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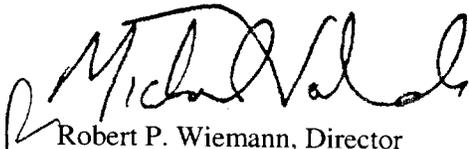
IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is cleaning and alterations firm. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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 additional evidence and asserts that the director erroneously interpreted the petitioner's tax returns in reviewing the petitioner's continuing ability to pay the proffered salary.

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) provides:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 March 4, 1998. The proffered wage as stated on the Form ETA 750 is \$12.10 per hour, which amounts to \$25,168 per annum. On the Form ETA 750B, signed by the beneficiary on January 26, 1998, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in 1984, to currently employ eleven workers, to have a gross annual income of approximately \$592,000 and to have a net annual income of \$47,796. In support of its ability to pay the beneficiary's proposed wage offer of \$25,168 per year, the

petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and a copy of one of its shareholder's individual tax return. The corporate return reflects that the petitioner files its federal tax returns using a standard calendar year. It shows that the petitioner reported net income of \$47,796 in 2001. Schedule L of the tax return indicates that the petitioner had \$78,223 in current assets and \$190,360 in current liabilities, resulting in -\$112,137 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and are a measure of a petitioner's liquidity during a given period.<sup>1</sup> A corporate petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax return. 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On May 2, 2003, the director instructed the petitioner to submit copies of annual reports, federal tax returns, or audited financial statements in support of its ability to pay the proffered salary.

In response, the petitioner, through counsel, submitted copies of the individual tax returns (Form 1040) of one of the shareholders for 1998 through 2002. The director issued a second request for evidence in support of the petitioner's ability to pay the certified wage on July 20, 2003. In response, counsel submitted the petitioner's corporate tax returns for 1998 through 2002. The 1998, 1999, 2000 and 2002 returns contain the following information:

	1998	1999	2000	2002
Net income	\$ 75,390	-\$ 71,545	-\$ 62,630	\$ 40,652
Current Assets	\$102,839	\$ 74,552	\$ 59,977	\$ 34,953
Current Liabilities	\$122,117	\$166,187	\$192,286	\$165,247
Net current assets	-\$ 19,728	-\$ 91,635	-\$132,309	-\$130,294

The director reviewed the petitioner's net income and net current assets as shown on its corporate tax returns from 1998 through 2002 and determined that the evidence failed to establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of March 4, 1998.

On appeal, counsel submits a copy of an accountant's letter, dated October 17, 2003, suggesting that various amounts representing depreciation expense (Form 4562), credit line liability owed but not paid (Schedule L), and interest income and installment sale gain (Schedule K) should be added back to the petitioner's net income. Counsel asserts that the revised figures reflect the petitioner's ability to pay the proffered wage. He asserts that the petitioner has produced increasing revenue and growth through the years despite the effects of the 1994

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

earthquake. Counsel maintains that if sometime between the priority date and the date permanent residency is granted, a petitioner can show the ability to pay the proffered wage, then a petition should be approved. In support of this proposition, counsel points to the petitioner's 2001 and 2002 tax returns.

Counsel's assertions are not persuasive. 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 may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record does not suggest that the petitioner has employed the alien.

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 a petitioner's federal income tax return, without consideration of depreciation or other expenses, if a petitioner has elected to submit its tax returns as evidence of its financial ability to pay a certified wage. 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. 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 that 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. (Original emphasis.) *Chi-Feng* at 537.

Although we recognize the review of net current assets as an alternative method of evaluating a petitioner's ability to pay the proffered wage, we will not add back or alter the figures represented as current liabilities because a petitioner may elect to pay only interest on a credit line as claimed in the accountant's letter submitted on appeal. In this case, the petitioner demonstrated its ability to pay the proffered wage in 1998, 2001, and 2002 because the petitioner's net income as shown on its tax return was sufficient to cover the proposed annual wage offer of \$25,168.

In 1999, however, neither the petitioner's net income of -\$71,545, nor its net current assets of -\$91,635 could cover the certified wage of \$25,168. Similarly, in 2000, the proffered salary could not be met by either the petitioner's net income of -\$62,630 or its net current assets of -\$132,309. Even if the claim of adding back isolated amounts represented on Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. as interest income and installment sale income was accepted, it would not overcome the substantial shortfall presented in these tax returns.<sup>2</sup>

Counsel's assertion regarding the effects of the '94 earthquake on the petitioner's business are not supported by the facts in the record and do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although expectations of increasing business and profits supported the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), it is noted that that case related to a petition filed during an uncharacteristically unprofitable or difficult year within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. 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 this case, the petitioner's 1998 net income of \$75,390 reached its highest level. Negative net income was reported in 1999 and 2000 before climbing again to the relatively modest level of \$47,796 in 2001 and dropping to \$40,652 in 2002. The AAO cannot conclude that the petitioner has demonstrated that unusual and unique circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

As noted by counsel, the regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* financial ability to pay a proffered wage. Unless it is found that unusual circumstances have been sufficiently demonstrated, the AAO finds this to mean that a petitioner must show that its financial ability to pay a certified wage has persisted and been uninterrupted as of the priority date of the preference petition.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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

**ORDER:** The appeal is dismissed.

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<sup>2</sup> It is noted that the income figures set forth on Schedule K are to be offset by expense amounts such as interest expense and charitable contributions.