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U.S. Citizenship
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Services

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FILE: EAC-02-034-50835 Office: VERMONT SERVICE CENTER Date: **JUL 19 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

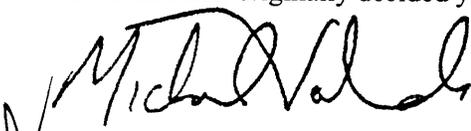
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director of the Vermont Service Center denied the preference visa petition and a subsequent motion to reopen, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion will be granted. The prior decision of the AAO will be affirmed. The petition remains denied.

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 December 31, 1997. The proffered wage as stated on the Form ETA 750 is \$21.64 per hour, which would be \$45,011.20 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner¹.

The petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

On April 22, 2002, 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 because the petitioner failed to provide regulatory-prescribed evidence covering the priority date timeframe, which is 1997, and the only tax return submitted, for 1999, showed a negative net income and negative net current assets.

On September 13, 2002, the director affirmed his decision on the petitioner's appeal and/or motion to reopen the matter. The director stated that he received the first page of the petitioner's 1997 tax return that showed negative net income, but since no additional pages were submitted from the tax return, the petitioner's current assets could not be evaluated.

¹ In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 AAO affirmed the director's decision on February 2, 2004 for the same reasons stated by the director. Additionally, the AAO's decision stated that the petitioner could not use wages paid to other employees because those funds were already expended in the context of replacing them with the beneficiary, and the AAO found inconsistent representations concerning the beneficiary's qualifications.

On motion to reopen and reconsider, counsel submits no new evidence but cites to precedent not previously cited to. Counsel suggests that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and a case called *Oriental Pearl Restaurant*, that counsel did not provide a citation for, applied to the facts of the petitioner's case and should result in an approval of the petition. Counsel submits copies of *Sonogawa* and a case abstract on *Oriental Pearl Restaurant*. Additionally, counsel states that her legal assistant made a typographical error on the forms indicating the beneficiary's prior employment experience. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Since an assertion is made that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision, the motion qualifies for consideration as a motion to reconsider.

On review, the record of proceeding affirms the AAO's prior determination that the petitioner has not demonstrated a continuing ability to pay the proffered wage beginning on the priority date.

Contrary to counsel's assertions, *Matter of Sonogawa*, 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 *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1997 or 1999 were uncharacteristically unprofitable years for the petitioner.

Counsel provided insufficient information concerning *Oriental Pearl Restaurant* and the abstracted concerning the case did not provide sufficient information pertaining to the facts in that case and the applicability to the instant case.

Additionally, counsel advised that the beneficiary would replace unspecified workers. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has

not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's assertion that the beneficiary confirmed his employment experience with her does not provide sufficient clarification of the inconsistency noted by the AAO in its prior decision. The unsupported statements of counsel on appeal or in a motion 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). The AAO notes upon review that the name of the beneficiary's prior employer was handwritten onto the Form ETA 750B with ink and handwriting very similar to the beneficiary's signature below that representation, which undermines the assertion that the petitioner's prior counsel's paralegal made a typographical error if the beneficiary actually completed the form manually. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

As properly noted by the AAO previously, the petitioner failed to submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage in 1998. Additionally, the petitioner's net income was negative in the two years it did submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage beginning on the priority date, and the only year in which it submitted evidence of its current assets, it showed negative net current assets.² Thus, the director and the AAO were correct in denying the petition based upon the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

² Although evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the petitioner's 2000 corporate tax return was the only piece of evidence contained in the record of proceeding that conformed to regulatory requirements and thus was properly analyzed. As noted in the prior AAO decision, 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 receipts and wage expense is misplaced. 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 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 motion to reopen or reconsider is granted. The prior decision of the AAO, dated February 2, 2004, is affirmed. The petition remains denied.

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. 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.