

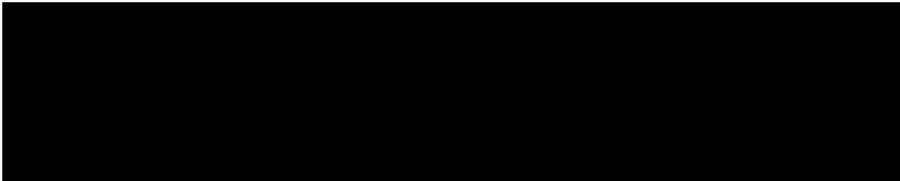
**PUBLIC COPY**

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



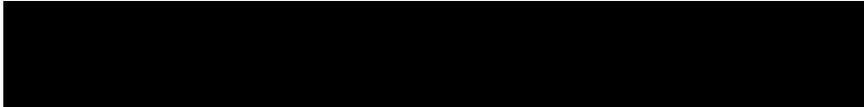
**U.S. Citizenship  
and Immigration  
Services**

**B6**



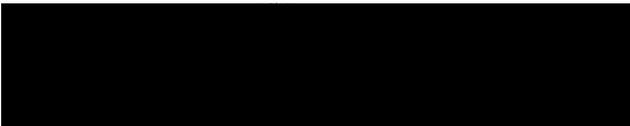
FILE: EAC-03-099-52361 Office: VERMON SERVICE CENTER Date: **NOV 02 2005**

IN RE: Petitioner:  
Beneficiary:



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

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. 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.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$26.45 per hour, which amounts to \$48,139.00 annually. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 1, 2003. On the petition, the petitioner claimed to have been established on August 27, 1997, to currently have fifteen employees, and to have a gross annual income of \$1,027,337. The item on the petition for the petitioner's net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 19, 2003, the director requested additional evidence relevant to the petitioner's 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 submissions in response to the RFE were received by the director on March 3, 2004.

In a decision dated July 9, 2004, 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, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the beneficiary has been employed by the petitioner, and that petitioner's balance sheets and bank statements show financial resources sufficient to pay the amounts needed to raise the beneficiary's compensation to the proffered wage. Counsel also states that the evidence is sufficient to establish the petitioner's ability to pay the proffered wage under the principles of the decision of the Board of Immigration Appeals in *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 by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 (Reg. Comm. 1967).

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 April 23, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001 and 2002 showing compensation received from the petitioner. The amounts of compensation stated on those Form W-2's are shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$26,620.00	\$48,139.00	\$21,519.00
2002	\$28,468.00	\$48,139.00	\$19,761.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001 and 2002. The petitioner's tax year runs from October 1 of each year until September 30 of the following year. The record before the director closed on March 3, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002, covering the period from October 1, 2002 until September 30, 2003 is the most recent return available.

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 show 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
2000	\$1,666.00	\$21,519.00*	-\$19,853.00
2001	-\$30,833.00	\$28,468.00**	-\$50,504.00
2002	\$1,941*	W-2 not submitted	no information

\* Crediting the petitioner with the \$26,620.00 actually paid to the beneficiary in calendar year 2001.

\*\* Crediting the petitioner with the \$28,468.00 actually paid to the beneficiary in calendar year 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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	
2000	-\$465.00	\$10,618.00	\$21,519.00*
2001	\$10,618.00	-\$14,259.00	\$28,468.00*
2002	-\$14,259.00	-\$29,497.00	no information

\* Crediting the petitioner with the \$26,620.00 actually paid to the beneficiary in calendar year 2001.

\*\* Crediting the petitioner with the \$28,468.00 actually paid to the beneficiary in calendar year 2002.

The figures for the petitioner's net current assets at the beginning of each year, as shown above, reflect the assets available to the petitioner at the beginning of its tax year. If positive, those assets could be drawn upon by the petitioner, if necessary, to pay the proffered wage to the beneficiary. The figures for the petitioner's net current assets at the end of each year, also shown above, reflect the assets available to the petitioner at the end of its tax year as a result of the petitioner's activities during the tax year. If positive, those assets could be drawn upon by the petitioner during the year as they are accumulated if needed to pay the proffered wage to the beneficiary. Therefore in evaluating the petitioner's ability to pay the proffered wage it is appropriate to base the analysis either on the petitioner's net current assets for the beginning of each tax year or its net current assets for the end of each tax year.

The above table shows that only for the end of the tax year 2000, which ended on September 30, 2001, was the figure for net current assets positive. That same figure is also the net current assets figure for the beginning of the tax year 2001, which began on October 1, 2001. But in any event, the figure if \$10,618.00 is less than the wage increase needed to raise the beneficiary's actual wage to the proffered wage in calendar year 2001 and in calendar year 2002.

