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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 03 102 52365 Office: CALIFORNIA SERVICE CENTER Date: NOV 18 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.

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 building contractor and construction firm. It seeks to employ the beneficiary permanently in the United States as a project manager. 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.

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 August 23, 2000. The beneficiary's salary as stated on the labor certification is $61,631.44 per year.

Counsel initially submitted its 2000 and 2001 U.S. Corporation Income Tax Returns (Forms 1120). Also, 2000 and 2001 Wage and Tax Statements (Forms W-2) reflected payments of wages to the beneficiary, being $31,753.78 in 2000 and $19,931.42 in 2001. The petitioner's President confirmed the offer of a full-time permanent position to the beneficiary at the proffered wage stated on the labor certification in a letter dated January 31, 2003 (job offer letter). In a request for evidence (RFE) dated May 21, 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 exacted the petitioner's federal income tax returns or audited financial statements since 2001.

In response to the RFE, the petitioner explained that certain uses of its resources, a consequent loss of business, and some nonrecurring expenses reduced profits in 2001 and 2002, but that profits still justified the ability to pay the proffered wage. *See* the President's letter dated August 11, 2003 (profitability analysis). A publication of the State of Hawaii Department of Business, Economic Development & Tourism stated its status, as the Regional Center Authority (RCA), to certify the number of jobs created in support of investor petitions.

In further response to the RFE, the petitioner offered its 2002 Form 1120 with Schedule L, the balance sheet. Tax returns showed taxable income before net operating loss deduction and special deductions, the net income or (loss). Schedules L reflected net current assets. Net current assets are the difference of the taxpayer's current assets minus current liabilities, and if they are not equal to, or greater than, the proffered wage, the petitioner

has not demonstrated the ability to pay the proffered wage. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period. [1]

	2000	2001	2002
Net income	$ 59,105	$(96,551)	$(49,372)
Current assets	$110,618	$ 89,100	$ 37,958
Minus Current liabilities	$ 38,800	$ 66,923	$ 56,250
Net current assets	$ 71,818	$ 22,177	$(18,392)
Beneficiary's Form W-2 wages	$ 31,753.78	$ 19,938.42	None

The director considered that the net loss, plus wages paid to the beneficiary, reflected deficits for 2001 and 2002, viz., ($76,613) and ($49,372), less than the proffered wage. Net income in 2000 and wages paid to the beneficiary were $90,858.78, equal to or greater than the proffered wage. The director concluded that the petitioner did not establish its ability to pay the proffered wage since the priority date and denied the petition.

On appeal, counsel submits a brief and asserts that the director disregarded the petitioner's explanation of circumstances surrounding the inability to pay the proffered wage in 2001, in 2002, and until the beneficiary obtains lawful permanent residence. Counsel characterizes the net losses as "paper loss" since:

> . . . [The] petitioner elected to use its own resources and labor to construct a new headquarters building[,] and[,] had the [petitioner] contracted the construction of its own building to an outside firm[,] it would have had the resources available to do other work and generate profit.

The profitability analysis hypothesizes that the petitioner lost profitable business because the petitioner built its own headquarters in "these years," 2001 and 2002. It reflects only representations of management and is only an unaudited financial statement. If the petitioner has recourse to financial statements, the regulation plainly and specifically requires audited financial documents. *See* 8 C.F.R. § 204.5(g)(2), *supra*. Others are not persuasive evidence of the ability to pay the proffered wage.

Forms 1120 report, respectively, gross receipts or sales of $734,036 in 2000, $706,774 in 2001, and $363,717 in 2002. Gross receipts and sales for 2001 show little effect from any source, but a definite reduction in 2002. The profitability analysis predicts that the 2002 reduction in gross receipts represents the period of the construction of the headquarters and its expenses. The construction costs, however, declined from $641,214 in 2001 (statement 6 of Form 1120) to $245,093 in 2002 (statement 5 of Form 1120). Construction costs are inconsistent with the asserted period of headquarters building. The period of lost business applied only to 2002, not 2001, as the profitability analysis anticipated. Finally, the petitioner does not provide any basis to compare the cost of contracting the construction of its own building.

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[1] 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, such as Form 1120, 1120S, or 1065.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) 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.

Counsel, also, urges that:

> Another very significant factor in the temporary diminution of the petitioner's profits in the year 2002 was the absence of the beneficiary himself, upon termination of his final period of H-1B status under then existing regulations. The unavailability of the beneficiary to fill the position of bilingual Project Director with the petitioner resulted in the suspension of several major construction projects for Japanese speaking companies, which are awaiting the beneficiary's return to the petitioner's employ. The gross value of these projects is estimated in excess of $500,000. . . . For this reason it is quite understandable that the petitioner has been unable to fill the essential position held for the beneficiary, and it would be inappropriate to decline to approve the subject immigrant petition as a result of the inevitable temporary loss of business resulting from the beneficiary's unavailability.
>
> It is also of consequence that petitioner is a well-established minority Hawaiian owned business, which is greatly contributing to the economic rebound now occurring in Hawaii.

In the first instance, the petitioner does not document how many projects there are, the "major" ones, their status, the nature of their "suspension," their profitability, or their relevance in 2001 and 2002. Second, the petitioner states on appeal that it contributes to the revitalization of Oahu. Counsel observes that the RCA administers certain requirements EB5 investor programs in that connection. The EB5 investor program and the cited authority of the RCA do not relate, however, to evidence of the ability to pay the proffered wage, as stated in the Form ETA 750 for this petition.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Third, the petitioner does not document how the petitioner is "well-established" beyond the fact that it has existed since 1993. Consequently, any reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. It relates to a petition 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. No unusual circumstances,

parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years 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. Counsel has not, however, documented any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

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.

Further, counsel notes that the petitioner has "gone through the arduous Labor Certification process." Though not a part of the director's decision, the petitioner amended the Form ETA 750 after the priority date from "sales engineer" at $35,000 per year to "project manager" at $61,631.44 per year.

The regulation at 20 C.F.R. § 656.20(g) requires, as to applications for labor certifications, that:

> (1) In applications filed under . . . [§] 656.21 (Basic Process), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupation classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days.

No evidence in this record documents that the petitioner complied with this notice requirement for the application for the approval of the labor certification. If the petitioner did, the notice must relate to the relevant job opportunity and allow any person to provide documentary evidence bearing on the application to the Department of Labor. *See* §§ 8 C.F.R. 656.20(g)(3)(i) and (ii). The application for labor certification, at the priority date, proposed a job offer for only a sales engineer at $35,000 per year. Though not a basis of this decision, the absence of evidence of the notice and posting of a job offer for a project manager at $61,631.44 per year prevents the approval of the petition in these proceedings. [2]

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.

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[2] The petitioner does not claim that proceedings before the Department of Labor on the application for a labor certification included the job offer letter, dated January 31, 2003.