U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 07 2006

SRC 04 095 51237

IN RE: Petitioner:
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:

[redacted]

PUBLIC COPY

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a jewelry repairman. 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 submitted a statement.

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 granting 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $11.73 per hour, which equals $24,398.40 per year.

The Form I-140 visa petition in this matter was submitted on February 17, 2004. On the petition, the petitioner stated that it was established during October 1992 and that it employs three workers. The petition states that the petitioner's gross annual income is $276,360 but does not state its net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Baytown, Texas.

In support of the petition, counsel submitted 1998 and 1999 Form 1065 U.S. Returns of Partnership Income showing that the petitioner was held as a single member Limited Liability Company (LLC) during those years. Those returns are essentially blank and indicate that the petitioner's owner reports the income of the company on a Schedule C attached to the owner's Form 1040 U.S. Individual Income Tax Return.

That 1998 return indicates that it is the petitioner's final return. In this context "Final return" indicates that the petitioner did not anticipate filing another Form 1065 U.S. Return of Partnership Income for 1999, the following year. This office notes that the petitioner did, however, file a Form 1065 U.S. Return of Partnership Income covering 1999

Counsel also provided copies of the 1998, 1999, 2000, 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns[1] of [redacted] whom the Form I-140 petition states is the petitioner's president. Schedules C attached to those returns show that [redacted] owned the petitioner during those years, and report the petitioner's net profit during those years.

During 1998 the petitioner had a net profit of $14,042. The petitioner's owner declared adjusted gross income of $13,060 during that year, including the petitioner's entire profit offset by deductions.

During 1999 the petitioner had a net profit of $28,731. The petitioner's owner declared adjusted gross income of $26,701 during that year, including the petitioner's entire profit offset by deductions.

During 2000 the petitioner had a net profit of $33,563. The petitioner's owner declared adjusted gross income of $31,192 during that year, including the petitioner's entire profit offset by deductions.

During 2001 the petitioner had a net profit of $36,724. The petitioner's owner declared adjusted gross income of $34,129 during that year, including the petitioner's entire profit offset by deductions.

During 2002 the petitioner had a net profit of $20,666. The petitioner's owner declared adjusted gross income of $19,206 during that year, including the petitioner's entire profit offset by deductions. The Schedule C reveals that during that year the petitioner paid total wages of $26,516.

Counsel also provided the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the first and second quarters of 2002 and the final quarter of 2003. In addition to the original quarterly return for the first quarter of 2002 counsel provided an amended return for that same quarter.

The amended return for the first quarter of 2002 shows that the petitioner paid gross wages of $15,758 during that quarter to its sole employee. The quarterly returns for the second quarter of 2002 and the final quarter of 2003 show that the petitioner paid gross wages of $10,758 and $4,433.50 during those two quarters, respectively, to one employee.

This office notes that the wages the petitioner paid during the first quarter of 2002 added to the wages it paid during the second quarter of 2002 equals $26,516, which is the amount the Schedule C attached to the petitioner's 2002 tax return indicates the petitioner spent on wages during that entire year. This indicates that the petitioner paid no wages during the third and final quarters of 2002.

[1] Whether the petitioner was held as an LLC or as a sole proprietorship during 2000, 2001, and 2002 is unknown to this office. The significance of the form in which the petitioner is held is explained below.

Finally, counsel submitted a letter dated January 28, 2004 from the petitioner's president. That letter notes that a previous Form I-140 petition by the petitioner for [redacted] was approved. That letter notes that [redacted] no longer works for the petitioner and asks that approval of that Form I-140 petition be revoked. The letter does not make clear whether the petition was based on the same Form ETA 750 as the instant petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on January 25, 2005, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also noted that the petitioner might provide copies of Form W-2 Wage and Tax Statements showing payments the petitioner made to the beneficiary since the priority date.

Finally, the service center requested evidence that the petitioner's owner is citizen or legal permanent resident of the United States. Although the petitioner's owner's status is not directly relevant to the petitioner's ability to pay the proffered wage, the petitioner's response to that request will be considered.

In response, counsel submitted (1) the 2003 Form 1040 U.S. Individual Income Tax Return of [redacted] (2) a gift letter dated January 1, 2005, and (3) a letter dated April 18, 2005. Counsel submitted no W-2 forms.

A Schedule C attached to the 2003 tax return shows that the petitioner returned a profit of $30,550 during that year. [redacted] who then owned the petitioner, declared adjusted gross income of $28,926 during that year. The Schedule C further indicates that the petitioner paid total wages of $4,433.50 during all of 2003, which is the same amount shown on the petitioner's quarterly return for the last quarter of 2003. This indicates that the petitioner paid no wages during the first, second, and third quarters of 2003.

The gift letter shows that on January 1, 2005 [redacted] transferred his 100% ownership in the petitioner to [redacted]

In the April 18, 2005 letter, counsel cited *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of the instant visa petition should not be precluded by the fact that the petitioner's net profit during 1998 was less than the proffered wage.

Counsel stated that the petitioner paid over $81,000 in employee salaries and cited that wage expense as evidence of its ability to pay additional wages. Counsel provided no evidence in support of the contention that the petitioner's wage expense was $81,000. Line 26 of the Schedule C attached to the petitioner's owner's 1998 tax return, which purports to contain an exhaustive list of the petitioner's expenses during that year, states that the petitioner paid "Wages (less employment credits)" of $11,182.

