U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 034 55743

DEC 17 2004

IN RE: Petitioner:
Beneficiary [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center for health care. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 3, 2001. The proffered salary as stated on the labor certification is $3,796 per month or $45,552 per year.

With the petition, counsel submitted a copy of its 2001 Form 1120, U.S. Corporation Income Tax Return. The return reflected a taxable income before net operating loss deduction and special deductions of -$3,077 and net current assets of -$108,038.

The director considered this documentation insufficient, and, on January 9, 2003, he requested additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel provided an Internal Revenue Service date stamped computer printout of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return and copies of its Forms DE-6, Quarterly Wage Reports, for the year 2002. The Forms DE-6 reflected wages paid to the beneficiary of $27,601.53 in 2002.

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 March 18, 2003, denied the petition.

On appeal, counsel submits copies of previously submitted material, a copy of the Internal Revenue Service's (IRS) instructions for Form 4562, Depreciation and Amortization, a copy of an IRS computer printout of the petitioner's 1999 and 2000 tax return, a copy of IRS Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for 2002, a letter from the petitioner regarding advertising costs, a copy of the petitioner's advertising costs accounting statements for 2001 and 2002, and copies of the beneficiary's paycheck stubs from September 1, 2002 to March 31, 2002. Counsel states:

* * *

> However, federal tax returns are not the **only** evidence that the Service must consider in deciding the Petitioner's ability to pay. Other additional evidence can be considered by the Service. *See* 8 C.F.R. §204.5(g)(2). Furthermore, approval of such petition is not mandated **solely** by the fact that the employer's **net profit** commensurate with the proffered wage. Matter of Sonegawa, 12 I. & N. Dec. 612 (1967). Sonegawa held that a denial of a petition is not mandated by the fact that the employer's net profit was not commensurate with the proffered wages, **where there is evidence that the size of the employer's business has increased, there are reasonable expectations of continued increase in business and profits, and the employer has the ability to meet the proffered wages.** Id.
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> Also, courts have repeatedly stated that it is impermissible for the Service to use standardized and mechanical adjudicative process in lieu of case-by-case, individualized examinations of submitted evidence. Paramasamy v. Ashcroft, 295 F.3rd 1047 (9th Cir. 2002); Rosedate and Linden Park Co. v. Smith, 595 F.Supp. 829 (D.D.C. 1984).

* * *

> Despite the fact that the Director mechanically used the boilerplate language of Elatos and Chi-Feng Chang, we agree with the Director that the Service could rely on the Petitioner's income tax returns. The Director, however, reached an erroneous conclusion. The Director **should** have considered the depreciation amount because the depreciation amount as well as the net income constitutes the income tax return.
>
> Therefore, in the present case, contrary to the Director's opinion, the Petitioner's 2001 income tax return shows that it has the ability to pay the proffered wages to the Beneficiary. Furthermore, the Petitioner anticipates tremendous growth in business and profit once the Beneficiary is hired on a permanent basis because the Beneficiary's talent

> and experience will reduce the advertising cost that the Petitioner is currently incurring for its health-care related publications and advertisements.
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> * * *
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> The Beneficiary has been working for the Petitioner as a Computer Graphic Designer since December of 2001 under a valid H-1B status. Currently, her wage as an H-1B worker is $28,800.00 per year. Although this is less than the proffered wage of $45,552.00, it is only short by $16,752.00. As the Petitioner's past three income tax returns have indicated, the value of the Petitioner's business has been growing yearly. It is difficult to imagine that a business with the Petitioner's reputation and caliber would not have the ability to afford to pay the wage difference of a mere $16,752.00. These are all factors that Sonegawa deemed sufficient evidence of the petitioner's ability to pay.
>
> Furthermore, as we have previously mentioned, the Beneficiary's experience and contribution to the Petitioner's business has been and will continue to be valuable. The Beneficiary's expertise as a graphic designer has allowed the Petitioner to save advertising expenses.
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> In the year 2001, the Petitioner incurred advertising costs around $290,000. (*See* submitted 2001 Tax Return and Accounting Statement for 2001.) But in the year 2002, the advertising costs decreased to $90,000.00 (*See* Petitioner's Letter Regarding Advertising Expenses.) Once the Beneficiary is hired on a permanent basis, the Petitioner will continue to save advertising costs because the Beneficiary will handle all the design layouts and other design-related matters that go into advertising. The advertising costs saved can then be allocated to pay the Beneficiary's wages.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, 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. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084.

The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 year in question, 2001, were -$108,038. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel cites several non-precedent decisions in support of his claim that depreciation should be considered when determining the petitioner's ability to pay the proffered wage. 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. *See* 8 C.F.R. § 103.9(a).

Counsel also cites *Matter of Sonegawa,* 12 I. & N. Dec. 612 (1967). *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), 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.

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[1] 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 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.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

It is noted that the tax returns indicate that the petitioner has increased its total income in the three years provided, however, the tax returns also indicate that the petitioner's taxable income before net operating loss deduction and special deductions have decreased in those same years and there is no evidence that the taxable income rebounded in 2002.

Counsel further states that the beneficiary had saved the petitioner approximately 70% in advertising costs in the year 2002 over the year 2001 and that those savings could be used to pay the beneficiary's wages. Counsel, has not, however, provided a copy of the petitioner's 2002 tax return showing those savings were actually available to pay the beneficiary. 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).

The petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay. CIS will consider any wages paid to the owner of the personal service corporation by the corporation as possible income that could be used to pay the wages of the beneficiary if the petitioner can show that those funds were discretionary funds. In the present case, there is no evidence that the petitioner's owner drew a salary from the corporation.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of -$3,077 and net current assets of -$108,038. The petitioner could not pay the proffered wage in 2001 either from its taxable income or its net current assets.

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.