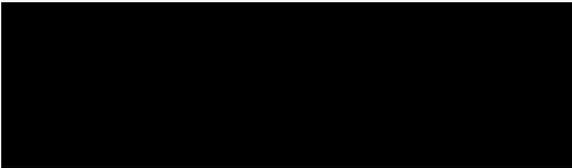




U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 14 2005
WAC-03-055-55058

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:

SELF-REPRESENTED

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 computer services provider. It seeks to employ the beneficiary permanently in the United States as a network control operator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25.64 per hour (\$53,331.20 per year). The Form ETA 750 states that the position requires 2 years experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1990¹, to have a gross annual income of \$2.2 million, and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based calendar year. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since February 1999.

¹ However, the petitioner's tax return indicates it was incorporated on December 31, 1991.

With the petition, the petitioner submitted the following documents pertinent to its ability to pay the proffered wage: the petitioner's tax return for 2001, copies of 3 paychecks issued by the petitioner to the beneficiary, and the beneficiary's Schedule C Profit and Loss from Business of Form 1040 for 1999 through 2001.

On May 7, 2003, 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, the director issued a request for additional evidence (RFE). In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide tax return for 2002 with all schedules and tables, submit original and complete printouts from the Internal Revenue Service (IRS), date stamped by the IRS, of tax returns filed with the IRS by the petitioner for the year 2002 and the Employment Development Department (EDD) Quarterly Wage Reports for all employees for the last four (4) quarters. In response received by the director on July 30, 2003, the petitioner submitted DE-6 Quarterly Wage Report for the four quarters in 2002. The petitioner did not submit its tax return for 2002. Instead, it submitted a copy of Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, whereby the petitioner applied on March 5, 2003 for automatic extension of time to file tax return until September 15, 2003. The petitioner stated that the tax return for 2002 would be available by September 15, 2003.

On September 11, 2003, the director issued the second RFE requesting for the petitioner's IRS computer tax records for 2002, all schedules and tables to the tax return, the beneficiary's W-2 forms for 2001 and 2002, and the petitioner's current valid business license. In response received by the director on December 8, 2003, the petitioner submitted the copy of Form 7004 filed on March 5, 2003 again. Counsel indicated that the tax return for 2002 would be available by early of year 2004 and requested a subsequent RFE. The petitioner submitted the petitioner's bank statements for January, February, March, May and July of 2002 and March, April, June, July and August of 2003; DE-6 Quarterly Wage Report for the four quarters in 2002; and a copy of City of Los Angeles Tax Registration Certificate for the petitioner.

On April 28, 2004, the director issued a notice of intent to deny (NOID) finding that to date the beneficiary is not clearly eligible for classification sought and giving the petitioner thirty days to submit additional information, evidence or arguments to support the petition with warning that failure to respond to the NOID would result in the denial of the petition. In response to the NOID, the petitioner submitted a letter from its president [REDACTED] claiming that under the AAO ruling in a published decision dated January 17, 2002 the petitioner's ability to pay is firmly established by adding \$71,158 depreciation to the net income for 2002. The petitioner also submitted Form 1120 for 2002 filed on May 21, 2004, Form 7004 for extension of time to file 2003 tax return until September 15, 2004, bank statements for August 2003 and January through April of 2004.

The director denied the petition on July 21, 2004 determining that the evidence submitted with the petition, in response to RFEs and NOID did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts the petitioner is financially capable of paying the proffered wage of the beneficiary pursuant to precedent decisions.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claimed on ETA 750B that

