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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 13 2007

EAC 03 224 50772

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The nature of the petitioner's business is food products. It seeks to employ the beneficiary permanently in the United States as a purchasing agent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated June 21, 2004, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] The director initially rejected the appeal as untimely filed.

Here, the Form ETA 750 was accepted on April 30, 2001.[2] The proffered wage as stated on the Form ETA 750 is $63,000.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.[3]

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

Relevant evidence in the record includes copies of the following documents: cover letters from counsel dated June 20, 2003, and May 17, 2004; the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax return for 2001; a W-2 Wage and Tax Statement for 2001 issued by the petitioner to the beneficiary in the amount of $50,115.70; the petitioner's financial statement for the year ended December 31, 2001;[5] and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on September 5, 2000, the beneficiary claimed to have worked for the petitioner since February 1999.

On appeal, counsel asserts that the "employer had cash available in the amount of $254,525.00 and $133,282.00, at the beginning and the end of the year, respectively, and accumulated earnings in excess of $200,00.00;" and that the cash and accumulated earnings are is evidence of the ability to pay the proffered wage.

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[2] It has been approximately over six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[3] The beneficiary's qualifications are not at issue in these proceedings.

[4] The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] There is no indication that the financial statement submitted was audited and it was not accompanied by an auditor's report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying this statement, the AAO cannot conclude it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel contends that the acting director erred as she failed to consider "the viability of the employer, which has been in business for more than 20 years, the accumulation of substantial earnings and assets, the success of the petitioner, the nature of the petitioner's business, the significant amount of taxes and wages paid by the employer and other relevant financial information ...."

Accompanying the appeal, counsel submits a legal brief and a cover letter from counsel dated September 16, 2006.

In the brief submitted counsel states that the petitioner has been in existence for 22 years, had gross revenues in 2001 of $14 million, and had assets of over $6.3 million. Counsel contends that the evidence demonstrates that the petitioner is a growing and profitable business.

Counsel contends that the acting director's "failure to consider factors other than taxable income in 2001 is improper and inconsistent with the law." In support of his contention, counsel cites the case precedent of *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) and *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988).

Counsel also contended that because of the acting director's "analysis and statements concerning the petitioner's current assets and current liabilities [they] do not take into account the reality of business operations." Counsel goes on to say that in his opinion the acting director "presumes that the [petitioner's business] operations are going to cease at a particular time." Counsel's logic is not apparent and he has not elaborated or submitted case precedent to explain and substantiate this assertion. Insofar as the AAO takes a *de novo* look at issues raised in the denial of this petition, this office does not presume that the petitioner's business operations are going to cease at a particular time, nor has this office we found any reason to assume from a review of the record of proceeding that the acting director held this belief.

Counsel disputes the acting director's inclusion in the calculation of net current assets "notes and bonds in [sic] less than one year." This office assumes counsel is referring to Line 2a of Schedule L that includes a provision for trade notes and accounts receivable less allowance for bad debts that in 2001 at end-of-year amounted to $2,167,669.00 that counsel would have us ignore. Again, counsel has not elaborated or submitted case precedent to explain and substantiate this assertion. The calculation of net current assets includes the figure on Line 2.a. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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. A W-2 Wage and Tax Statement for 2001 issued by the petitioner to the beneficiary in the amount of $50,115.70 was submitted. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $63,000.00 from the priority date, but it did establish that it paid partial wages in 2001. Therefore the petitioner must establish that it can pay the difference between the was actually paid to the beneficiary and the proffered wage which is $12,884.30 in 2001.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

On appeal counsel states that depreciation stated as an expense on the petitioner's tax return is evidence of the ability to pay the proffered wage. The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner's 2001 tax return demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated a loss (Line 28) of <$54,831.00>[6].

Since the proffered wage is $63,000.00 per year, the petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for year 2001.

If the net income the petitioner demonstrates it had available during the 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.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during 2001 were <$120,592.00>.

Therefore, for the year 2001 the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[8] copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

As a preface to the following discussion, counsel has made various contentions and has cited cases in support of his contentions, but only some of the cases cited are precedent that are binding upon CIS and the AAO.

Counsel refers to unpublished decisions in support of his contentions but does not provide published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the

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[6] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

[7] 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.

[8] 8 C.F.R. § 204.5(g)(2).

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).[9]

Counsel also cites the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) in support of his contentions. *Full Gospel Portland Church* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Counsel cited the case precedent of *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), to support his contention that the acting director should have reviewed the totality of the petitioner's circumstances. Counsel mentioned the viability of the petitioner which has been in business for more than 20 years, its accumulation of substantial earnings and assets, the success of the petitioner, the nature of the petitioner's business, and the amount of taxes and wages paid by the employer.

Matter of Sonegawa 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.

There is a paucity of data in the record relating to the petitioner's finances. The only admissible information presented concerning the petitioner's gross receipts, net income and net current assets are found in the 2001 tax return submitted. Reliance on federal income tax returns are one of the regulatory acceptable 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). There is insufficient financial evidence submitted to determine if over time the petitioner will become profitable.

Counsel has made an assertion concerning the success of the petitioner but he has not submitted any historical evidence such as tax returns, audited financial statements or annual reports from each year since the priority date of 2001. There has been sufficient time for the petitioner to submit such documentation. Counsel stated

[9] We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

that the petitioner has been in existence for 22 years, had gross revenues in 2001 of $14 million, and had assets of over $6.3 million. Counsel contends that the evidence demonstrates that the petitioner is a growing and profitable business but he has not submitted any evidence to support his contention. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner must establish eligibility at the time of filing the immigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In 2001, the petitioner's Form 1120 stated a loss (Line 28) of <$54,831.00>. The petitioner's net current assets during 2001 were <$120,592.00>. Counsel has not attempted to explain why such losses can be ignored in this case or to show that year 2001 was an unusual circumstance. No facts have been shown to exist in this case to parallel those in *Sonegawa*, nor has sufficient evidence to establish that 2001 was an uncharacteristically unprofitable year for the petitioner.

On appeal, counsel asserts that the "employer had cash available in the amount of $254,525.00 and $133,282.00, at the beginning and the end of the year [2001]," respectively. However counsel is ignoring other current assets as well as all of the petitioner's substantial current liabilities. As stated above the net current assets for the petitioner are a negative <$120,592.00>. On Schedule "L" to the petitioner's Form 1120, CIS considers net current assets as an alternative method to net income to demonstrate the petitioner's ability to pay the proffered wage. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

Counsel also asserts that "accumulated earnings" in excess of $200,000.00 is evidence of the ability to pay the proffered wage. Because the petitioner has stated retained earnings of $228,566.00 on Schedule L, we therefore understand that counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments made to stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and net current assets is therefore duplicative, at least in part.

Further, even if considered separately from net income and net current assets, a petitioner's retained earnings may not be appropriately included in the calculation of the petitioner's continuing ability to pay the proffered wage, because they do not necessarily represent funds available for disposition. The amount shown as retained earnings on the petitioner's tax return may represent current or non-current, cash or non-cash assets. They may or may not represent assets of a type readily available to the employer pay to its employees in cash while continuing in business. They are not, therefore, a clear and convincing index of a company's ability to pay additional wages.

Counsel states on appeal that as a loss of $12,484.00 resulting from the exchange of a vehicle is evidence of the petitioner's ability to pay the proffered wage. Since the petitioner's income loss and net current assets loss are substantial, counsel has not explained how a loss can be evidence of the ability to pay, or assuming this item is an extraordinary one-time occurrence, to ignore it would effect the over-all lack of profitability demonstrated in this case.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.