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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **JUL 10 2006**
SRC 04 194 50761

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.¹

On appeal, counsel states that the petitioner has the ability to pay the proffered wage, and reexamines the petitioner's previously submitted federal income tax returns.

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.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$16,348.80. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1997. The petitioner submitted a letter from [REDACTED], C.P.A., Collector, Dart and Associates, Houston, Texas that stated the petitioner had total revenues of \$561,030 in tax year 2000, and total revenues of \$632,464 in tax year 2001.² The petitioner also submitted letters of employment verification

¹ The petitioner had previously filed an I-140 petition in support of the beneficiary on February 11, 2003. This petition was denied because the petitioner submitted a copy of the ETA 750 Labor Certification, as opposed to the original document. The director in a request for further evidence addressed issues concerning the petitioner's ability to pay the proffered wage; however, the initial I-140 was denied on February 19, 2004 based on the failure of the petitioner to provide an original document, as stipulated in 8 C.F.R. 204.5(1)(3)(i). On August 2, 2004, the AAO subsequently affirmed the director's decision and beyond the director's decision also noted that the petitioner had not established its ability to pay the proffered wage to multiple beneficiaries.

² This letter is found in the I-485 petition submitted simultaneously with the I-140 immigrant petition.

that stated the beneficiary worked from July 1994 to August 1995 at [REDACTED] Karachi, Pakistan, and that during this time the beneficiary started as an assistant cook and then was promoted to head cook [REDACTED] [REDACTED] and [REDACTED] League City, Texas signed a second letter of work verification. In this letter, Mr. [REDACTED] states that the beneficiary worked at his restaurant from October 1995 to December 1996.³

On September 20, 2004, the director issued a Notice of Intent to Deny (NOID). In this document, the director stated that pursuant to 8 C.F.R. § 103.2(b)(16)(i), he intended to deny the petitioner based on derogatory information contained in the record. The director then reviewed the previous petition filed for the beneficiary, and noted that in the instant I-140 petition, the petitioner still had not provided the original ETA 750 labor certification. The director also noted that the petitioner had not provided evidence of its ability to pay the proffered wage. The director also noted that in its previous dismissal of the petitioner's appeal, the AAO had determined that the petitioner had filed two other immigrant visa petitions. The director stated that the petitioner's two other I-140 petitions had been reviewed and that the Service had already denied one petition based on the petitioner's inability to pay the proffered wage to the beneficiary and that the other petition was currently in revocation proceedings based on lack of documentary evidence to establish the petitioner's ability to pay the proffered wage and for omission of the original, individual labor certification. The director identified one beneficiary of the petitioner's two other I-140 petitions as the brother of the beneficiary. The director noted that both beneficiaries' G-325A forms listed identical mothers and fathers, with identical birth dates and places of residences. The director then stated that to overcome the grounds of denial of the instant petition, the petitioner had to submit the original ETA 750 labor certification for the beneficiary, and also evidence of the petitioner's ability to pay the proffered wage. The director stated that such evidence must be in the form of copies of federal tax returns, annual reports, or audited financial statements. The director further stated that the petitioner's ability to pay the proffered wage had to be established as of the priority date of the ETA 750 until the time the beneficiary obtains lawful permanent residence.

In response, counsel submitted the original ETA 750 labor certification and stated that it appeared the petitioner was sent the original ETA 750 document and that counsel received the duplicate form. Counsel stated that he thought the duplicate was the original because the attorney of record generally received the original document. With regard to the petitioner's ability to pay the proffered wage, counsel submitted the petitioner's IRS Form 1120S, the petitioner's corporate tax returns for the years 1998 to 2002, as well as a copy of the IRS extension request for the petitioner's 2003 federal tax forms. Counsel stated that courts have stated that an employer's entire financial resources must be analyzed in order to make an assessment of the petitioner's ability to pay the proffered wage and cited *O'Connor V. Attorney General*, 1987 WL 18243(D. Mass). Counsel also cited *Ohsawa America* 88-INA-240 (9 August 20, 1988) a Board of Appeals for Labor Certification Appeals (BALCA). Counsel stated that in this decision a petitioner's explanation of its ongoing progress toward increased profitability and its logical explanation of whether it had done and is doing to maintain profitability were given weight in considering the petitioner's ability to pay the proffered wage. Counsel stated that the petitioner sought to pay the beneficiary a salary of \$16,348 per year, which was \$1,362.33 a month. Counsel also stated that if the beneficiary's brother's petition that was pending was included in the analysis of the petitioner's ability to pay the proffered wage, the petitioner had to have an additional \$39,200 a year or \$3,266.67. Counsel noted that the petitioner's cash flow, assets, and average

