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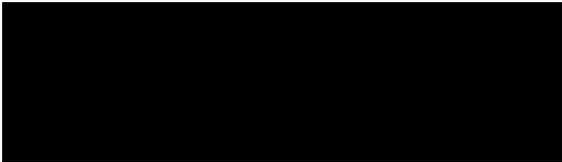
FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 03 014 50741

Date: DEC 23 2005

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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company that consults in iron, steel products, electronic and information technology, primarily for Chinese clients. It seeks to employ the beneficiary permanently in the United States as a sales manager. 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 states that the petitioner has sufficient financial resources to pay the proffered wage. Counsel submits no further documentation.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 9, 1998. The proffered wage as stated on the Form ETA 750 is an annual salary of \$90,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December 1997.

On the petition, the petitioner claimed to have been established in 1992, and to have two employees. In support of the petition, the petitioner submitted a letter of support that described its business operations, as well as a company profile sheet that listed the beneficiary's contributions to the petitioner's business in primarily building up six projects for the petitioner during the past three years. The petitioner also stated the beneficiary began working with the petitioner in December 1997. The petitioner submitted a letter of employment verification from Mr. [REDACTED], Director of Import and Export Department, Shougang Steel and Iron International Trade Import and Export Engineering Company, Beijing, China that stated the beneficiary worked for this company for eight years managing joint venture projects in electronic control equipment and other products. The petitioner also submitted an educational equivalency document from the Trusteforte Corporation, New York, New York that stated the beneficiary had the equivalent of a U.S. baccalaureate

degree in economics, with an emphasis on international economics and trade. The petitioner also submitted a Baili University document that attested the beneficiary had graduated from the university with a baccalaureate degree after studying foreign economics and international trade, as well as a translated college transcript.

The petitioner also submitted IRS Forms 1120S, the petitioner's corporate income tax return for 1999, 2000, and 2001. These returns indicated the petitioner had net income of \$1,141 in 1999; \$6,496 in 2000; and \$7,493 in 2001. In addition, the petitioner submitted earnings statements for the beneficiary for the months March and April 2002 that indicated the beneficiary's monthly wage in 2002 was \$5,000. Finally the petitioner submitted copies of bank statements from ██████ Bank for the petitioner's two banking accounts, one of which is a checking account, and the other is a money market savings account. The bank statement listed individual balances for the two accounts, as well as a combined balance. The petitioner submitted bank statements for the month of March 1998 that indicated a joint balance of \$55,906.84. Other bank statements for the months of March, April and May of 2002 indicated joint balances of \$43,661, \$50,684.07, and \$29,578.37. Counsel also stated that the petitioner submitted a flowchart showing the petitioner's monthly bank balances for January 1998 to August 2003.¹

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 3, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns for tax years 1998 and 2002. The director also requested that copies of her Form W-2 Wage and Tax statement be submitted, if the petitioner employed the beneficiary in the years 1998 to 2002.

In response, counsel submitted IRS Forms 1120S, the petitioner's corporate tax returns for the years 1998 and 2002. These two documents indicated the petitioner had ordinary income in 1998 of -\$151, and \$17,551 in 2002. The petitioner also submitted copies of the beneficiary's Forms W-2 from 1998 to 2002. These documents indicated the beneficiary was paid \$60,000 each year. In addition, counsel submitted copies of the petitioner's bank accounts with ██████ Bank for the period from January 1998 through August 2003. Counsel noted that the petitioner also submitted a flowchart showing the petitioner's monthly bank balances for the entire period from January of 1998 to August 2003.

Counsel also stated that, in a number of precedent decisions, the AAO had consistently held that an employer's ability to pay its employees could be established by tax returns and checking accounts in which monthly checking balances exceeded proffered wage. Counsel cited four AAO decisions. Counsel stated that these decisions also looked at whether the employer had other assets, including sufficient cash on hand to pay the employee the proffered wage. Counsel also referred to a Vermont Service Center liaison meeting in 1995 with chapters of the New Jersey and New York American Immigration Lawyers Association (AILA). Counsel stated that the Service Center had stated at the meeting that the ability to pay a beneficiary's proffered wage should be established if the petitioner provided a rationale and any other documentation that would persuade a reasonable person of the petitioner's ability to pay.

