

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
PUBLIC COPY



U.S. Citizenship  
and Immigration  
Services

BO

FILE: WAC 03 043 50715 Office: CALIFORNIA SERVICE CENTER Date: NOV 13 2006

IN RE: Petitioner:  
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:



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*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The record contains a Form G-28 showing that the petitioner is represented by counsel. The record contains a previous Form G-28 showing that a different attorney previously represented the petitioner. All representations will be considered but today's decision will be furnished only to the petitioner and the petitioner's current counsel of record.

The petitioner is a home health agency. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a billing manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and additional evidence.

The motion in this matter was submitted after the statutory period for filing such a motion had expired. Preliminarily, counsel states that previous counsel failed to inform the petitioner and beneficiary of their right to file a motion. Counsel also noted that previous counsel made no argument pertinent to the wages the petitioner paid to the beneficiary during the years since the priority date. Counsel argues that, therefore, the petitioner's case was prejudiced by ineffective assistance of counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

With the motion counsel provided an affidavit from the beneficiary attesting to the facts alleged by counsel. Counsel also submitted a letter dated November 22, 2004 from the beneficiary to previous counsel complaining of the alleged lapses and a letter dated November 29, 2004 to the California State Bar complaining of previous counsel's behavior.

This office finds that the evidence submitted satisfies all three prongs of *Matter of Lozada*, supra. This office will therefore consider counsel's substantive arguments. On the motion counsel makes various arguments including the argument that the wages paid to the beneficiary during the salient years demonstrate the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable 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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$22 per hour, which equals \$45,760 per year.

The Form I-140 petition in this matter was submitted on November 21, 2002. On the petition, the petitioner stated that it was established during 1994 and that it employs 35 workers. The petition states that the petitioner's gross annual income is \$958,000 and that its net annual income is \$530,000. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in El Segundo, California.

The instructions to the Form ETA 750, Part B, request that the beneficiary list "all jobs held during the past three years" and that she also list any other jobs related to the occupation for which the alien is seeking certification."

On the Form ETA 750, Part B in the instant case, signed by the beneficiary on March 15, 2001, the beneficiary did not claim to have worked for the petitioner. The beneficiary stated that she had been working 40 hours per week for Home Care Network Incorporated of Long Beach, California, not the petitioner in this case, since May 1998 and continuing through the date she signed that form. In addition, the beneficiary stated

that she had been working 15 hours per week as staffing coordinator for Premier Nursing Service, also of Long Beach, from March 1998 to the date she signed that form. Finally, the beneficiary stated that she had been working 20 hour per week as a billing coordinator for Greater South Bay Home Health Incorporated from November 1996 to the date of that form.

In support of the beneficiary's claim of qualifying employment for Greater South Bay Home Health Incorporated the petitioner provided an undated letter from that company stating that it had employed the beneficiary full-time from November 1996 to November 1998 as billing coordinator/billing manager and part-time from September 2000 until the unstated date of that letter.

The petition in this matter was submitted on November 21, 2002. In support of the petition, the petitioner submitted the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax return shows that the petitioner is a corporation, that it incorporated on December 3, 1993,<sup>1</sup> and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2001 the petitioner declared a loss of \$4,712 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 17, 2003, 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 specifically requested copies of the petitioner's California Form DE-6 quarterly wage reports for the previous four quarters.

In response, the petitioner submitted a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, and copies of the petitioner's Form DE-6 wage reports for all four quarters of 2002.

The petitioner's 2002 return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$10,475 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 wage reports show that the petitioner paid wages of \$11,395, \$10,670, \$9,329, and \$9,220 during the four quarters of 2002, respectively, for a total of \$40,614 during that year.

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 June 16, 2003, denied the petition.

On appeal, the petitioner's previous counsel submitted a brief.

---

<sup>1</sup> This office believes that the date the petitioner was established as stated on the Form I-140 and the date the petitioner incorporated as stated on its tax return are reconcilable. That is, the petitioner may have formally incorporated on December 3, 1993 but commenced operations during 1994. In any event, the apparent discrepancy does not appear to be relevant to any material issue.

In the brief previous counsel argued that the decision of denial failed to address the petitioner's gross revenues, gross profits, total payroll expenses, and assets. Previous counsel further argued that the evidence shows that the petitioner's tax documentation indicates that its business is growing and argues that, under these circumstances the petition should be approved pursuant to the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Previous counsel urges that some of the deductions on the petitioner's tax returns, such as its carry-over losses and depreciation deductions, lowered its taxable income without affecting its cash position, and that its taxable income was therefore an unreliable index of its ability to pay the proffered wage.

Subsequently previous counsel submitted an additional brief to supplement the appeal. In that brief previous counsel reiterated the arguments previously presented and, in addition, argued that the increase in the petitioner's gross receipts from 2001 to 2002 demonstrates, pursuant to *Matter of Sonegawa, supra*, that the petitioner has the ability to pay the proffered wage and the petition should therefore be approved. Although previous counsel argued that the petitioner's total wage expense demonstrates that it is able to pay the proffered wage previous counsel did not note that the Form DE-6 reports show that the petitioner paid wages to the beneficiary during 2002.