³ These letters are also found in the I-485 petition materials.

ledger balances in its bank statements all were indicators that supported the petitioner's ability to pay the proffered wages. Counsel identified the petitioner's net income in the years 1998 to 2002 as follows: -\$18,572, -\$65,143,⁴ \$27,858, \$23,649, and \$48,267. Counsel identified the petitioner's cash flow which counsel identified as taxable income plus depreciation for the years 1998 to 2002 as follows: -\$17,724, -\$21,825, \$31,453, \$27,444, and \$101,942. Counsel identified the petitioner's assets from the years 1998 to 2002 as \$257,516, \$717,793, \$868,094, \$760,695, and \$832,079.

Counsel also submitted the first pages of petitioner's bank statements from League City Bank and Trust for the year 1998 and from First Community Bank for the year 1999. Counsel stated that in 1998, the petitioner maintained an average ledger balance of \$9,803.16, while in 1999, the petitioner maintained a monthly average closing balance of \$51,810.06. Counsel then submitted bank statements from First Community Bank, N.A., for four months in 2000, 2001, 2002, and 2003. Counsel stated that the petitioner maintained balances of \$27,665.11, \$27,522.14, \$11,232.71, and \$40,302.42 for the years 2000 to 2003. Counsel stated that such balances represented money that was reserved or unforeseeable expenses and events such as salaries, and purchase costs. Counsel also stated that the monthly statement established that the petitioner had necessary cash reserve to pay the proffered wage.

Counsel also submitted the beneficiary's W-2 Form for 2003. This document indicated the beneficiary earned \$5,449.36 in 2003. Counsel stated that these were wages earned after the beneficiary received employment authorization. Counsel also stated that the petitioner has shown consistent financial improvement and a pattern of increased financial results. Counsel cited *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967), and stated that in this decision, the court utilized factors such as petitioner's expectations of continued increase in business and increasing profits in its decision that the petitioner was indeed able to pay the proffered wage.

In his denial of the petition, the director noted that the petitioner had filed I-140 petitions for both the beneficiary and his brother. The director stated that the petitioner has to establish its ability to pay the beneficiary's proffered wage of \$16,348.80 and the brother's proffered salary of \$39,200, or \$55,548. The director then noted that the petitioner in tax year 1998, had an annual gross income of \$5,969 and that after expenses, which included wages and benefits the petitioner had a net income of -\$18,572. The director then identified the petitioner's assets, excluding the sale price of liquidation locked up in building or land, was \$143,471, while the petitioner's liabilities, excluding liabilities paid out in more than one year, was \$112,813. The director then stated that the petitioner's remaining assets left after the petitioner's liabilities were deducted was \$30,000.⁵ The director stated that the petitioner must establish a bottom line of assets over liabilities sufficient to pay the proffered wage.⁶ The director then noted that the petitioner had not established the ability to pay the proffered wages to the beneficiaries as of the priority date and continuing until the beneficiary(ies) obtained lawful permanent residence. The director then examined two other issues, beyond

⁴ It is not clear why counsel used this figure. The petitioner's 1999 federal income tax return indicates ordinary income of -\$24,931.

⁵ The AAO will examine the petitioner's current assets, current liabilities and net current assets further in this decision. It is noted that the actual difference between the two figures used by the director is \$30,659.