he had been employed with the petitioner since February 1999. His Form G-325A also claimed his employment with the petitioner. The petitioner submitted copies of 3 claimed paychecks issued by the petitioner to the beneficiary in the amount of \$900 on September 10, 2002, \$900 on September 17, 2002 and \$850 on September 24, 2002 respectively. The petitioner also submitted DE-6 forms for all employees for all four quarters of 2002, however, the beneficiary was not listed. The beneficiary's Schedule C of Form 1040 in the record shows that the beneficiary had a net profit of \$12,565 in 1999, \$12,599 in 2000 and \$16,298 in 2001 from his electric business with trade name of E.D. Electric, not the petitioner. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2002.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner in response to NOID and counsel on appeal argued that AAO's ruling of adding the depreciation and the net profit in a published decision of January 17, 2002 (cited by counsel as JAN1702 02B6203) must be applied in the instant case. However, the case is distinguishable at facts from the instant case. First, as the director correctly pointed out in his decision, that the petitioner in that particular case had a net profit of \$78,651 and depreciation of \$0, and that the petitioner had sufficient income after paying the beneficiary's salary to exceed the stated poverty level of \$13,880. In the instant case, the petitioner has a net profit of \$0, and depreciation of \$71,158 for the tax year 2002.

Secondly, the petitioner in the case is a sole proprietorship. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Unlike a corporation, a sole proprietorship is not legally separate from its owner. The sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Therefore, rulings to sole proprietorship cases are different from the ones to corporation cases in determining the petitioner's ability to pay. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). However, in the instant case, the petitioner is structured as a C corporation and filed Form 1120 for its tax returns. Counsel's assertion that the prior AAO ruling is legally binding and must be applied to instant case is misplaced. 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).

Finally, reliance on the net income without consideration of depreciation or other expenses from the petitioner's federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns of the petitioner in the record demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$53,331.20 per year from the priority date.

In 2001, the Form 1120 stated net income² of \$(199,791).

In 2002, the Form 1120 stated net income of \$0.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the 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.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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the years in question were \$(624,915) in 2001 and \$(256,575) in 2002 respectively. Therefore, the petitioner had no sufficient net current assets to pay the proffered wage to the beneficiary in the years 2001 through 2002.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.

In addition, the petitioner filed Immigrant Petitions for Alien Worker (Form I-140) for three more workers⁴ around the time the instant petition was filed. The priority dates for these petitions and the dates the three other beneficiaries obtained their permanent status cover the two years 2001 through 2002. Therefore, the petitioner must show that it had sufficient income to pay all the wages for the years 2001 and 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The director correctly determined that the bank records submitted were incomplete and the ones submitted showed balances that range from \$13,669.74 to \$48.87, which was short of the proffered wage of \$53,331.20 annually. Nevertheless, counsel's reliance on the bank balance in the petitioner's bank account 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel asserts in his brief accompanying the appeal that the ruling of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), is applicable to the instant case. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult year 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 1966 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 petitioner's 1966 income tax return indicates a net business profit of \$280, which is considerably short of the proffered wage of \$6,240. However, the petitioner made a net profit of \$4,774 January 1, 1967 to May 31, 1967 that was equal to approximately \$11,457 per year, more than twice of the proffered wage. 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.

However, facts of the instant case are distinguishable from ones of *Sonogawa*. First, the petitioner's tax returns show that the petitioner had a net income of \$0 in 2002 and minus \$199,791 in 2001. Counsel claims that the petitioner's net incomes of \$29,939 in 1998, \$46,822 in 1999 and \$0 in 2000 through 2002. Counsel did not submit evidence to support his claim. Nevertheless, continuously three years zero or negative net

⁴ CIS receipt numbers WAC-01-246-52395, WAC-01-256-55771 and WAC-03-063-52455.

income does not establish that the petitioner's business was in an uncharacteristically unprofitable period within a frame-work of profitable or successful years. Second, the petitioner did not provide any documents on the profitability for the subsequent year or any parts thereof showing it would become capable to pay the proffered wage in the future. Third, counsel failed to prove with objective evidence that the petitioner's prospects for a resumption of successful business operations were well established despite listing company's alliances, clients in the brief with appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is concluded that no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*.

Counsel argues that the denial of the petition will result in hardship to the petitioner because the employment of the beneficiary as Network Control Operator is a vital component in the fulfillment of the petitioner's long-term plan of expansion. Counsel did not submit any evidence to support his argument. 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).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.