U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2004

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, Director
Administrative Appeals Office

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 fire sprinkler contractor firm. It seeks to employ the beneficiary permanently in the United States as a protective-signal repairer. 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.

On appeal, counsel submits a brief and additional evidence.

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

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 November 17, 1998. The proffered wage as stated on the Form ETA 750 is 25.17 per hour, which amounts to $52,353.60 annually.

With the petition, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998, 1999 and 2000. The tax returns reflect that the petitioner files its returns using a fiscal year beginning September 1st and running until August 31st of the following year. Thus, they collectively reflect financial data from September 1, 1998 to August 31, 2001. The tax returns also contain the following information:

Year	1998	1999	2000
Taxable Income before Net Operating Loss (NOL) deduction	$62,084	$ 35,884	$ 4,919
Current Assets	$48,431	$ 15,425	$ 2,846
Current Liabilities	$49,132	$136,327	$103,690
Net current assets	-$ 701	- $120,902	-$100,844

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 13, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its Internal Revenue Service (IRS) computer printouts of its federal tax returns for the year 2001 until the present.

In response, counsel submitted two copies of IRS printouts of the petitioner's federal tax returns. One represented the petitioner's 2000 corporate tax return that was previously submitted to the record. The other printout represented the petitioner's 2001 tax return. It reflects that the petitioner declared a taxable income of $47,212 for the 2001 fiscal year.

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 27, 2003, denied the petition.

On appeal, counsel submits copies of the petitioner's checking account statements from January 31, 2000 to December 31, 2002. Counsel asserts that they represent sufficient cash assets to demonstrate the petitioner's continuing ability to pay the proffered wage. Counsel's reliance on the petitioner's bank account statements is misplaced. It is noted that bank statements are not among the three types of fundamental 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 persuasively demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statement balances represent only part of a petitioner's financial status and do not reflect all relevant liabilities that may affect a petitioner's ability to pay a proffered salary. It is also noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not shown on the correlating tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Counsel's assertions in this regard do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N DE. 503, 506 (BIA 1980).

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 as *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage during any of the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*,

623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

In this case, as noted above, the petitioner's corporate tax returns show that the only year in which its net income could meet the beneficiary's proffered wage of $52,353.60 was 1998, when the petitioner's taxable income was $62,084.

CIS will also review the petitioner's net current assets as reflected on Schedule L of its corporate tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] 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. Although the IRS record showing the petitioner's tax return for 2001 did not contain sufficient data to determine the petitioner's net current assets during that year, it is noted that the petitioner's net current assets during 1999 and 2000 showed losses of $120,902 and $100,844, respectively, and were insufficient to cover the proffered wage of $52,353.60 during each of those years.

Counsel contends that the AAO should consider the petitioner's financial status within the context of *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel argues that the financial health of the petitioner is reflected by the fact that the business has existed for over 16 years and employs 45 workers. Counsel also asserts that hiring the beneficiary, following an unsuccessful attempt to recruit a qualified U.S. worker, will enhance its prospects to expand. Counsel submits copies of some of the documentation that supported the petitioner's application for a labor certification from the Department of Labor.

It is noted that the petitioner's ability to obtain a labor certification for the position of protective-signal repairer is not relevant to CIS' authority to review a prospective employer's ability to pay the proffered wage. *See Ubeda v. Palmer,* and *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra.* Counsel is correct that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. *Matter of Sonegawa,* 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

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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.

In this case, the three corporate tax returns submitted as evidence of the petitioner's ability to pay the beneficiary's proffered annual salary of $52,353.60 from 1999 through 2001, do not show sufficient net income or net current assets to cover the beneficiary's wage offer. The evidence does not show that unusual circumstances exist in this case, which parallel those in *Sonegawa,* or that the level of income is somehow uncharacteristic within a framework of profitable years. Further, the AAO cannot conclude that the petitioner's projection of future earnings and profitability overcomes the AAO's decision to affirm the director's denial. *See Matter of Great Wall,* 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977).

Accordingly, based on the evidence contained in the record and the foregoing discussion, the AAO concludes that the petitioner has failed to present sufficient persuasive evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition. .

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.