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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 03 086 50154 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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.

For Michael Valdez

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 an insurance agency. It seeks to employ the beneficiary permanently in the United States as an underwriter. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. The director determined that the petitioner did not establish the ability to pay the proffered wage to the beneficiary as of the priority date.

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 or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date 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). The petition's priority date in this instance is February 5, 2001. The beneficiary's salary as stated on the labor certification is $25 per hour or $52,000 per year.

The director determined that the petitioner submitted insufficient evidence of the ability to pay the proffered wage at the priority date. In a request for evidence (RFE) dated May 6, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's signed federal income tax returns or annual reports with audited financial statements for 2001 and 2002 and its quarterly wage reports for the last four quarters (Form DE-6), listing each employee with job title and duties. Finally, the RFE requested evidence of the beneficiary's three (3) years of experience in the job offered, as of the priority date, verifying specific information.

In response to the RFE, counsel presented the letter of KRS Auto Insurance Marketing, dated January 25, 2001 (KRS letter). This "insurance broker" indicated that the beneficiary's experience was as a full-time insurance underwriter "from January of 1996 to January of 1999." [1]

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[1] Another offer of proof of experience appeared in the 1999 Wage and Tax Statement (Form W-2) for $3,079,87, paid to the beneficiary by Survival Insurance. The director's decision did not evaluate either the KRS letter or Form W-2.

Counsel submitted 28 monthly statements of a commercial checking account, dated from January 31, 2001 to April 30, 2003, in response to the request for evidence of ability to pay the proffered wage. Balances ranged from $752.56 (December 31, 2002) to $22,821.14 (May 31, 2002), and all were less than the proffered wage. [2]

In further response to the RFE, the petitioner provided copies of Miscellaneous Income (Form 1099), reflecting payments of wages to the beneficiary of $12,983 in 2001 and $19,705.57 in 2002, amounts less than the proffered wage. The record included the petitioner's 2001 and 2002 U.S. Return of Partnership Income (Form 1065). The federal tax returns reported ordinary income from trade or business activities (net income). Schedules L with both returns, however, were blank and supported no computation of net current assets. [3] Thus, the data showed:

	2001	2002
Net income	$ 2,423.52	$52,298.08
Current assets	$0	$0
Current liabilities	$0	$0
Net current assets	$0	$0
Form 1099 wages	$12,983.95	$19,705.57

The director determined that the petitioner established its ability to pay the proffered wage in 2002, but failed to do so in 2001, and denied the petition. The AAO concurs.

On appeal, counsel submits a brief and attaches evidence that the petitioner already submitted. Counsel's brief cites a head note from *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967):

> Approval of a visa petition . . . is not precluded by the fact that the petitioner's net profit for the previous year is not commensurate with the salary specifications of the labor certification where it is found that the petitioner's business has increased; that her expectations of continued increase in business and profits are reasonable expectations; and it has been established that she has the ability to meet the wages stipulated in the labor certification.

Counsel asserts, in connection with *Matter of Sonegawa*, that the petitioner "suffered from the deterioration of general industry conditions in the sequel to the disasters of September 11, 2001." Also, counsel contends that the denial of this petition will cause "hardship" to the petitioner, but cites no provision that makes hardship a part of

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[2] As of February 1, 2001, the bank statement reflected $12,980.86, less than the proffered wage. The median balance of the 28 statements was on a statement of December 31, 2001, being $6,771.58, less than the proffered wage. The AAO considers bank statements fully below.

[3] Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, Form 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

the determination of the ability to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Counsel further asserts that consideration of the petitioner's expectations of increased business and profits is appropriate. The petitioner failed to submit any documentary evidence to establish that it has a reasonable expectation of increased profits. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Matter of Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only within 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 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 determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Matter of Sonegawa provides guidance for evidence to evaluate its test of the totality of circumstances. The petitioner in the present proceedings began business in 1999, about two (2) years before the priority date. Counsel offers no prior tax return or financial statements, no evidence of the historical growth of the petitioner's business, and no estimation of the petitioner's reputation in the industry. Apart from assertions of counsel, no unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has evidence in the record established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. As noted above, counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated how the beneficiary will replace less productive workers or how his reputation will increase the number of customers.

Counsel asserts that bank balances justify the ability to pay the proffered wage because, generally, they show a balance of one (1) month of the beneficiary's wage. Counsel attaches a decision of the AAO and contends that it endorses this logic. It does not appear to be a published decision of the AAO, and that record is not now before the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (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. 8 C.F.R. § 103.9(a).

Apart from principles of precedent decisions, bank statements are of doubtful value in this instance. The bank addresses them to a "client trust account." This designation destroys the credibility of the petitioner's right to dispose of trust funds as assets of the business without an explanation.

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.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.,* 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Counsel presents a marginally stronger interpretation of balances of bank statements, but these differences do not overcome the director's decision. First, bank statements are not among the types of evidence specified for proof of the ability to pay the proffered wage in 8 C.F.R. § 204.5(g)(2). This regulation allows additional material in "appropriate cases," but the petitioner has not shown that the prescribed documentation is inapplicable, inaccurate, or unavailable. Second, bank statements show only the amount in an account on a single date. The median balance was hardly a month's wage. *A fortiori*, once spent, the balance reveals no source of other funds to support the proffered wage as of the priority date. Third, no credible evidence proved that the petitioner's bank statements, somehow, represent additional funds beyond those of the tax returns, which recorded nothing for cash and net current assets.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.