Counsel also stated that the petitioner had total assets worth over $16,000 during 1998 and cited that asset value as an index of the petitioner's ability to pay the proffered wage during that year. Counsel provided no evidence in support of the assertion that the petitioner had $16,000 in assets during that year.

As to the petitioner's owner's citizenship or immigrant status counsel stated, "As of January 1, 2005, ownership of [the petitioner] was conveyed to [redacted] a lawful U.S. permanent resident."

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 September 14, 2005, denied the petition. In that decision the director appeared to imply that because the petitioner's owner received all of the petitioner's profits the petitioner is unable to rely on those profits to show its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel stated that the director had failed to consider the totality of the evidence. Counsel also cites a non-precedent decision of this office for the proposition that the petitioner's profits may be used to show its ability to pay the proffered wage in a given year notwithstanding that those profits were paid to the petitioner's owner.

Initially this office notes that the non-precedent case cited by counsel is not controlling. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. This office agrees, however, with counsel's contention that the petitioner's profits should be considered, notwithstanding that they were ultimately paid to the petitioner's owner.

Counsel's citation of *Matter of Sonegawa, supra*, is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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 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 couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here the record contains no evidence that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1998 and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Counsel stated that the petitioner paid wages of $81,000 during 1998 but provided no evidence to support that assertion. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Even if counsel had demonstrated, rather than asserted, that the petitioner paid wages of $81,000 during 1998 that would be insufficient to show the ability to pay the proffered wage. Showing that the petitioner paid total wages in excess of the proffered wage, or far greater than the proffered wage, is insufficient. Similarly, showing that the petitioner's gross receipts exceeded the proffered wage, or far exceeded 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel appears to cite the petitioner's 1998 total assets as an index of funds available to pay the proffered wage during that year. Counsel, however, provided no evidence to demonstrate the value of the petitioner's assets during that year. Again, the assertions of counsel are not evidence, are not entitled to any evidentiary weight, and are insufficient to sustain the burden of proof. *See INS v. Phinpathya, supra, Matter of Ramirez-Sanchez, supra.*

Further, even if counsel had demonstrated, rather than alleged, the value of the petitioner's total assets during 1998, those total assets would not be considered a fund available to pay wages. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities

projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[2] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

In the instant case the Schedules L provided do not list the value of the petitioner's current assets and current liabilities. Further, the petitioner did not submit any other evidence from which the petitioner's current assets may be determined.

The proffered wage is $24,398.40 per year. The priority date is January 14, 1998.

During 1998 the petitioner had a net profit of $14,042. That amount is insufficient to pay the proffered wage. No information is included on the 1998 returns submitted from which the petitioner's net current assets can be calculated. The petitioner submitted no reliable evidence of any other funds available to the petitioner with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 1998.

During 1999 the petitioner had a net profit of $28,731. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.[3]

During 2000 the petitioner had a net profit of $33,563. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner had a net profit of $36,724. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner had a net profit of $20,666. That amount is insufficient to pay the proffered wage. No information is included on the 2002 return submitted from which the petitioner's net current assets can be calculated. The petitioner submitted no reliable evidence of any other funds available to the petitioner with which it could have paid the proffered wage. The petitioner has not shown the ability to pay the proffered wage during 2002.

During 2003 the petitioner had a net profit of $30,550. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

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[2] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

[3] The amount of the petitioner's owner's adjusted gross income, and his apparent dependency on the petitioner's profit, raises the issue of the petitioner's owner's ability to pay the proffered wage while continuing to support himself and his dependent. This raises the issue of the legitimacy of the job offer. Because the petitioner is an LLC, however, this issue is not determinative, as it would be if the petitioner were a sole proprietorship.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis.

The record suggests additional issues that were not addressed in the decision of denial. The January 1, 2005 gift letter shows that [redacted] transferred his 100% ownership in the petitioner to [redacted] on that date.

If the petitioner has changed owners during the pendency of the petition the new owner must demonstrate that his company is a true successor to the original company within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must show that it assumed all of the rights, duties, obligations, and assets of the original company. In the instant case the gift letter notes that [redacted] did not personally assume any of the company's debts, but does not state whether or not the company assumed, or retained, all of its previous rights, duties, obligations, and assets.

In addition, the petitioner submitted a letter dated January 28, 2004 requesting that a previously approved petition be revoked. The instant petitioner submitted that petition on behalf of beneficiary [redacted] The Form I-140 may have been based on the same Form ETA 750 labor certification as the instant petition, although that is not clear. This office questions whether the petitioner is able to reuse the labor certification for a different beneficiary, especially if approval of the previous Form I-140 petition has not been revoked.

Although the petition, submitted on February 17, 2004, states that the petitioner then employed three workers, this office notes that its quarterly returns show that it employed no workers during the last half of 2002 and the first three quarters of 2003, a period of more than a year. The petition in this matter indicates that the petitioner intends to employ the beneficiary on a full-time, permanent basis. Absent any explanation, that the petitioner went so long without compensating any employees casts doubt on the legitimacy of that job offer.

Because these additional issues were not raised in the decision of denial and the petitioner has not been accorded an opportunity to address them this office declines to base today's decision on them, even in part. If the petitioner attempts to overcome today's decision on motion, however, it should address these issues.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.