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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
WAC 04 187 50592

Office: CALIFORNIA SERVICE CENTER

Date: FEB 20 2008

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:  
[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a textile dyeing and finishing company. The petitioner sought to employ the beneficiary permanently in the United States as a first line supervisor (production and warehouse) (Dyeing Supervisor (Textile)). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.

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 DOL's employment system. See 8 CFR § 204.5(d). The ETA 750 reflects that the priority date in this case is April 2, 2001. As set forth on the ETA 750, the certified wage is \$4,108.44 per week, which amounts to \$49,301.28 per annum.

The Immigrant Petition for Alien Worker (I-140) was filed on June 18, 2004.<sup>1</sup> The director determined that the petitioner failed to establish that it had the continuing financial ability to pay the proffered wage and on March 10, 2005, the director denied the petition. The evidence that the director examined included copies of the petitioner's 2001 and 2002 federal corporate tax returns provided with the I-140, copies of the beneficiary's payroll records showing wages paid to the beneficiary beginning on October 15, 2004 through February 15, 2005, and a copy of the beneficiary's Wage and Tax Statement (W-2) for 2004 indicating that the petitioner paid him \$10,500.

Counsel filed the appeal on March 21, 2005. On appeal, the AAO reviewed the evidence of the petitioner's continuing financial ability to pay the proffered wage and dismissed the appeal on July 27, 2006, concluding that the evidence did not support the petitioner's ability to pay. In rendering this decision, the AAO considered the evidence submitted to the underlying record as well as counsel's assertion on appeal that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004) supported a finding of an ability to pay the

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<sup>1</sup> The date stated in the AAO's prior decision was erroneously given as June 12, 2004.

proffered wage if the petitioner is currently paying the proffered wage. Counsel did not submit any additional evidence on appeal. In its decision, the AAO found that in 2001, neither the petitioner's ordinary business net income of -\$901,656 nor its net current assets of -\$478,044 could cover the proffered wage. The AAO also found that in 2002, each of the petitioner's ordinary business net income of -\$22,164 and its net current assets of -\$965,994 failed to cover payment of the proffered wage. The AAO further noted that in 2004, the beneficiary's W-2 did not establish the petitioner's ability to pay the certified wage during that period.

Through counsel, the petitioner submits a motion to reopen and a motion to reconsider the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Accompanying the motion is a copy of the beneficiary's W-2 for 2005 issued by the petitioner. It shows that the petitioner paid the beneficiary \$50,400. Also provided are copies of the first seven months of payroll records showing the petitioner is paying the beneficiary \$2,250 per pay period. Counsel also includes copies of the petitioner's federal tax returns for 2000 and 2005. The 2005 tax return reflects that the petitioner reported ordinary income of \$267,260. The 2000 return indicates that the petitioner declared ordinary business income of \$55,613.

As stated in the AAO's prior decision, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing ability to pay the proffered wage as of the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

On motion, counsel asserts that the beneficiary has continued to receive the offered wage for the last 18 months that the appeal has been pending. He also asserts that the petitioner's payroll of 2.5 to 3 million dollars and over 100 workers justifies the approval of the petition. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that it is not necessary to show an ability to pay for each year because other factors may be considered. Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. Here, while it is noted that the petitioner's gross receipts and sales and salaries and wages are substantial, it is also noted that the petitioner has reported

significant losses in ordinary business income and net current assets. It is further noted that the petitioner's net income(s) in 2000 and 2005, as reported on its respective federal tax returns may have been sufficient to cover the proffered wage, but it is also noted that the petitioner failed to provide a tax return or audited financial statement for 2003 or 2004. As such, it cannot be concluded that an ability to pay the certified salary has been established for the relevant years of 2001, 2002, 2003, or 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Based on the two tax returns provided on motion, it cannot be concluded that these two profitable years represents a framework of success such as that discussed in *Sonegawa* or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

Counsel also contends that with the turnover of workers in a labor intensive business, the wages that are no longer paid to a departed worker become available to pay the new worker such as to establish a continuous ability to pay. This assertion is also not persuasive. Moreover, counsel offers no specificity as to the individual worker he is discussing as one replaced by the beneficiary, who did not begin to work for the petitioner until 2004. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after eligibility is sought under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).<sup>2</sup> This ability must be existent at the time the priority date was established. *See* 8 C.F.R. § 204.5(g)(2).

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, July 27, 2006, is affirmed. The petition remains denied.

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<sup>2</sup> *See also, Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988) A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements.