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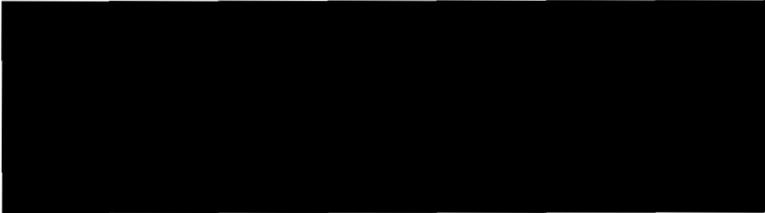
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 29 2006  
EAC 05 023 50811

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

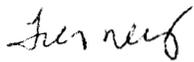
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an IT 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 accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the Form ETA 750 labor certification and denied the position accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 granting 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(l)(2) states, in pertinent part:

*“Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”*

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

*Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states, in pertinent part:

*Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . .

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.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(1), then, the petitioner must demonstrate that the beneficiary received the requisite United States baccalaureate degree or an equivalent foreign degree prior to 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. If the petition is for a skilled worker then the petitioner is still obliged to show that the beneficiary was qualified for the proffered position on that date pursuant to the qualifications listed on the Form ETA 750, including educational qualifications. Here, the Form ETA 750 was accepted for processing on July 31, 2001. The Form ETA 750 states that the proffered position requires a bachelor's degree in computer science or a related field and six months of experience in the proffered position.

The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$75,000 per year.

The Form I-140 petition in this matter was submitted on October 28, 2004. On the petition, the petitioner stated that it was established on September 8, 1997 and that it employs 25 workers. The petition states that the petitioner's gross annual income is \$1,216,300 and that its net annual income is \$5,316. On the Form ETA 750, Part B, signed by the beneficiary on July 20, 2001, the beneficiary claimed to have worked for the petitioner since December 1998. The Form ETA 750 indicates that the petitioner would employ the beneficiary on Staten Island, New York. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Monmouth Jet, New Jersey.

With the petition, counsel submitted (1) a diploma from Osmania University in India stating that the beneficiary received a bachelor of science degree on August 12, 1994, (2) a diploma in systems management issued by the Academic Council of the National Institute of Information Technologies (NIIT) in Hyderabad, India on November 4, 1996, (3) a certificate issued by Wilshire Software Technologies Ltd. in Hyderabad stating that the beneficiary successfully completed Unix Administrator training from May of 1998 to June of 1998, (4) a certificate issued by Wilshire Software Technologies Ltd. in Hyderabad stating that the beneficiary successfully completed Oracle DBA training from July 1998 to August 1998, (5) a report dated July 25, 2004 from an educational evaluation service, (6) a copy of the beneficiary's résumé, and (7) copies of monthly statements pertinent to the petitioner's bank account.

In his July 25, 2004 report the educational evaluator stated that, based on the beneficiary's academic work and the classes she took at various institutions she has attained the equivalent of a Bachelor of Science degree in Computer Information Systems from a U.S. institution. In her résumé the beneficiary stated that she has a bachelor of science degree in computers from Osmania University, India.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on February 3, 2005, denied the petition.

In that decision the director also noted that the evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is insufficient in that it did not include copies of annual reports, federal tax returns, or audited financial statements. The director requested that the petitioner address this issue in any future filings.

On appeal, counsel submitted (1) the petitioner's 2001, 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) 2001 and 2004 W-2 forms, (3) educational evaluations from A&M Logos International as well as Morningside Evaluations and Consulting, and (4) a brief.

The tax returns submitted show that the petitioner is a corporation, that it incorporated on October 27, 1997,<sup>1</sup> and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$26,058 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$89,277 and current liabilities of \$68,739, which yields net current assets of \$20,538.

The petitioner's 2002 tax return shows that the petitioner declared ordinary income of \$6,275 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$167,993 and current liabilities of \$142,177, which yields net current assets of \$25,816.

The petitioner's 2003 tax return shows that the petitioner declared ordinary income of \$5,031 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$214,066 and current liabilities of \$104,981, which yields net current assets of \$109,085.

The 2001 W-2 form submitted shows that the petitioner paid the beneficiary \$24,999.90 during that year.

The 2004 W-2 form submitted shows that the petitioner paid the beneficiary \$71,875 during that year.

In the brief counsel stated that the beneficiary's education alone was the basis of the educational evaluator's finding and demonstrates that the beneficiary has the equivalent of the requisite bachelor's degree in computer science. Counsel noted that the beneficiary has a bachelor of science degree from Osmania University and characterized the diploma in computer applications from NIIT as a "Post-graduate diploma."