Previous counsel further argued that the petitioner's negative taxable income during a given year does not indicate that it had negative cash flow during that same year.

Previous counsel noted that pursuant to *Sonegawa, supra*, approval of the petition is not precluded by low profits or losses during a given year where the petitioner established that it could reasonably expect an increase in business during ensuing years.

On September 23, 2004 the AAO issued a decision in this matter. The AAO found that the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and dismissed the appeal. In that decision the AAO noted that on the Form ETA 750, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The AAO also stated that the petitioner had not established that it employed the beneficiary.

On the motion counsel submitted additional Form DE-6 wage reports, Form W-2 Wage and Tax Statements, and a brief.

The additional wage reports show that the petitioner paid the beneficiary \$8,056, \$8,448, and \$10,520 during the first three quarters of 2001 for a total of \$27,024. The reports also show that the petitioner paid the beneficiary \$9,512, \$14,544, \$9,315, and \$10,728, respectively, during the four quarters of 2003 for a total of \$44,099 during that year.

The W-2 forms show that the petitioner paid the beneficiary \$17,783.50, \$29,472, \$32,661.75, \$39,014, \$40,614, and \$44,099 during 1998, 1999, 2000, 2001, 2002, and 2003, respectively.

In the brief counsel stated that the petitioner employed the beneficiary during 2000, 2001, 2002, and 2003. Counsel stated that the finding in the decision of denial that the beneficiary did not claim to have worked for

the petitioner is in error and not supported by any evidence in the record. Counsel states that the beneficiary presented her résumé, which included her claim of employment for the petitioner, to her previous counsel, and that previous counsel opted not to include that employment on the Form ETA 750. Counsel stated that this decision was probably made because, "after all, experience acquired while working with the petitioning firm will not be considered qualifying for the position for which she is being petitioned." Counsel provided no authority for that assertion.

Counsel asserted that the director did not consider the computations from which net income is derived and cited a non-precedent case of this office for the proposition that CIS "must consider the normal accounting practices of [a] company even if the ability to pay [the proffered wage] is not reflected in [its] tax returns."

Counsel cites *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989) for the proposition that, "[CIS] should consider the employer's ability to generate income when determining the employer's ability to pay salary."

In arguing that the petitioner's 2002 tax return shows its ability to pay the proffered wage during that year, counsel stated that "the petitioner offset its gross income in 2002 by deducting a carried over net operating loss of \$243,522." Counsel further states, "This amount was deducted, along with the itemized additional amounts on the schedule, to arrive at a negative taxable income." Counsel argues that this amount does not affect the petitioner's cash position during the year taken and that it should be added back to income to show the petitioner's cash position during 2002. These assertions are addressed below.

Counsel notes that the amounts the petitioner paid to the beneficiary during the salient years have been less than the annual amount of the proffered wage, but notes that, pursuant to 20 C.F.R. § (C)(2) the petitioner is not obliged to pay the proffered wage to the beneficiary during the pendency of the petition.

Counsel cited a non-precedent decision; the facts of which he asserts are similar to the facts of the instant case. 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 will, however, consider normal accounting practices in determining a petitioner's continuing ability to pay the proffered wage beginning on the priority date, as counsel urged in citing that non-precedent decision.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup> or otherwise increased its net income,<sup>3</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at

---

<sup>2</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>3</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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 CIS should have considered income before expenses were paid rather than net income.

Counsel apparently cited *Chang v. Thornburgh, supra*, in error. This office is unable to find any portion of that decision that states or otherwise supports counsel's assertion that CIS should consider the employer's ability to generate income when determining the employer's ability to pay salary. Second, if any such language were present in that case it would be dictum, as the court found for the Attorney General. Third, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within 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.

This office notes, however, that it does routinely consider a petitioner's ability to generate income in the determination of its ability to pay the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner may demonstrate that ability with its copies of annual reports, federal tax returns, or audited financial statements.

Present counsel urges that this office should consider, in some unspecified way, the petitioner's gross profits in assessing its ability to pay the proffered wage. Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>4</sup> Counsel appears to be asserting that the real cost of long-term

---

<sup>4</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the

tangible assets should never be deducted from revenue for the purpose of determining the funds available to the beneficiary. Such a scenario is unacceptable.

The petitioner did not, as counsel states, take a net operating loss deduction of \$243,522 during 2002. That amount, shown on Statement Two of the return, is the total net operating loss available to the petitioner, carried over from previous unprofitable years. During that year the petitioner took a Line 29 Net Operating Loss deduction of \$10,475.

Counsel is correct, however, that a net operating loss deduction does not in any way reduce a taxpayer's available cash during the year taken. It is merely an acknowledgement that the petitioner has suffered losses in the past, and that to tax it on a given year's profit when its operations have resulted in an overall loss would be fundamentally unfair. In assessing the petitioner's ability to pay the proffered wage during a given year, however, this office will utilize its taxable income before net operating loss deductions and special deductions, the figure on the tax return most analogous to net income. As the name implies the petitioner's net operating loss deduction has not been subtracted from that amount.

