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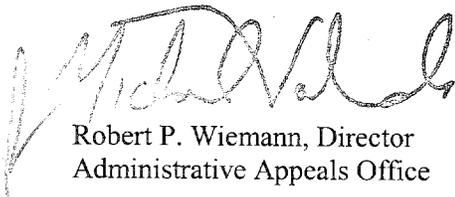
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

- An original certified ETA 750.

On June 30, 2003, the director issued a notice of intent to deny the petition based upon the U.S. Attorney for the Southern District of Florida obtaining guilty verdicts against the petitioner's then counsel [REDACTED] for immigration fraud.² The director gave the petitioner 30 days to supply additional information. After the director sent a second notice, dated December 18, 2003, the petitioner, through new counsel [REDACTED] Esq., hereafter "counsel," responded on July 23, 2003, on September 26, 2003, and on March 12, 2004, by supplying some of the requested information and by asking for additional time to supply the balance. With the response, counsel submitted, among other things:

- Copies of the ETA 750;
- The petitioner's Form 1120-A returns for 2001-2003;
- The petitioner's Form 941 quarterly returns for 2001-2003;
- The petitioner's 2003 quarterly bank statements; and,
- The petitioner's 2003 balance sheet.

On April 16, 2004, counsel sent a second response to the notice of intent to deny dated December 18, 2003, asking for more time to respond.

In a decision dated May 1, 2004, the director denied counsel's request for 45 more days to supply the petitioner's quarterly tax returns, instead determining that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner only need establish ability to pay as of a future date of the visa issuance, not as of the priority date. Counsel asserts that its Form 1120-A income tax returns as of 2003 shows a net income of \$31,952, or about 20 percent more than the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Contrary to counsel's assertions, in determining the petitioner's ability to pay the proffered wage 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

²The director advised that on May 23, 2003, a federal jury "returned guilty verdicts on all counts against immigration attorney, Javier Lopera," the petitioner's prior attorney of record, on 18 counts of conspiracy to commit immigration fraud. The NOID, stating, "it may be concluded that this petition may contain fraudulent documents," and if the petitioner wished to proceed, the director required additional evidence of the veracity of prior documents submitted.

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 instant case, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

As another 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 for a given year, 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 the Immigration and Naturalization Service, now 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 the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 25 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28:

The official Web site for the Internal Revenue Service states that a corporation may file a short-form Form 1120-A return if:

- Its gross receipts (line 1a on page 1) are under \$500,000, its total income (line 11 on page 1) is under \$500,000, and its total assets (Item D on page 1) are under \$500,000; and,
- It does not have any ownership in a foreign corporation or foreign partnership, foreign shareholders that directly or indirectly own 25% or more of its stock, or any ownership in, or transactions with, a foreign trust.

In the instant case, the petitioner's tax returns show a taxable income of -\$10,078 for 2001; -\$16,321 for 2002; and -\$14,338 for 2003. Since each of those figures is negative, those figures fail to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables a company expects to convert to cash within one year. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner can and probably will pay the proffered wage out of those net current assets. The net current assets would likely be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In general, "Part III" of a Form 1120-A return provides the same information as the Schedule L attachment to the Form 1120 return does. Calculations based on the petitioner's Part III attached to the petitioner's tax returns yield the following amounts for net current assets: \$2,501 for 2001; \$3,779 for 2002; and \$8,387 for 2003. Since each of those figures is less than the proffered wage of \$25,418,³ they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements. The bank statements include checks paid and deposits made during each quarter of 2003 along with a bank statement for transactions between March and June of 2003, showing a balance ranging from \$7,287.77 to \$9,106.15. More bank statement records, submitted on appeal, are for April through June 2004, revealing bank balances ranging from a low of \$721.41 in April 2004 to a high of \$10,721.79 for June 2004. In general, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in asserting the petitioner's ability to pay, but that reliance is misplaced. The *Sonogawa* case 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001–2003 were uncharacteristically unprofitable years for the petitioner.

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.

³ The calculation assumes the full proffered wage, since the evidence indicates the petitioner has not paid the beneficiary any wages.

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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.