¹ Upon review of the record, no such flowchart is found.

With regard to the negative ordinary income of \$151 indicated on the petitioner's 1998 tax return, counsel stated that the petitioner's monthly bank balance for March 1998 was \$55,728.84 and the monthly balance for each of the remaining months in 1998 was over \$40,000. Counsel also asserted that the petitioner has always maintained sufficient cash noting that the monthly bank statements and the flowchart that summarized the petitioner's monthly bank balances showed an average monthly balance of \$53,775.42 in 1998, \$78,925.50 in 1999, \$105,936.33 in 2000, \$143,859.33 in 2001, \$39,557 in 2002, and an average balance of \$41,647.13 for 2003 as of August 2003. Counsel stated that based on the documentation submitted to the record, the petitioner had provided a rationale that could persuade a reasonable person of the petitioner's ability to pay the proffered wage.

On December 8, 2003, the director denied the petition. In his denial of the petition, the director stated that although the petitioner's Forms W-2 indicated that it had paid the beneficiary \$60,000 each year from 1998 to 2002, the petitioner's ordinary income, which the director described as net profit or loss in these years, all fell short of paying the additional \$30,000, the difference between the beneficiary's actual wages and the proffered wage. For example, the director noted that in 1998, the petitioner showed a net loss of \$151, which indicated that the petitioner lacked \$30,151 in ordinary income to pay the \$30,000 difference between the actual wages and the proffered wage.

With regard to the petitioner's bank statements, the director stated that these documents were of little value because on more than one month, the bank statement balances dropped down to \$0.00 leaving nothing to pay the additional wages needed to establish the petitioner's ability to pay the proffered wage. The director then determined that the petitioner had not established its ability to pay the proffered wage as of the 1998 priority date and onward.

On appeal, counsel asserts that the director's decision is erroneous and not supported by the record. Counsel again refers to previous AAO decisions that involved the use of petitioner's bank balances to establish that the petitioner had sufficient funds each month to pay the proffered wage. Counsel stated that the petitioner has always maintained two linked accounts maintained by ██████ Bank and reiterates the average monthly balances first mentioned in the petitioner's response to the director's request for further evidence. Counsel also cited *Matter of Sonogawa*, 12 I & N Dec. 612 (Reg. Comm. 1967) and noted that the AAO has more than once emphasized that the continued business operation of the petitioner is a factor to be considered in determining the petitioner's ability to pay the proffered wage. Counsel states that there is no evidence that the petitioner will not continue its business operation, and that taking into consideration all relevant factors, the petitioner has provided a reasonable assurance that it has the ability to pay the proffered wage.

The director's comment in his decision with regard to the petitioner's bank statements having no value because several monthly balances in the petitioner's checking account were \$0.00 is not well-founded. In the two instances where the petitioner's checking account balance was \$0.00, namely June 2002, and April 2003, the petitioner's money market account appeared to contain funds initially placed in the petitioner's checking account and then transferred to the petitioner's interest-bearing money market account. The fact that the petitioner's checking account had no funds in it at the end of the month, and the money market account had increased funds neither proves nor disproves the petitioner's ability to pay the proffered wage.

