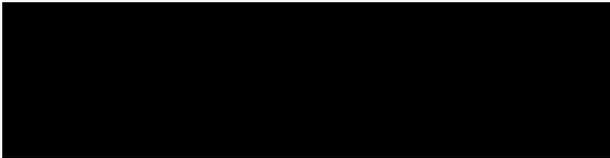


identifying can be used to
prevent clearly unwarranted
invasion of personal privacy



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and Immigration
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FILE: [REDACTED]
WAC 03 003 54341

Office: CALIFORNIA SERVICE CENTER

Date: FEB 25 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an industrial design company. It seeks to employ the beneficiary permanently in the United States as an industrial 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.

On appeal, counsel submits a brief and submits 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 7, 2000. The proffered wage as stated on the Form ETA 750 is \$52,540.80 annually.

With the petition, the petitioner submitted a Profit and Loss Statement for October 2001 through December 2001, along with a balance sheet for the same period of time. The profit and loss statement reflected a loss of \$37,095 for the three months. Another sheet with the profit and loss statement is dated December 11, 2001 and indicated that the total net assets of the petitioner at the end of 2001 were -\$139,272. The petitioner also submitted self-generated quarterly employee reports for the first two quarters of 2002. The beneficiary's wages for the first two quarters of 2002 were \$22,550. The petitioner also submitted seven of the beneficiary's payroll records that indicated the beneficiary had earned \$12,950 from June 11, 2002 to September 16, 2002. The petitioner also submitted an I-797 Approval Notice for the beneficiary's H-1B visa from May 2, 2000 to January 31, 2003, along with documentation of the beneficiary's qualifications.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 17, 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 from the petitioner's financial officer. The director specifically requested the petitioner's federal income tax returns for the years 2000 and 2001, noting also that the profit and loss statement from October 2001 to December 2001 was not sufficient to establish the petitioner's ability to pay the proffered wage. The director provided instructions on what documents the petitioner should submit based on what the petitioner's business structure was, stating that regardless of the type of business entity, all schedules and attachments had to be submitted.

In response, on March 10, 2003, the petitioner submitted financial statements for 2000 and 2001. Counsel stated that the fiscal year for the petitioner runs from July to June of the respective year. Counsel further stated that the 2002 financial statement would be available later in 2003, and would be submitted to Citizenship and Immigration Services (CIS) as soon as it was available. Counsel reviewed the petitioner's financial position in 2000 and stated that the company generated a taxable income of \$23,635 and maintained current assets of \$65,407 as of June 2001. Counsel noted that the beneficiary was working for the petitioner during the fiscal year 2000 and was paid \$41,600 annually. Counsel also noted that the petitioner, during its fiscal year 2001 (July 2001 to June 2002), had a net income of \$12,371 and current assets of \$121,719. With regard to the beneficiary's wages, counsel stated that the beneficiary worked for the petitioner during the entire fiscal year of 2001 and was paid \$48,000. Counsel finally noted that the beneficiary continues to work for the petitioner and is being paid \$4,000 a month.

Counsel submitted a cover letter from Glass & Blum, P.C., CPAs, Garden City, New York, dated January 7, 2003. This letter stated that the accounting firm had compiled balance sheets and related statements of income for the petitioner as of June 30, 2001 and June 30, 2002. The firm stated that it had not audited or reviewed the accompanying financial statements.