The record also contains partial copies of monthly bank statements for an account of the petitioner for the months of January 2001 through December 2001. However, bank 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, bank 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. On the petitioner's bank statements the ending balances are as follows:

2001:	Ending balances		Ending balances
January	\$17,686.52	July	\$52,283.34
February	\$24,396.61	August	\$41,716.27
March	\$26,172.54	September	\$12,604.30
April	\$41,709.44	October	\$78,120.81
May	\$17,919.74	November	\$45,858.25
June	\$23,582.23	December	\$31,295.26

The average ending balance on the monthly statements for 2001 is \$34,445.34, an figure greater than the \$21,519.00 which was needed to raise the beneficiary's actual compensation to the proffered wage during 2001. However, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank 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.

The record does not establish the relationship between the petitioner's cash balances in its bank account and its years-end cash assets as shown on its tax return for the year ending in 2001. As noted above, the petitioner's tax year runs from October 1 until September 30 of the following year. On the Schedule L attached to the petitioner's Form 1120S tax return for 2000, the petitioner states year-end assets of cash in the amount of \$36,859.00. That figure presumably shows the petitioner's cash assets as of September 30, 2001. On the petitioner's bank statement for September 2001, which has an ending date of September 28, 2001, the ending balance is \$12,604.30. It is not possible from the record to determine the reason for the difference of over \$24,000.00 between those two figures. The date September 28, 2001 was a Friday, and it was therefore the last business day of that month. The partial copies of bank statements in the record contain only account summaries and do not contain complete daily transaction information. The record does not establish the relationship between the figures shown on the petitioner's tax returns and the figures shown on the petitioner's bank statements.

In any event, no bank statements for 2002 or 2003 were submitted. The record before the director closed on March 3, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's bank statements for 2002 and 2003 should have been available. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's bank statements for 2001 met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2002 and 2003.

The record also contains a letter dated July 21, 2004 from a certified public accountant, submitted for the first time on appeal. In the letter, the accountant offers her opinion that based on her review of the financial position of the petitioner in 2001, the petitioner could have afforded to pay the beneficiary the full proffered wage in 2001.

Opinion letters from accountants are not among the types of acceptable evidence described in the regulation at 8 C.F.R. § 204.5(g)(2). Although letters from accountants may be helpful in some circumstances in explaining certain aspects of a petitioner's financial situation, the July 21, 2004 accountant's letter in the instant petition provides no additional financial information beyond that described above. Therefore the accountant's letter provides no additional support to help establish the petitioner's ability to pay the proffered wage during the relevant time period.

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 \$100,000.00. 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 *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 the years 2000, 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the proposition that CIS should not rely on a balance sheet analysis of the petitioner's ability to pay the proffered wage. Counsel states that the court in *Masonry Masters* found that CIS (formerly the INS) had unrealistically assumed that the beneficiary would contribute nothing to the employer's income. Nonetheless, although part of that decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a painter will significantly increase profits for the petitioner. As noted above, the record shows that the beneficiary was already on the petitioner's payroll during 2001 and 2002, earning compensation of \$26,620.00 in 2001 and \$28,468.00 in 2002. No evidence in the record indicates that raising the beneficiary's compensation to the proffered wage of \$48,139.00 would increase the petitioner's net income in any way.

Counsel also cites three decisions of the AAO as authority that bank statements may be found to be sufficient evidence of a petitioner's ability to pay the proffered wage. Counsel does not provide official published citations for any of those cases. For two cases counsel provides only file numbers as citations, and for the third case counsel provides only a citation to the online service of the Westlaw company. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS 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).

Counsel has provided no copies of the decisions which are cited only by file numbers. The AAO therefore cannot comment on the analyses in those cases as summarized by counsel. The AAO has accessed the decision cited to the Westlaw online service, *In Re [Identifying Information Redacted by Agency]*, 2002 WL 32082463 (AAO January 11, 2002). Nothing in that decision indicates that it is a precedent decision. Moreover the reasoning in that decision is not persuasive. In that decision, the AAO stated, "A review of the bank statements reveals that the petitioner had sufficient cash at the end of every month to pay the beneficiary's monthly salary of \$4,650.00." *Id.* ¶ 9. The monthly ending balances and other evidence in the record were found sufficient to establish the petitioner's ability to pay the proffered wage. However reliance on the ending monthly balances alone would be insufficient to establish the petitioner's ability to pay the proffered wage, since funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

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.

In his decision, the director correctly stated the petitioner's net income shows on its tax returns for 2000, 2001 and 2002. The director failed to note that the petitioner's tax year does not correspond to the calendar year. In calculating the petitioner's year-end net current assets, the director failed to consider the petitioner's tax return for 2000, which covered the period from October 1, 2000 until September 30, 2001, a period which includes the priority date. The director correctly calculated the petitioner's year-end net current assets based on the information in the petitioner's tax returns for 2001 and 2002. The director also correctly evaluated the petitioner's bank account statements. The director's decision to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted 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.