As to the petitioner's ability to pay the proffered wage, counsel asserted that the petitioner's tax returns and the W-2 forms submitted demonstrate its ability to pay the proffered wage. Pertinent to the W-2 forms counsel cited a May 4, 2004 memorandum from the Associate Director for Operations of CIS for the proposition that the petition should be approved if the "record contains credible verifiable evidence that the petitioner is not only employing the beneficiary, but also has paid or currently is paying the proffered wages."

Counsel also asserted that the amount of the proffered wage the petitioner must show the ability to pay during 2001 should be prorated as only five months of that year remained on the July 31, 2001 priority date. In

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<sup>1</sup> Although this appears to conflict with the petitioner's assertion on the Form I-140 petition that it was established on September 8, 1997 this office does not believe the discrepancy is relevant to any material issue.

support of that decision counsel cited a non-precedent decision issued by a service center. Counsel also cites the petitioner's total assets, net income, and depreciation deductions as indices of its ability to pay the proffered wage.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that a petition may be approved notwithstanding the petitioner's losses or low profits during a salient year. Counsel cites the petitioner's growth since 1997 as evidence to be considered pursuant to *Sonogawa*. Counsel stated that the petitioner's net income exceeded \$1 million during each of the salient years.

Counsel's assertion that the beneficiary's education qualifies her for the proffered position is unconvincing. This office notes that the Form ETA 750, prepared and filed by the petitioner, states that the proffered position requires a bachelor's degree in computer science or a related field. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree but did not.

The beneficiary's degree from Osmania University was awarded after only three years of study. As such, it is not the equivalent of a four-year U.S. bachelor degree in computer science. Reports from educational evaluators submitted into the record acknowledge this and indicate that the diploma from Osmania University is the equivalent of only three years *toward* a U.S. bachelor of science degree in computer science.

The educational evaluator at A & M Logos International, Inc. indicated that the beneficiary's one year of study at NIIT-National Institute of Information Technology combined with her three years of study at Osmania University amounted to the equivalent of a four-year U.S. bachelor of science degree in computer science. However, the accuracy of this educational evaluation is called into question for the following reasons. The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program. Also, the NIIT diploma submitted into the record gives no indication that the beneficiary completed a degree at the post-graduate level at NIIT or that she completed work at the level of the final year of study in a four-year bachelor of science in computer science program, culminating in a four-year bachelor of science degree.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Moreover, the petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981). Absent a stipulation in the approved labor certification no criterion exists pursuant to which the beneficiary's education, absent a four year bachelor of

science degree in computer science or a related field, may be analyzed to see whether it is equivalent to a bachelor's degree. The various evaluation reports submitted in this case are unpersuasive for just that reason.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary must meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary has a bachelor's degree in computer science or an equivalent foreign degree. Neither the beneficiary's education standing alone, nor the beneficiary's education coupled with her employment experience, qualifies her for the proffered position pursuant to the terms of the approved labor petition. Therefore, the petition was correctly denied, and the petitioner has not overcome the basis for the director's denial.

Although it did not form the basis of the director's decision, the issue of whether the petitioner demonstrated its continuing ability to pay the proffered wage beginning on the priority date has been raised and counsel provided evidence pertinent to that issue.

Counsel stated on appeal that the petitioner's net income during each of the salient years exceeded \$1 million. That is incorrect.<sup>2</sup> The figure on a Form 1120S, U.S. Income Tax Return for an S Corporation most nearly analogous to net income is the Line 21 Ordinary Income. As was noted above the petitioner's ordinary income was \$26,058 during 2001, \$6,275 during 2002, and \$5,031 during 2003.

Counsel's reliance on non-precedent decisions is misplaced. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect. **Further, the case counsel cited was issued by a service center. This office is not bound by the pronouncements of the service centers.**

Counsel asserts, relying on the May 4, 2004 memorandum of William Yates, CIS Associate Director of Operations, that the W-2 forms in the record demonstrate that the petitioner is able to pay the proffered wage. That memorandum states that the petition should be approved if the record demonstrates that "the petitioner is not only employing the beneficiary, but also has paid or currently is paying the proffered wages."

