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EAC-02-030-51159

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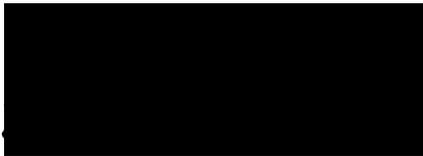
Date: **SEP 12 2005**

In re:            Petitioner:  
                     Beneficiary:



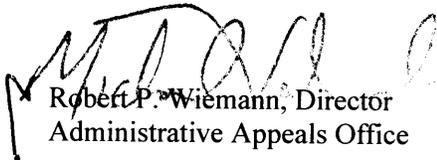
Petition:        Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN 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, Vermont Service Center, denied the immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter was again before the AAO on a motion to reopen and reconsider, which was rejected as an untimely filing pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5a(b), and 103.5(a)(4). The petitioner's counsel subsequently submitted evidence showing that the AAO received the motion to reopen and reconsider on time<sup>1</sup>. Thus, the AAO is reopening these proceedings on its own motion and will adjudicate the substance of the petitioner's prior motion to reopen and reconsider. The motion to reopen and reconsider is granted. The AAO's decision is affirmed in part and withdrawn in part. The petition remains denied.

The petitioner is a shipping agent and cargo broker. It seeks to employ the beneficiary permanently in the United States as an accountant. 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. The AAO affirmed the director's decision.

On motion, counsel submits a brief and 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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 15, 1997. The proffered wage as stated on the Form ETA 750 is \$63,054.16 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 1997.

On the petition, the petitioner claimed to have been established in 1981, to have a gross annual income of \$754,898, and to currently employ four workers. In support of the petition, the petitioner submitted Form 1120,

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<sup>1</sup> The petitioner's evidence consisted of Federal Express tracking information showing that their motion's mailing was received by the Vermont Service Center on the 33<sup>rd</sup> day. The package was marked received by the mailroom on the 34<sup>th</sup> day when it was opened. Thus, the AAO properly rejected it the first time relying upon the date receipt stamp.

U.S. Corporation Income Tax Return for 1996, showing a fiscal tax year running from November 1996 through October 31, 1997.

The petitioner's tax return reflects the following information:

	<u>1996</u>
Net income <sup>2</sup>	\$562
Current Assets	\$3,020,028
Current Liabilities	\$3,060,050
Net current assets	-\$40,022

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 12, 2001, 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 to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's 1996 corporate tax return reflected net income and net current assets insufficient to establish its continuing ability to pay the proffered wage beginning on the priority date and requested any evidence of wages actually paid to the beneficiary.

In response, counsel submitted copies of the petitioner's checking account and investment funds statements and the petitioner's Form W-2, Wage and Tax Statement the petitioner issued to the beneficiary in 1997. The Forms W-2 reflect that the petitioner paid wages of \$27,000 to the beneficiary in that year, which is \$36,054.16 less than the proffered wage. Counsel pointed out that the beneficiary commenced employment with the petitioner in February 1997 so the wage rate only accounted for "ten months," although the AAO's calculation from February indicates eleven months.

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 1, 2002, denied the petition.

On appeal, counsel asserted that considering the petitioner's entire financial status based on accounts receivable, which he stated falsely diminished the petitioner's apparent net current assets because the petitioner's accounting methodology is a cash system rather than the accrual system, and "unencumbered" cash assets and flow as evidenced in bank statements and investment funds, that demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel references unpublished AAO decisions and *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) in support of his appellate arguments.

The petitioner submitted new evidence on appeal, such as its Schedule Ls to its corporate tax returns without the remainder of those returns for 1997 through 1999; proof it sought an extension to file its 2000 tax return; an affidavit from Bing Chen, the petitioner's president describing the amount of accounts receivable the petitioner received in 1997 through 1999 and stating that he uses the cash in the petitioner's bank and investment accounts to run the daily business operations; a letter from H. Lebowitz, certified public accountant, who states that "[a]ll cash in [bank and investment] accounts are unencumbered" and explains that since the petitioner files its taxes on a cash basis system, its account receivables, which were \$150,000 in 1997 are not reflected on its balance sheets; copies of pages titled "Accounts Receivables," without any indication of being audited and itemizing vessels,

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

contract dates, and amounts owed from 1996 to 1999; W-2 forms issued by the petitioner to the beneficiary in 1996 and 1998 reflecting wages paid in the amounts of \$24,750 and \$27,000, respectively, which is \$38,304.16 less than the proffered wage in 1996 and \$36,054.16 less than the proffered wage in 1998; copies of unpublished AAO decisions; and additional copies of bank and investment account statements.