Counsel is incorrect that the statement in the previous decision of this office that the beneficiary had not claimed on the Form ETA 750 to have worked for the petitioner is not supported by any evidence. That Form ETA 750 is in the file. Its instructions required the beneficiary to list all employment during the previous three years as well as all employment relevant to the proffered position. Although the beneficiary now claims to have worked for the petitioner in the proffered position since at least 1998, and although she did list the other three employers for whom she claimed to work at that time, the beneficiary listed no employment with the petitioner on that form.

The W-2 forms submitted, if found credible, confirm counsel's assertion that the petitioner employed the beneficiary during 2000, 2001, 2002, and 2003, as well as 1998 and 1999. The credibility of that evidence is addressed further below.

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 W-2 forms presented state that the petitioner the beneficiary \$39,014, \$40,614, and \$44,099 during 2001, 2002, and 2003.<sup>5</sup>

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*

---

year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's long-term tangible assets purchased during the salient years.

<sup>5</sup> Additional W-2 forms show amounts the petitioner paid to the beneficiary during 1998, 1999, and 2000. Because the priority date of the petition is March 29, 2001, however, amounts paid during previous years are not relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

*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).

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. Counsel is correct that, 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.

The petitioner's total assets, however, are not available to pay the proffered wage. 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<sup>6</sup> 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.

The proffered wage is \$45,760 per year. The priority date is March 29, 2001.

The 2001 W-2 form states that the petitioner paid the beneficiary \$39,014 during that year. The petitioner is obliged to demonstrate the ability to pay the \$6,746 balance of the proffered wage during that year. During that year the petitioner declared a loss as its net income or taxable income before net operating loss deductions and special deductions. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The 2002 W-2 form states that the petitioner paid the beneficiary \$40,614 during that year. The petitioner is obliged to demonstrate the ability to pay the \$5,146 balance of the proffered wage during that year. During that year the petitioner declared taxable income before net operating loss deductions and special deductions of \$10,475. That amount is sufficient to pay the balance of the proffered wage. Assuming that the W-2 form submitted is credible, the petitioner has demonstrated the ability to pay the proffered wage during 2002.

---

<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The 2003 W-2 form states that the petitioner paid the beneficiary \$44,099 during that year. Ordinarily the petitioner would be obliged to show the ability to pay the \$1,661 balance of the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petition in this case, however, was submitted on November 21, 2002. The request for evidence was issued on April 17, 2003. On those dates the petitioner's 2003 tax return was unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2003 and subsequent years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel argues, however, that pursuant to *Sonegawa, supra*, the instant case should be approved notwithstanding that the petitioner's 2001 tax return might not show its ability to pay the proffered wage with its net profit added to the wages it actually paid to the beneficiary during that year. Counsel is correct that *Sonegawa* held that a petition might be approved notwithstanding that it suffered losses or declared low net income during a given year.

*Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel 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 it 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 2001 was an uncharacteristically unprofitable year for the petitioner.<sup>7</sup> Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. The petition was correctly denied based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

---

<sup>7</sup> In fact, the availability of a \$243,522 net operating loss available to the petitioner during 2002 is an indication that the petitioner's operations have not generally been profitable. Although it is not binding, this office notes that the decision in *Chang, supra* at 536, indicated that losses during previous years, as demonstrated by carry-over losses, are a factor adverse to the petitioner's showing its ability to pay the proffered wage.

The record suggests another issue not addressed in the decision of denial. On the Form ETA 750B the beneficiary claimed to have worked, beginning in November 1996, for Greater South Bay Home Health Incorporated. The employment verification letter submitted from Greater South Bay Home Health states that employment, beginning in September 2000, was reduced from full-time to part-time. The beneficiary stated, on the Form ETA 750B, that her part-time employment there encompassed 20 hours per week.

The beneficiary further claimed, on the Form ETA 750B, to have worked for Premier Nursing Service, beginning on March 1998, for 15 hours per week.

Further still, the beneficiary claimed, on that form, to have worked for Home Care Network, Incorporated, beginning in May of 1998, for 40 hours per week.

Subsequently, when required to provide evidence of the petitioner's ability to pay the proffered wage, the beneficiary provided evidence that she had worked for the petitioner, beginning in 1998. The amounts shown on the W-2 forms and Form DE-6 reports submitted indicate that employment was apparently full-time.

In total, the beneficiary claims to have worked approximately 115 hours per week at those four locations since at least September 2000 and apparently earlier. While this workweek is physically possible its length raises the issue of the veracity of the beneficiary's employment claims, including her claim of employment qualifying her for the proffered position.

Because the service center did not mention this issue in either the request for evidence or the decision of denial, and the petitioner has not been accorded an opportunity to respond to it, today's decision is not based, even in part, on this issue. If the petitioner attempts to overcome today's decision on motion, however, it should provide contemporaneous evidence in support of the entire length of each of those four employment claims.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The AAO's decision of September 23, 2004 is affirmed. The petition is denied.