⁶ Although the director did not explicitly state this in his decision, the petitioner's remaining assets, as identified by the director at \$30,000, are not sufficient to pay the proffered combined wages of both the beneficiary and his brother, namely, \$55,548.80.

the petitioner's ability to pay the proffered wage. First the director stated that the petitioner had not provided the original ETA 750 labor certification in its submission of either its first I-140 petition on behalf of the beneficiary or in the instant petition. The director questioned whether this omission, whether willful or remiss could raise issues on appeal. Second, the director noted that the petitioner may need to provide evidence of the beneficiary's claimed employment or establish an employer-employee relationship in further proceedings.

On appeal, counsel states that the director's denial of the instant petition was an egregious error. Counsel stated that the director penalized the petitioner by revoking the previously approved I-140 for paying him only \$5,449.36 in 2003, and that CIS did not grant employment authorization until July 28, 2003.⁷ Counsel states that the beneficiary was only able to work legally for four months in 2003. Counsel also stated that the amount paid to the beneficiary in these four months is commensurate with working for four months at a yearly salary of \$16,348. Counsel further notes that since the petitioner was paying the proffered wage, the petitioner has established its ability to pay the proffered wage.

Counsel reiterates his comments with regard to the petitioner's tax return, net income, cash flow, assets, and bank statements for the years 1998 to 2003. Counsel states that even if the beneficiary's brother's monthly salary of \$3,266.66 were combined with the beneficiary's monthly salary of \$1,362.33, the petitioner would still have sufficient resources to pay the proffered wages. Counsel notes in the appeal that the beneficiary's brother has utilized the visa portability provision of AC21 (American Competitiveness in the Twentifirst Century Act of 2000) to substitute employers since his I-140 was approved and his I-485 remained adjudicated for over 180 days. Counsel asserts that the brother's proffered wage no longer is in consideration with regard to the petitioner's ability to pay the proffered wage, and that the petitioner can easily establish its ability to pay the proffered wage.

With regard to the issue of the Form 750 ETA labor certificate, counsel states that he believed that the original document had previously been submitted. In addition, counsel states that the beneficiary previously submitted letters of work experience showing his qualifying work experience. Counsel states that the beneficiary was only seventeen when he entered the United States and that his only work experience could have been in the United States as he was too young to work before he entered the United States. Counsel finally states that CIS had never questioned this issue in the proceedings, and that to do so without providing the opportunity for a rebuttal constitutes an abuse of discretion

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, statements for the years 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), namely federal income tax returns, annual reports or audited financial statements, is inapplicable or otherwise 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. Third, no evidence was

⁷ Counsel appears to refer to the I-140 petition of the beneficiary's brother that was revoked based on further examination of the petitioner's ability to pay the proffered wage. However, the wages referred to by counsel are those of the beneficiary.

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. Moreover, the petitioner only submitted first pages of monthly statements for the years 1998 and 1999, and only statements for four months in each of the years 2000 to 2003. Even if the bank statements were to be considered as evidence, the record is not complete.

With regard to the use of cash flow, assets, or net income to determine a petitioner's ability to pay the proffered wage, the AAO does examine the net income of petitioners; however, gross assets and cash flow are not viewed as sufficient factors to evaluate the petitioner's ability to pay a proffered wage. *See 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)); *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).

In his response to the director's NOID, counsel stated that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel stated that in this decision a petitioner's explanation of its ongoing progress toward increased profitability and its logical explanation of whether it had done and is doing to maintain profitability. Counsel does not state how DOL precedent is binding in these proceedings. 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, BALCA 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).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity, besides showing increased revenue and decreased operating losses, also established one of its shareholder's willingness and ability to fund the company. In the instant petition, the petitioner provided no further explanation of any shareholder willingness to fund the petitioner or explanation of progress toward increased profitability other than an examination of items such as cash flow, and gross receipts. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Contrary to counsel's assertion, it is fair and reasonable for the director to suggest that in further stages of the proceedings, the petitioner may be asked to establish its employment of the beneficiary more fully. For example, although the petitioner submitted W-2 salary statements for the beneficiary for the year 2003, the petitioner did not establish that the salary identified on the form was for only four months of the year. Counsel's or the petitioner's assertions 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). Further more, the petitioner did not provide any further documentary evidence that it employed the beneficiary as of the priority date, such as Forms 1099-MISC, pay slips, or paychecks. Therefore the petitioner did not establish that as of the 1998 priority date, it paid the beneficiary a salary either equal or greater than the proffered wage. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the priority date, based on the beneficiary's wages in 2003.