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 May 19, 2003, denied the petition. Based on the beneficiary's biweekly pay roll records in 2002, the director determined that in 2002 the beneficiary received a biweekly salary of \$1,850, which is a difference of \$4,440 from the proffered wage.¹ The director then determined that since the petitioner had not paid the beneficiary the full proffered wage, the petitioner had to provide further evidence to establish that it had the ability to pay the proffered wage. The director then noted that the profit and loss statement submitted by the petitioner only covered a three-month period and was only considered to be supplemental evidence. With regard to the financial statements submitted by the petitioner, the director stated that these documents were not audited and could not be used as evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the petitioner has established the ability to pay the proffered wage. Counsel states that in fact the petitioner is paying the beneficiary a salary greater than the one stated on both the labor certification application and the I-140 petition since the beginning of 2003. Counsel states that the additional

¹ The proffered wage is \$52,450. The director apparently projected the annual salary for the beneficiary, based on her seven payroll records from June to September 2002, to be \$48,010.

evidence submitted on appeal establishes that the petitioner has maintained cash reserves far greater than the slight discrepancy between the beneficiary's salary and the proffered wages as of the priority date. Counsel refers to *Matter of Sonogawa*, and its finding that the approval of a visa was not precluded in the absence of sufficient net profits, when it was found that the petitioner's business had increased and that the petitioner's expectations of a continuous increase in business and profits were reasonable. Counsel also refers to *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, (S.D.N.Y. 1986) in which the tax return of the petitioner was open to differing interpretations with respect to the actual ability to pay the proffered wage. Counsel notes that the corporation had to submit more conclusive evidence such as cash flow data or certified financial statements to clarify the income figure reflected on its return.

Counsel submits the beneficiary's pay stubs from January 1, 2003 to June 2003. Counsel also submits the petitioner's bank statements from June 2000 to May 2003. Counsel asserts that the petitioner's bank statements indicate that the company maintained average daily cash balances of \$26,382. Counsel asserts that the "cash flow data" represented by the bank statement balances clearly demonstrate that the petitioner had far more cash available than the \$10,940 difference between the proffered wage and the beneficiary's actual salary. Counsel states that the cash flow data clearly satisfies the requirement found in the denial notice that the petitioner provide evidence of having the ability to pay the remainder of the proffered wage. With regard to fiscal year 2001, counsel states that the petitioner's bank statement indicated that the company maintained average daily cash balances of \$19,810.91. Counsel states that the cash flow data clearly demonstrated that the petitioner had far more cash available than the \$4,540 difference between the proffered wage and the beneficiary's actual salary of \$48,000.

Counsel asserts that the beneficiary has continued to work for the petitioner since January 2003, and has been paid \$4,500 monthly or \$2,076 every two weeks. In conclusion, counsel states that the "cash flow data" provided on appeal, when viewed according to the standards cited in the *Sonogawa* and *Elatos* decisions, should have been considered in determining whether or not the petitioner had the financial ability to pay the beneficiary's salary.

Counsel's reference to *Sonogawa* is unfounded. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), 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. In the instant petition, neither counsel nor the petitioner have made any claim as to any unprofitable years of business, or reasonable expectations of a continued increase in business.

Furthermore, counsel's reference to *Elatos Restaurant* is irrelevant to these proceedings. This case involves a petitioner whose tax return figures were questioned, and the petitioner had to submit more evidence, including cash flow data, to clarify the income figures reflected on its tax return. However, the petitioner in the instant petition has not submitted its federal income tax returns and as a consequence, its tax return figures have not been questioned. While the petitioner submitted other documents to be discussed below, it never submitted its federal income tax returns from 2000 to the present time for further examination. Furthermore, the petitioner has provided no clarification or explanation as to why it has not submitted its federal income tax returns.

In the original petition, the petitioner submitted an unaudited profit and loss statement as proof of its ability to pay the proffered wage. Furthermore, on appeal, counsel submits two financial statements prepared by accountants who acknowledge their reports are not audited. The unaudited financial statements that the petitioner submitted with the petition 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.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statements from June 2000 to November 2002. Counsel's reliance on the monthly balances 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), namely, federal tax returns, annual reports, federal tax returns, or audited financial statements, 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. Furthermore, counsel's assertions of the petitioner's average daily cash balances of \$26,382 in 2000, and of \$19,810 in 2001 are unsubstantiated. Counsel's further reference to such figures as probative "cash flow data" evidence that would establish the petitioner's ability to pay the proffered wage, appears totally unfounded, especially in view of the absence of the more conclusive financial documentation identified in 8 C.F.R. § 204.5(g)(2).

