tourism industry and that attendance is increasing at the Disneyland and California Adventure amusement parks, which will keep business increasing for the petitioner. [REDACTED] also states that the petitioner has ample net current assets and has invested into capital improvements on its property in the amount of \$613,624 over the past six years as discretionary spending on upgrading its hotel facility. Mr. [REDACTED] asserts that depreciation, since it is an artificial expense, should be added back to the petitioner's net income.

On appeal, the petitioner also submits an unaudited financial statement as well as its 2002 corporate tax return that reflects -\$283,060 in net income and \$81,333 in net current assets, and a Form W-2, Wage and Tax Statement issued to the beneficiary from the petitioner in 2003 reflecting wages paid of \$44,869.86 in that year. The petitioner also submitted copies of prior unreported AAO decisions.

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

The unaudited financial statements that counsel submitted with the petition 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.

At the outset, the unreported cases submitted on appeal are not precedent and binding on Citizenship and Immigration Services (CIS). While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Thus, the AAO will not consider the copied cases submitted on appeal.

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 any wages in 1998, 1999, 2000, or 2001. The petitioner established that it employed and paid the beneficiary wages in the amounts of \$37,500 in 2002, which is \$4,500 less than the proffered wage, and \$44,869.86 in 2003, which is greater than the proffered wage.

The petitioner submitted a brief letter on appeal that confirmed that "[the beneficiary] worked at our motel from April 1994 to present and was compensated room and board and no cash remuneration was given to him. [The beneficiary] started to receive his payroll wages since January 2002." In counsel's appellate brief, she sets forth calculations to determine how much room and board was worth in terms of dollars. She asserts that the value of room and board in 1998 was \$30.44 per day, which equaled \$11,110 for 365 days and meals for the year were valued at \$5,475. In 1999, she asserts that the value of room and board was \$31.02 per day, which equaled \$11,332 for 365 days and meals for the year were valued at \$5,475. In 2000, she asserts that the value of room and board was \$33.10 per day, which equaled \$12,081 for 365 days and meals for the year were valued at \$5,475. In 2001, she asserts that the value of room and board was \$32.33 per day, which equaled \$11,800 for 365 days and meals for the year were valued at \$5,475. In 2002, she asserts that the value of room and board was \$23.91 per day, which equaled \$8,727.15 for 365 days and meals for the year were valued at \$5,475. In 2003, she asserts that the value of room and board was \$32.17 per day, which equaled \$11,742 for 365 days and meals for the year were valued at \$5,475. Counsel did not explain how she derived her figures for the calculations she made. The AAO notes that 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). However, since the petitioner stated that it remunerated the beneficiary through room and board, the AAO will accept counsel's figures and calculations as representative of the petitioner's assigned values for this form of employee compensation.

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, contrary to counsel's and the petitioner's certified public accountants' assertions. 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). 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.

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 assets². 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.³ 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 has not demonstrated that it paid the full proffered wage to the beneficiary in 1998. In 1998, the petitioner shows a loss but net current assets of \$47,696, which are greater than the proffered wage of \$42,000, and has, therefore, demonstrated the ability to pay the full proffered wage without having to consider the lesser obligated wage of \$25,415, which is what the petitioner would have to show it could pay after reducing the proffered wage by the total amount of room and board compensation value of \$16,585 with which it actually already remunerated the beneficiary. The petitioner has, therefore, shown the ability to pay the proffered wage during 1998.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 1999. In 1999, the petitioner shows a loss but net current assets of \$17,701, which are less than the proffered wage of \$42,000, and has not, therefore, demonstrated the ability to pay the full proffered wage. However, the petitioner is only obliged to pay the difference between the proffered wage and the amount of compensation already received by the beneficiary for work performed for the beneficiary in that year, which was remunerated in the form of room and board valued at \$16,807. Reducing the proffered wage by \$16,807 leaves \$25,193, which is greater than the petitioner's net income and net current assets for 1999. The petitioner has not demonstrated that there are any other funds available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

² The director erred by failing to consider the petitioner's net current assets.

³ 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 the full proffered wage to the beneficiary in 2000. In 2000, the petitioner shows a loss but net current assets of \$116,513, which are greater than the proffered wage of \$42,000, and has, therefore, demonstrated the ability to pay the full proffered wage without having to consider the lesser obligated wage of \$24,444, which is what the petitioner would have to show it could pay after reducing the proffered wage by the total amount of room and board compensation value of \$17,556 with which it actually already remunerated the beneficiary. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a loss and negative net current assets, which are both less than the proffered wage of \$42,000, and has not, therefore, demonstrated the ability to pay the full proffered wage. However, the petitioner is only obliged to pay the difference between the proffered wage and the amount of compensation already received by the beneficiary for work performed for the beneficiary in that year, which was remunerated in the form of room and board valued at \$17,275. Reducing the proffered wage by \$17,275 leaves \$24,725, which is greater than the petitioner's net income and net current assets for 2001. The petitioner has not demonstrated that there are any other funds available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2002, but it did pay the beneficiary \$37,500, which obligates it to demonstrate it can pay the difference between the proffered wage of \$42,000 and \$37,500, which is \$4,500. In 2002, the petitioner shows a loss but net current assets of \$81,333, which are greater than the difference between the proffered wage and the wages actually paid of \$4,500, and has, therefore, demonstrated the ability to pay the full proffered wage without having to consider that it had also already compensated the beneficiary with room and board valued at \$14,202.15. The petitioner has, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner demonstrated that it paid the beneficiary \$44,869.86 in 2003, which is greater than the proffered wage and establishes a *prima facie* demonstration of an ability to pay for that year. The petitioner has, therefore, shown the ability to pay the proffered wage during 2003.

The petitioner has failed to establish that it can pay the proffered wage out of its net income or net current assets in 1999 and 2001. However, the petitioner submitted a letter from [REDACTED] stating that the petitioner's business was adversely affected by the terrorist attacks on the United States in 2001 that reduced the amount of tourism in that year. While the petitioner failed to submit documentation to corroborate this assertion, the AAO finds it to be plausible and accepts it as invocation of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

[REDACTED] s arguments concerning the petitioner's business proximity to a famous tourist site, the impact on the accommodation industry after tourism decreased due to the terrorist attacks on the United States, as well as its efforts to invest capital to make hotel improvements and general increase in revenue cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline⁴. See *Matter of Sonogawa*, 12 I&N Dec. at 612. The petitioner is part of a well-known hotel franchise, it was incorporated in 1969, its gross revenues have always been above \$1 million and they pay salaries and wages each year of approximately \$250,000-350,000. Its explanation for 2001 is plausible and accepted. The shortfall in 1999 is only approximately \$8,000, which is marginal against the context of its other years and does not undermine the petitioner's overall financial showing. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2002, and 2003. Therefore, the petitioner has established that it has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

⁴ The petitioner was short for two years out of six. The AAO considers this a marginal or borderline fact pattern.