The petitioner's Schedule Ls to its tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Current Assets	\$2,580,282	\$2,275,017	\$2,381,484
Current Liabilities	\$2,597,488	\$2,331,967	\$2,462,901
Net current assets	-\$17,206	-\$56,950	-\$81,417

The AAO issued its decision on June 18, 2003 finding that there was insufficient evidence that the petitioner's cash assets from its bank and investment accounts were not reflected on Schedule L to its corporate tax return. The AAO noted that unpublished AAO decisions are not binding precedent. The AAO also affirmed the director's decision that the petitioner's net income and net current assets from 1996 were both lower than the proffered wage and failed to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The AAO failed to consider wage payments made by the petitioner to the beneficiary or the applicability of the holding in *Sonegawa*.

On motion to reopen and reconsider, counsel states that the AAO's failure to conform to Citizenship and Immigration Services (CIS) precedent, practice, and policy by failing to consider the wages paid by the petitioner to the beneficiary, and the petitioner's cash assets as illustrated in its bank and investment accounts is arbitrary and would invite "judicial wrath" since the petitioner is likely to litigate these proceedings in the Second Circuit federal court system. Counsel again cites to unpublished AAO decisions from 1991 and 1993 and *Sonegawa*. The petitioner submits new evidence, such as a notarized affidavit from its controller and vice president, Ms. Rita Wu (Ms. Wu); a notarized letter from Mr. George Xu (Mr. Xu), a certified public accountant; a copy of supporting documents to an approved nonimmigrant visa showing that the petitioner is only obligated to pay the beneficiary \$31,920 per year in that context; notes from a meeting between the American Immigration Lawyers Association (AILA) and an unidentified service center representative; and cash flow data from 1997 to 2003 showing the ending balances in the petitioner's Citibank accounts.

Ms. Wu's affidavit states, in pertinent part, that the petitioner has been in operation since 1981 and "in many years of its existence it has achieved a gross revenue of nearly one million dollars, except for the last few years during the severe economic downturn that has affected the entire economy across the board." Ms. Wu states that the petitioner's payroll declined in recent years that impacted the petitioner's revenues, but that the petitioner has had a slow and steady turnaround. She also references the petitioner's cash flow in its bank accounts and states that the beneficiary is indispensable to the petitioner's business and "transition from a severe economic slump to our previous glory days." Mr. Xu's letter states, in pertinent part, that the petitioner has shown reliable sales revenue to cover its operation costs such as employee wages and extracts information from the petitioner's tax returns, such as its sales in 1996 of \$754,898 to its sales in 1999 of \$401,978 and wages paid in 1996 of \$510,056 to wages paid in 1999 of \$215,684. Mr. Xu also states that the petitioner's total assets, since many are liquid assets that could be collected or borrow, and bank statement balances should be considered. Finally, Mr. Xu asserts that most businesses in the service industry operate at a loss while hiring more employees so they generate more revenues to finally realize a profit.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Since new evidence has been submitted and an assertion is made that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision, the motion qualifies for consideration as a motion to reopen and reconsider.

At the outset, counsel asserts that CIS' precedent, policy, and practice is to accept bank records to illustrate a petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, the regulation at 8 C.F.R. § 204.5(g)(2) uses the word "shall" to set forth the evidentiary requirement that the petitioner must submit either tax returns, audited financial statements, or its annual report to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The regulation states, as a final provision, that "[i]n appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS]." (Emphasis added). Thus, CIS' request and consideration of bank account records is discretionary and not mandatory.

