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U.S. Citizenship
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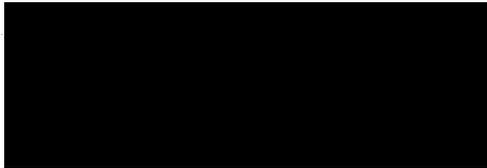
FILE: [Redacted]
SRC-04-195-50393

Office: TEXAS SERVICE CENTER Date: JUL 06 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either 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 petition's priority date, which is the date 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). The priority date in the instant petition is December 27, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000.00 per year. On the Form ETA 750B, signed by the beneficiary on September 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in October 2000 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on July 21, 2004. On the petition, the petitioner claimed to have been established in 1999, to currently have 12 employees, to have a gross annual income of one million dollars, and to have a net annual income of "[§]150000 Projected." (I-140 Petition, Part 5, Item 2). The petitioner submitted supporting evidence with the petition.

In a request for evidence (RFE) dated January 21, 2005, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director 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.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's response to the RFE was received by CIS on April 18, 2005.

In a decision dated April 21, 2005, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that an evaluation of the petitioner's complete financial situation establishes the petitioner's ability to pay the proffered wage, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. In the proceedings before the director, the director issued an RFE which required evidence in the form of copies of either annual reports, federal tax returns, or audited financial statements. But the director did not specify any specific document which the petitioner was requested to submit. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on September 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in October 2000 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary. The beneficiary's Form W-2's stated compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
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2001	\$41,647.72	\$65,000.00	\$23,352.28
2002	\$16,931.18	"	\$48,068.82
2003	\$23,845.52	"	\$41,154.48
2004	\$37,304.48	"	\$27,695.52

The record before the director closed on April 18, 2005 with the submission of the petitioner's response to the RFE. As of that date the beneficiary's Form W-2 Wage and Tax Statement for 2004 was the most recent Form W-2 available.

The above figures fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns state the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$9,350.00	\$23,352.28*	-\$14,002.58
2002	-\$29,498.00	\$48,068.82*	-\$77,566.82
2003	\$10,194.00	\$41,154.48*	-\$30,960.48
2004	not submitted	\$27,695.52*	-\$27,695.52

* Crediting the petitioner with the wages actually paid to the beneficiary in the corresponding year.

The record before the director closed on April 18, 2005 with the submission of the petitioner's response to the RFE. As of that date, the petitioner's tax return for 2004 should have been available, but a copy of that return was not submitted in evidence. The above figures fail to establish the ability of the petitioner to pay the proffered wage in any of the years at issue.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current

liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$215,854.00	\$112,463.00	\$23,352.28*
2002	\$112,463.00	\$12,696.00	\$48,068.82*
2003	\$12,696.00	-\$35,383.00	\$41,154.88*
2004	not submitted	not submitted	\$27,695.52*

* Crediting the petitioner with the wages actually paid to the beneficiary in the corresponding year.

The petitioner's net current assets for the end of 2001 were greater than the amount of wage increase needed to have paid the beneficiary the full proffered wage. For 2002, the petitioner's net current assets at the end of the year were less than the needed wage increase. For 2003, the petitioner's net current assets at the end of the year were negative. The figures for the petitioner's end-of-year net current assets for 2002 and 2003 therefore fail to establish the petitioner's ability to pay the proffered wage in those years. No tax return of the petitioner was submitted for the year 2004.

The record also contains copies of unaudited financial statements. Unaudited financial statements 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 of its 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.

The record also contains copies of bank statements and credit union statements. However, bank statements and credit union statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, monthly account statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the statements covered certain months in the year 2002 for business accounts of the petitioner and personal accounts of the petitioner's majority owner and his wife. The information on those account statements covers only certain months on different accounts, and it therefore fails to provide significant information to help establish the petitioner's ability to pay the proffered wage.

Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements and credit union statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2002 and 2003 were uncharacteristically unprofitable years for the petitioner.

In his decision, the director correctly analyzed the amounts of compensation paid to the beneficiary and the petitioner's net income and net current assets. The director correctly found that the evidence failed to establish the petitioner's ability to pay the proffered wage in the years 2002, 2003 and 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed other one other I-140 petition which has been pending during the time period relevant to the instant petition.¹ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

In the instant petition, the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of this petition. For this reason, it is not necessary to reach the issue of whether the evidence establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other I-140 petition submitted by the same petitioner.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The burden of proof in these

¹ I-140 receipt number SRC-04-011-52317.

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.