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. Although the beneficiary indicated on ETA Form 750 that she had worked fulltime for the petitioner from May 2000 to the present, the petitioner's employment records are incomplete. The petitioner did not submit any W-2 forms for the beneficiary for the years 2000, 2001, 2002 and 2003, but rather submitted two quarterly employee reports that documented the beneficiary's salary of \$22,550 for the first two quarters of 2002.² With regard to the beneficiary's employment by the petitioner in 2000, counsel asserted, in the petitioner's response to the director's request for further evidence, that the beneficiary was working for the petitioner during the fiscal year 2000 and was paid \$41,600 annually. However, the record is devoid of any documentary evidence to substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter*

² The petitioner's records indicate the beneficiary's first quarter salary in 2002 was \$9,600 and her second quarter salary in 2002 was \$12,950, or a six-month salary of \$22,550. In terms of the petitioner's fiscal year, these two quarters would be the last two quarters of fiscal year 2001.

of *Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). With regard to the beneficiary's wages in 2001, counsel also asserted that the beneficiary worked for the petitioner during the entire fiscal year of 2001 and was paid \$48,000. Once again, the assertions of counsel are not evidence. Although the petitioner provided documentation for the last two quarters of the petitioner's fiscal year 2001, or January 2002 to June 2002, there are no employment documents in the record for the first two quarters of the petitioner's 2001 fiscal year, namely, July 2001 to December 2001.

The beneficiary provided payroll stubs that documented that she received a biweekly salary of \$1,850 from June 11, 2002 to September 16, 2002, or the petitioner's first fiscal quarter of 2002. In addition, on appeal, the petitioner submits payroll records for the beneficiary that establish she received a biweekly salary of \$2,076 from January 2003 to June 2003. The total salary paid for the last two quarters of 2002, based on the twelve payroll documents submitted, is \$24,923. Therefore, the petitioner and beneficiary did provide documentation to establish the beneficiary's actual salary in three quarters of the petitioner's fiscal year 2002; however, there is no employment documentation in the record for the beneficiary's salary in the second quarter of fiscal year 2002. Thus, while the petitioner and beneficiary have provided some documentary evidence with regard to the beneficiary's salary from January 2002 to June 2002, from June to September 2002, and from January to June of 2003, the record lacks documentary evidence to establish the beneficiary's wages from July 2000 to December 2001, and from September 2002 to December 2002. Furthermore, even if the AAO were to extrapolate the beneficiary's annual wages for these periods of time from partial wage records, it does not appear that the petitioner paid the beneficiary the proffered wage of \$52,540 at any point from July 2000 to the present time. Without more persuasive evidence, the petitioner has not established that the beneficiary was paid a salary equal to or greater than the prevailing wage from June 2000 to the present.

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). 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 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, now CIS, should have considered income before expenses were paid rather than net income. With regard to the instant petition, the petitioner did not submit its federal income tax returns for the years 2000, 2001, and 2002. Therefore the petitioner cannot establish that its net income for the years 2000, 2001, and 2002 was sufficient to pay the difference between the proffered wage and the beneficiary's actual salary.

In addition, 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. In addition, 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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. As stated previously, the petitioner did not submit any federal income tax returns to enable the AAO to utilize this method of analysis. Therefore the petitioner cannot establish that its net current assets were sufficient to pay the difference between the proffered wage and the beneficiary's actual salary.

The petitioner has not demonstrated that it paid the proffered wage to the beneficiary from July 2000 to the present. Although counsel asserts that the petitioner's cash flow data is sufficient to pay any difference between the proffered wage and the beneficiary's actual salary, as previously stated, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). In addition, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date and onward, either based on its net income or net current assets. Therefore, the petitioner has not established its capability to pay the proffered wage from the priority date to the present. The director's decision shall stand, and the petition shall be denied.

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.

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.