The AAO notes that the petitioner did not submit complete tax returns, audited financial statements, or its annual report for any year other than 1996. It provided one page of its corporate tax returns for 1997, 1998, and 1999, without the remaining portions that would provide, as counsel urges us to consider, the petitioner's total financial picture. Even Mr. Xu references financial figures from the petitioner's complete tax returns that CIS has not been privy to. The AAO cannot confirm Mr. Xu's figures as the record of proceeding does not contain complete tax returns that would contain such information as the petitioner's gross sales, net income, or wages paid to employees.

As the AAO properly noted in its prior decision, counsel's reliance on the balances in the petitioner's bank accounts 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) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, although the petitioner submits a series of bank statements, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, despite counsel's statement to the contrary, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

While the petitioner's ending balances in its Citibank account are substantial, those amounts are reflected on Schedule L to its corporate tax return, the one page the petitioner did submit of its corporate tax return into the record of proceeding. Contrary to the assertion that such cash assets are "unencumbered," the petitioner shows substantial current liabilities on Schedule L that counterbalance its claim to an unencumbered cash flow. This point will be discussed further below.

Additionally, counsel's argument concerning the choice of accounting methodology utilized on its tax returns creating the appearance of a lack of funds is without merit. The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The petitioner implies that it reports income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during a year but not received during that same year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various

years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year.

The AAO's prior adjudicator erred by failing to give ample weight to the evidence that the petitioner paid partial wages to the beneficiary. The petitioner demonstrated that it paid wages in the amounts of \$24,750 in 1996 and \$27,000 in both 1997 and 1998, which is \$38,304.16 less than the proffered wage in 1996 and \$36,054.16 less than the proffered wage in 1997 and 1998. Thus, the petitioner is obligated to demonstrate that it can pay the difference between the amount of wages that it paid the beneficiary in each year and the proffered wage, or \$38,304.16 in 1996 and \$36,054.16 in 1997 and 1998.

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 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.

As noted above, the petitioner failed to provide evidence of its net income in 1997, 1998, or 1999, the final year in which the petitioner allegedly filed its corporate tax return and had them available for submission into the record of proceeding but failed to do so for an unstated reason. As the AAO's prior decision indicated, the petitioner's net income in 1996, of \$562, is less than the proffered wage, and does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Nevertheless, 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. We reject, however, Mr. Xu's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

The petitioner's net current assets during the years in question, 1996 through 1999, however, were all negative. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net current assets.

The AAO notes that the petitioner's accounts receivable figures are listed on its Schedule L as a current asset. The petitioner did not report any accounts receivables for any year it submitted a copy of its Schedule L. Thus, the AAO finds H. Lebowitz's assertions to be unfounded.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage; however, the prior AAO adjudicator failed to evaluate the applicability of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), to the instant case. *Sonogawa* 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1996, 1997, 1998, or 1999 were uncharacteristically unprofitable years for the petitioner. Since the petitioner failed to provide complete financial documentation as required by the pertinent regulation at 8 C.F.R. § 204.5(g)(2), the AAO cannot assess the totality of circumstances and the total financial picture of the petitioner's viability from 1997 onwards.

Ms. Wu argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. In fact, the petitioner has been already employing the beneficiary during the timeframe Ms. Wu concedes has been an economic slump for the petitioner.

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<sup>3</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.

Counsel refers to decisions issued by the AAO but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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). Thus, as properly noted by the AAO previously, the decisions relied upon by counsel, are not binding precedent, and the AAO notes in this decision that one unpublished decision relied upon by counsel was rendered in 1991, prior to the issuance of the pertinent regulation at 8 C.F.R. § 204.5(g)(2) at the end of 1991 and its subsequent amendments. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Likewise, transcribed teleconference minutes by AILA are not binding precedent, and the purported transcription contained in the record of proceeding does not indicate any formality or evidence as to those minutes' origins, date, or identity.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1996, 1997, 1998, or 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion to reopen and reconsider is granted. The AAO's decision of June 18, 2003 is affirmed in part and withdrawn in part. The petition remains denied.