Counsel contends that the combined balances on the two accounts with revolving funds should be examined, rather than the balances of only the checking account. Nevertheless, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of 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 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Furthermore, counsel, on appeal, refers to decisions issued by the AAO concerning the use of bank statements to establish the petitioner's ability to pay the proffered wage, but does not provide published citations. 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). Counsel, in the response to the director's request for further evidence, also referred to a meeting between the Vermont Service Center and AILA representatives. It is private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted W-2 salary statements for the beneficiary for the years 1998 to 2002, since the priority date for the petition is March 9, 1998. These documents establish that the petitioner paid the beneficiary \$60,000 each year, which is \$30,000 less than the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 1998 to 2002 show the following amount of ordinary income: -\$151 in 1998, \$1,141 in 1999; \$6,496 in 2000; \$7,493 in 2001; and \$17,551 in 2002. These figures fail to establish the ability of the petitioner to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$30,000, based on the petitioner's net income.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 submitted the following information for tax years 1998 to 2002:

	1998	1999	2000
Ordinary Income	\$ -151	\$ 1,141	\$ 6,496
Current Assets	\$ 39,867	\$ 58,690	\$ 51,985
Current Liabilities	\$ 51,243	\$ 75,367	\$ 80,128
Net current assets	\$ -11,376	\$ -16,677	\$ -28,143

	2001	2002
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² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Ordinary Income	\$ 7,493	\$ 17,551
Current Assets	\$ 50,560	\$ 22,210
Current Liabilities	\$ 68,961	\$ 21,386
Net current assets	\$ -18,401	\$ 824

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage of \$90,000 to the beneficiary in the years 1998 to 2002. In 1998, the petitioner shows a net income of -\$151, and net current assets of -\$11,376, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage, out of its net income or net current assets. In 1999, the petitioner shows a net income of \$1,141, and net current assets of -\$16,677, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 2000, the petitioner shows a net income of \$6,496, and net current assets of -\$28,143, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 2001, the petitioner shows a net income of \$7,493, and net current assets of -\$18,401, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Finally, in 2002, the petitioner shows a net income of \$17,551, and net current assets of only \$824, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

On appeal, counsel states that the petitioner's monthly banking balances are sufficient to pay the beneficiary's monthly increased wages, which would amount to \$30,000 a year, or \$2,500 a month. As stated previously, the flowchart mentioned by counsel in the petitioner's response to the director's request for further evidence is not found in the record. Therefore, it is not possible to gauge the conclusions that could be supported by such a document. The AAO acknowledges that the petitioner's combined monthly banking averages for its checking and money marketing accounts are always higher than the suggested requisite \$2,500 monthly pay increase, and in some months, the petitioner's banking balances, particularly those of the money market account, are higher than the entire proffered wage. However, it is noted that the petitioner's monthly balances would have diminished by \$2,500 each month to account for the beneficiary's proffered wage, which would over time have significantly reduced the petitioner's available money market funds in his banking accounts for the period 1998 to 2002. Thus, even using the approach of whether the petitioner had sufficient funds to pay for the beneficiary's increased salary on a monthly basis does not establish the petitioner's ability to pay the proffered wage. Neither counsel nor the petitioner has addressed any additional financial resources available to pay the proffered wage. Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

On appeal, counsel also cites to *Matter of Sonegawa* and to the concept of examining the totality of the petitioner's circumstances. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner in the instant petition does not appear to be analogous to the petitioner in *Sonegawa*. In the present case, the petitioner is a two-person consulting firm that had been in business for ten years at the time the Form ETA 750 was filed. The petitioner has established that it has paid the beneficiary a salary of \$60,000 for five years. However, in 1998, the petitioner had \$356,083 in gross receipts and paid out \$60,000 in salaries and wages, \$25,000 in officer compensation, and \$207,827 in subcontractor fees. In 2002, the petitioner had gross receipts of \$151,631, salaries and wages of \$60,000, officer compensation of \$27,000, and \$7,327 in subcontractor fees. Thus, in the year in which the petition was filed, the petitioner appears to have more business activity than in 2002. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998 was an uncharacteristically unprofitable year for the petitioner. In examining the totality of the petitioner's circumstances, the record is not clear that the petitioner's overall financial capability is sufficient to pay the proffered wage from 1998 to 2002.

Therefore, the director's decision shall stand, and the petition shall be denied.

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.