Counsel apparently reads that memorandum to indicate that payment of any portion of the proffered wage, either currently or previously, demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. This office reads that memorandum differently. Payment of some portion of the proffered wage during a given year does not demonstrate the ability to pay any portion of the proffered wage during previous years or subsequent years. The amount the petitioner paid to the

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<sup>2</sup> Counsel appears to have mistaken Line 6 Total income for net income. Total income, as that phrase is used on the Form 1120S return means the petitioner's Line 1c Gross Receipts or Sales minus its Line 2 Cost of Goods Sold plus its Line 5 Other Income. That amount is an interim value net of cost of goods sold but not net of other (operating) expenses. In the instant case, because the petitioner is not a retailer and has no cost of goods sold that number is equal to its gross income. A taxpayer's Line 6 Total income would never be likely to equal the taxpayer's net income.

beneficiary during any given year demonstrates the ability to pay that amount during that year, but no more and at no other time.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>3</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>4</sup>

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<sup>3</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

<sup>4</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$24,999.90 during 2001 and \$71,875 during 2004. The petitioner must show the ability to pay the balance of the proffered wage during those years and the entire annual amount of the proffered wage during the remaining salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

Contrary to counsel's assertion, however, the petitioner's total assets are not an index of its ability to pay the proffered wage. The petitioner's total assets are not available to pay the proffered wage. They include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay wages. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

typically<sup>5</sup> shown on lines 16(d) through 18(d). 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.

Because of the nature of net current assets, however, demonstrating the ability to pay the proffered wage with net current assets is truly **an alternative** to demonstrating the ability to pay the proffered wage with the petitioner's net income and the wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, a 2001 income which is greater than the amount of the proffered wage would indicate that a petitioner could have paid the wages during 2001 out of its income. Net current assets at the end of 2001 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$75,000 per year. The priority date is July 31, 2001. This office rejects counsel's assertion, however, that the amount of the proffered wage the petitioner is obliged to show the ability to pay should be prorated. We will not consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Having paid the beneficiary \$24,999.90 during 2001 the petitioner must show the ability to pay her the \$50,000.10 balance of the proffered wage during that year. During 2001 the petitioner declared ordinary income of \$26,058. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$20,538. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2001.

The petitioner has presented no evidence that it paid any wages to the beneficiary during 2002. The petitioner is obliged, therefore, to show the ability to pay the entire proffered wage during that year. During 2002 the petitioner declared ordinary income of \$6,275. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$25,816. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2002.

The petitioner has presented no evidence that it paid any wages to the beneficiary during 2003. The petitioner is obliged, therefore, to show the ability to pay the entire proffered wage during that year. During 2003 the petitioner declared ordinary income of \$5,031. That amount is insufficient to pay the proffered wage. At the

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<sup>5</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

end of that year, however, the petitioner had net current assets of \$109,085. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the full proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$71,875 during 2004. Ordinarily the petitioner would be obliged to show the ability to pay the \$3,125 balance of the proffered wage during that year. The Form I-140 petition in this matter, however, was submitted on October 28, 2004. On that date the petitioner's 2004 tax return was unavailable. Further, that return was not subsequently requested. The petitioner is excused from the obligation of demonstrating its ability to pay the proffered wage during 2004 and subsequent years.

Thus, the petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Thus, it has not shown an ability to pay the wage from the priority date onwards through an examination of the actual wages it paid the beneficiary, an examination of its net income or an examination of its net current assets.

Counsel asserted, however, that the petition should be approved on the strength of *Matter of Sonegawa, supra*. In support counsel cites the petitioner's growth.

In what sense counsel is stating that the petitioner's business has grown is unclear. From 2001 to 2003 the petitioner's gross receipts shrank progressively, as did its net income, shown as ordinary income on its tax returns. This office will, however, address the contention that *Sonegawa* renders the instant petition approvable.

Counsel is correct that *Sonegawa* held that a petition may be approved notwithstanding a petitioner's losses or low profits during a given year. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, as was noted above, the petitioner's gross receipts and profits shrank from 2001 to 2003. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner has failed to show the ability to pay the proffered wage during 2001 and 2002. Therefore the petitioner has failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The petitioner also failed to demonstrate, within the requirements of 8 C.F.R. § 204.5(g)(2), that it had the continuing ability to pay the proffered wage beginning on the priority date. The instant petition, submitted pursuant to 8 C.F.R. § 204.5(l), may not be approved.

The record contains an additional issue that was not addressed in the decision of denial. The approved Form ETA 750 in this case states that the petitioner would employ the beneficiary on Staten Island. The Form I-140 petition states that the petitioner would employ the beneficiary in Monmouth Jct, New Jersey. Because this issue was not raised in the decision of denial this office does not base today's decision, even in part, on this point. If the petitioner attempts to overcome today's decision on motion, however, it should explain why it considers that a labor certification approved for employment in Staten Island, New York is valid for employment in Monmouth Jct, New Jersey.

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.