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U.S. Citizenship
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FILE: WAC-03-231-51081 Office: CALIFORNIA SERVICE CENTER Date: **MAY 23 2005**

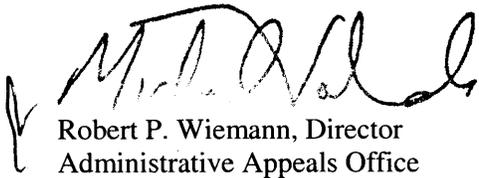
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 jewelry manufacturing firm. It seeks to employ the beneficiary permanently in the United States as a diamond setter. 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 states that the evidence establishes the petitioner's ability to pay the proffered wage.

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.

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 September 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.45 per hour, which amounts to \$23,816.00 annually. On the Form ETA 750B, signed by the beneficiary on September 20, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on August 8, 2003. On the petition, the petitioner claimed to have been established on September 1, 1989, to have a gross annual income of \$1,266,136.00, to have a net annual income of \$97,845.00, and to currently have five employees. With the petition, counsel submitted a letter from a jewelry company in Mexico stating the beneficiary's experience as a jewelry setter from April of 1996 until June of 1998, and no additional supporting evidence.

In a notice of intent to deny (ITD) dated November 6, 2003, the director stated that the petitioner had filed several other petitions, and stated that the petitioner's tax return for 2001 failed to establish the petitioner's ability to pay the proffered wages to all beneficiaries. A copy of the petitioner's tax return for 2001 had not yet been submitted for the record in the instant petition, but a copy of that return was apparently in the file of

The petitioner's lines of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not necessarily improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142.

Although lines of credit will not be considered as cash assets, CIS will consider the totality of circumstances in evaluating an petitioner's ability to pay the proffered wage, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612. Counsel asserts that the existence of three lines of credit is evidence of the petitioner's good financial condition, since banks will issue lines of credit only after a bank does an in-depth analysis of the financial condition of the company applying for a line of credit. The record in the instant case, however, lacks any copies of the financial information which the petitioner submitted to banks in support of its applications for lines of credit. Moreover, the information on the line of credit statements themselves fails to establish significant financial resources available to the petitioner.

A statement dated November 20, 2003 from [REDACTED] is in the name of the petitioner and shows an approved credit line of \$45,000.00, an ending balance of \$30,518.60, and available credit of \$14,481.40. A statement dated October 29, 2003 from [REDACTED], shows a credit line of \$72,500.00, a new balance of \$66,038.75, and available credit of \$6,461.00. The copy of that statement in the record, however, lacks any identification of the name of the person or organization holding the line of credit. For purposes of analysis, it will be assumed that this statement pertains to the petitioner. A statement dated November 20, 2003 from the Bank of America, Greensboro, North Carolina, is in the name of the petitioner and shows a total credit line of \$100,000.00, a principal balance of \$81,015.85, and available credit of \$18,984.15.

The statements show minimum payments due as follows: \$762.96 to U.S. Bank; zero to the [REDACTED] and \$514.75 to the [REDACTED]. The monthly finance charges shown on the statements are \$189.99 for [REDACTED], \$508.77 for the [REDACTED], and \$514.75 for the [REDACTED].

The line of credit statements show existing liabilities far in excess of the additional credit available to the petitioner, and significant monthly payments and monthly finance charges. The statements therefore fail to establish the petitioner's ability to pay the proffered wage for the year 2003. Moreover, no line of credit statements were submitted for prior years.

Counsel asserts that the services of the beneficiary are intended to replace the services now done for the petitioner by subcontractors. 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). No evidence in

the record establishes that the work to be performed by the beneficiary will replace the work which has been performed by subcontractors.

Counsel's reliance on *Matter of Sonogawa*, 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 *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case. The record in another petition submitted by the petitioner which also came before the AAO on appeal contained evidence describing the petitioner's past business history, but no such evidence was submitted in the instant petition. Nonetheless, the record in the instant petition indicates that the legal entity which is the petitioner began operations only in the year 2001. On the Forms 1120S of the petitioner for 2001 and 2002, the date of the petitioner's incorporation is shown as March 8, 2000. On the Schedule L attached to the petitioner's tax return for 2001 the assets and liabilities at the beginning of the year are stated as zero. Moreover, even if the current legal entity were assumed to be a continuation of the same business under a different form of organization, the record does not establish that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

On the petitioner's Form 1120S for 2001, the two shareholders of the petitioner are shown as receiving officer compensation in the amounts of \$42,075.00 each, and are shown to have each devoted 100% of the shareholder's time to the business. Similarly, on the petitioner's Form 1120S for 2002 one shareholder is shown as receiving \$56,875.00 in officer compensation and the other is shown as receiving \$49,025.00 in officer compensation. The percentage of time each person is stated to have devoted to the business is again shown as 100%. The record contains no evidence indicating that either of those shareholders could forego their compensation in order to pay the beneficiary the proffered wage. Moreover, the record lacks evidence pertaining to the beneficiaries of the other petitions filed by the petitioner. Any analysis under *Sonogawa* of the totality of the circumstances affecting the petitioner would have to include information concerning such other beneficiaries, but such evidence is lacking from the record in the instant petition.

For the foregoing reasons, the evidence in the record 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.

Since the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary in this decision to evaluate the total proffered wage commitments of the petitioner arising out of other petitions filed by the petitioner. But, in any event, the evidence in the record in the instant petition provides no information about the petitioner's other petitions. The record lacks evidence on the proffered wages in other petitions, the immigration status of the beneficiaries of other petitions submitted by the petitioner, and the present employment status of such beneficiaries. Therefore, even if the evidence established the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it would still fail

to establish the petitioner's ability to pay all of its proffered wage commitments, since the record fails to provide a sufficient basis on which to calculate the petitioner's total proffered wage commitments for each of the relevant years.

In his decision, the director correctly stated the petitioner's net income figures as shown on its tax returns, and correctly found that those figures failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The director failed to evaluate the petitioner's net current assets. That error, however, did not affect the director's decision in the case, since, as shown above, the petitioner's net current assets were insufficient to pay the proffered wage in each relevant year. The decision of the director to deny the petition was correct.

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

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.