It is also noted that the petitioner, as stated by the director, would have had to establish its ability to pay the proffered wages of all beneficiaries whose petitions were submitted at the same time as the instant petition.

With regard to the employment of the beneficiary and his brother, the combined wages would have been \$54,880.80. The petitioner submits no documentary evidence to establish it paid such combined wages as of 1998 to the present.

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. Contrary to counsel's assertions, CIS does not rely on the gross receipts or total income of petitioner's to establish the ability to pay the proffered wage. 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.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As previously stated, the petitioner's net income for the years 1998 to 2002 are as follows: -\$18,572, -\$24,931, \$27,858, \$23,649, and \$48,267. As noted previously, the petitioner has to establish its ability to pay the proffered wage of all beneficiaries for whom I-140 petitions were submitted. For tax years 1998 and 1999, the petitioner had insufficient net income to pay the combined wages of him and his brother, namely, \$55,548.80. Furthermore, the petitioner's net income for tax years 2000 to 2002 is not sufficient to pay the combined proffered wages of \$55,548.80. Therefore the petitioner's net income cannot be used to establish the ability to pay the combined wages.

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. 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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁸ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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

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 submitted the following information for tax years 1998 to 2002:

	1998	1999	2000
Ordinary Income	\$ -18,572	\$ -24,931	\$ 27,858
Current Assets	\$ 3,201	\$ 8,683	\$ 33,848
Current Liabilities	\$ 40,093	\$ 75,534	\$ 44,871
Net current assets	\$ -36,892	\$ -66,851	\$ -11,023
	2001	2002	
Ordinary Income	\$ 23,649	\$ 48,267	
Current Assets	\$ 34,670	\$ 420	
Current Liabilities	\$ 90,159	\$ 112,172	
Net current assets	\$ -55,489	\$ -111,752	

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary and his brother, a second beneficiary for whom the petitioner submitted an additional I-140 petition in the years 1998 to 2002. In 1998, the petitioner shows a net income of -\$18,572, and net current assets of -\$36,892, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 1999, the petitioner shows a net income of -\$24,931, and net current assets of -\$66,851, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 2000, the petitioner shows a net income of \$27,858 and net current assets of -\$11,023, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In 2001, the petitioner shows a net income of \$23,649, and net current assets of -\$55,489, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings. In 2002, the petitioner shows a net income of \$48,267, and net current assets of -\$111,752, and has not, therefore, demonstrated the ability to pay the combined wages of the two beneficiaries identified in these proceedings, namely \$55,548.80. In tax year 2003, the petitioner established that it paid the beneficiary \$5,549.36. However, the record contains no further evidence to further examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's proffered wage and his actual salary. As stated previously, the petitioner provided no evidence as to any wages paid to the beneficiary's brother, for the years 1998 to 2002 to examine any differences between proffered wages and actual wages.

In addition, although counsel states on appeal that the beneficiary's brother used the portability provisions of AC21 to change employment, and that therefore the petitioner did not have to pay the second beneficiary's

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.

wages, counsel did not identify in which tax year this change allegedly occurred. More importantly, the AAO notes that the approval of the beneficiary's brother's I-140 petition has been revoked, and thus, the underlying petition might no longer be valid, for purposes of AC21.⁹ Counsel's remarks with regard to the beneficiary's brother's change of employment, and the petitioner's reduced salary requirements are moot.

In addition, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Although counsel asserted that the petitioner had other liquid assets with which to pay the proffered wage in 2001, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) in its response to the director's NOID. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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

⁹ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the bona fides of the new prospective employer. Thus, if the initial petition is subsequently revoked, the beneficiary might not be able to take advantage of the portability provisions of AC21.

determination in *Sonegawa* 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 *Sonegawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner. In terms of net current assets, all the tax years documented in the record have been unprofitable. Although counsel stated in its response to the NOID that the petitioner has shown a pattern of increased profits, the record reflects a pattern of increased gross receipts up to tax year 2001, with a decrease of gross profits in 2002. The record also reflects a pattern of negative net current assets from 1998 to 2002, with tax year 2000 showing the least amount of negative net current assets.

