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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: WAC 02 174 53370 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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 Spanish product telemarketing firm. 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 submits additional evidence and asserts that the director improperly analyzed the evidence demonstrating the petitioner's financial ability to pay the proffered wage.

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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is $34.71 per hour, which amounts to $72,196.80 annually.[1] On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since July 1995.

On Part 5 of the petition, the petitioner claims to have been established in 1996 and to currently employ nine workers. In support of its ability to pay the proffered wage, the petitioner initially submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998 through 2000. The returns contain the following information for the following years:

	1998	1999	2000
Net income	$64,194	$77,056	$54,895

[1] The director mischaracterized the proffered wage as $66,480 per annum.

Current Assets (Sched. L)	$ 87,737	$103,532	$ 88,534
Current Liabilities (Sched. L)	$163,348	$195,061	$173,467
Net current assets[2]	- $ 75,611	- $ 91,529	-$ 84,933

Besides net income, CIS will consider a petitioner's net current assets as an alternative method of reviewing the ability to pay the proffered salary. Net current assets represent a measure of a petitioner's liquidity during a given period and are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets and current liabilities are shown on Schedule L on lines (1) through (6) and on lines (16) through (18), respectively. 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 also provided copies of the beneficiary's Wage and Tax Statement (W-2) for 1998 through 2001. They show that the petitioner paid the following wages to the beneficiary during those years:

	1998	1999	2000	2001
Wages Paid	$19,820	$26,620	$26,690	$26,640

In July and November 2002, the director requested additional evidence from the petitioner related to the beneficiary's prior work experience and the petitioner's ability to pay the proffered wage. Regarding the petitioner's ability to pay the proffered wage, the director requested that the petitioner provide supporting evidence in the form of annual reports, federal tax returns, or annual reports covering the period from 1998 to the present. The director specifically instructed the beneficiary to provide signed federal tax returns with all schedules and tables attached.

In response, the petitioner resubmitted signed copies of its corporate tax returns for 1998, 1999, and 2000. It also included a signed copy of its 2001 federal tax return. This tax return reveals that the petitioner declared $28,491 as net income that year. Schedule L of the tax return shows that the petitioner had $83,590 in current assets and $190,739 in current liabilities, resulting in -$107,149 in net current assets.

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 May 28, 2003, denied the petition.

On appeal, counsel submits the evidence previously offered and also includes a copy of the petitioner's 2002 corporate tax return, filed after the June 24, 2003 appeal date. It shows that the petitioner reported $55,264 in net income. Schedule L shows that the petitioner had $91,226 in current assets and $221,017 in current liabilities.

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[2] The director miscalculated the net current assets.

[3] 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.

Counsel further provided a copy of the beneficiary's 2002 W-2 showing that the petitioner paid her $19,980 in wages in 2002.

Counsel contends that the petitioner's depreciation expense should be added back to its net income as set forth on its tax federal tax returns. Counsel also asserts that the officer compensation paid in 2001 could have been used to pay the proffered wage to the beneficiary. Counsel's assertion is not persuasive. Citizenship and Immigration Services (CIS) examines 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 or other compensation in excess of, or in lieu 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.

Counsel's observation that the director failed to consider the wages already paid to the beneficiary, is, however, accurate. In determining the petitioner's ability to pay the proffered wage during a given period, CIS reviews whether the petitioner may have 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. To the extent that the petitioner may have paid wages at a level less than the proffered wage, consideration will be given to those amounts. If a petitioner's net income or net current assets can cover the difference between the proffered wage and the actual wages paid, a petitioner may thereby demonstrate its ability to pay the certified wage offer. In the instant case, the petitioner paid the beneficiary $52,376.80 less than the proffered wage in 1998; $45,576.80 less in 1999; $45,506.80 less in 2000, and $45,556.80 less in 2001. The documents submitted on appeal indicate that it paid the beneficiary $55,264 less than the proffered wage in 2002. It is noted that except for 2001, the petitioner's net income, as shown on its tax returns, could have covered the shortfall.

It must also be stated, however, that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage. Counsel contends that the insufficiency of one year's (2001) net income needed to cover the difference between the proffered wage of $72,196.80 and the actual wages of $26,640 paid to the beneficiary can be overlooked, consistent with *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). That case is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. *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.

In this case, the evidence fails to establish that such unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner's net income, as set forth in its corporate tax returns, has substantially fluctuated between 1998 and 2002, accompanied by negative figures representing its net current assets. Similarly, the petitioner's gross sales have, with the exception of 1999, steadily declined.

Counsel urges the consideration of the beneficiary's ability to generate income as an indication as a factor in evaluating the petitioner's ability to pay the proffered wage. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a sales manager will significantly increase revenue for the petitioner. As discussed above, the record indicates that the petitioner has already employed the beneficiary since 1995. It is not immediately apparent, based on the petitioner's declining sales figures, how the beneficiary may increase revenue. In this case counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns and cannot be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, based on the evidence contained in the record and the foregoing discussion, the AAO cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate its continuing ability to pay the proffered wage as of the priority date of the petition.

Beyond the decision of the director, it is noted that the beneficiary and the general manager of the petitioner bear almost identically spelled names. Part 7 of the visa petition reflects that the beneficiary's son and the general manager have the same name. It is not clear what this relationship involves or, other than as an employee since 1995, what the beneficiary's relationship is to the petitioning business. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Although this appeal has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.

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.