Counsel in his response to the director's NOID also cited *Ohsawa America*, a BALCA decision. Counsel also cited a district court decision, *O'Conner V. Attorney General*, 1987 WL 18243 (Mass.) Counsel cited these cases to further support counsel's statement that courts have adopted a "totality" approach in determining whether an petitioner has sufficiently established its ability to pay a proffered wage. However, it is noted that the CIS is not bound to the decisions of district courts, and that the Massachusetts district court decision would not be binding on the instant petition. With regard to counsel's reference to *Ohsawa America*, counsel does not provide legal authority for the applicability of BALCA's precedent decision to these proceedings occurring under the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL. With regard to *O'Connor*, the petitioner in that decision is a sole proprietor, while the instant petitioner is an S Corporation. Unlike an S corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. **In addition, they must show that they can sustain themselves and their dependents. The instant petitioner, as an S corporation, must establish its ability to pay the proffered wage based on its net income, and net current assets, without considering the assets of its shareholders, officers, or owners.**

In his decision, the director also questioned whether the petitioner had sufficiently established an employee-employer relationship or the actual employment of the beneficiary. Counsel on appeal states that this issue has not been raised previously, but that the beneficiary obviously worked for the petitioner, as he submitted letters of work employment verification. Counsel also states that the beneficiary could not have worked prior to his entrance into the United States because he was too young. Counsel's comments, while not constituting evidence, only further confuse the record. It appears the director in his comments was referring to the establishment of the beneficiary's employment by the petitioner as of the 1998 priority date and prior to the submission of a W-2 Form for tax year 2003. Such evidence could be in the form of W-2 Forms, or Forms 1099-MISC, or pay slips or checks. The director's comments on such evidence is viewed as proper in establishing the petitioner's ability to pay the proffered wage.

Furthermore, counsel's comments as to the beneficiary's lack of work experience prior to his entry into the United States conflicts with the information provided by the petitioner on Form ETA 750. The Form ETA 750, Section 15 states that the beneficiary worked from January 1995 to September 1995 as an assistant cook for [REDACTED] & Restaurant, in Karachi, Pakistan. As previously stated, a letter of work verification from [REDACTED] Karachi, Pakistan contained in the record states that the beneficiary worked as an assistant cook

and head cook from July 1994 to August 1995. Since the beneficiary was born on July 13, 1978, he would have begun his employment at the [REDACTED] before or after his 16th birthday, and have been a head cook at a hotel either before or after his 17th birthday in July 1995. In addition, the beneficiary would have begun his employment two months after his graduation from high school in Pakistan.¹⁰ Therefore, if counsel is correct that the beneficiary did not work prior to his entry into the United States, this calls into question the validity of the [REDACTED] letter of work verification.

The ETA 750 also states that the beneficiary then worked for [REDACTED] in League City, Texas from October 1995 to December 1996, which is verified by a second letter of work employment contained in the record. Finally the ETA 750 states that the beneficiary then began to work for the petitioner in Pearland, Texas, on January 1, 1997, the same date that the ETA 750 was dated and signed, and works there to the present time. Based on these jobs, the beneficiary does appear to have the requisite two years of work employment as a cook stipulated in the ETA 750. However, *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho* also states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Based on counsel's comments, and the contents of the [REDACTED] letter, a part of the ETA 750 appears implausible, which could call into question the entire section of relevant work experience. Based on the lack of any evidence as to the beneficiary's employment by the petitioner as of 1997, it does not appear an abuse of discretion on the part of the director to question whether the petitioner has employed the beneficiary from 1997 to 2003 and to request further documentation of this employment.

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.

The record also contains a copy of the beneficiary's graduation certificate from [REDACTED] High School in May 1994.