

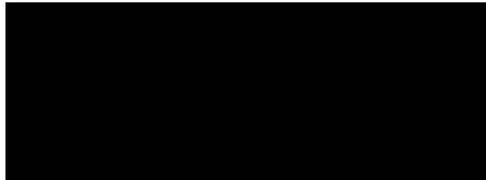
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**U.S. Citizenship
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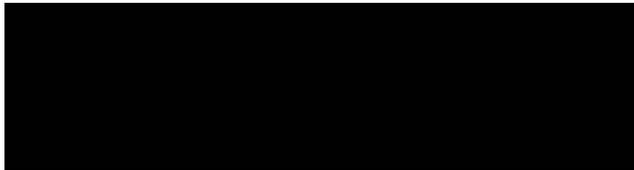
FILE: [REDACTED]
SRC 04 153 51611

Office: TEXAS SERVICE CENTER Date: **AUG 21 2007**

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an information technology (IT) and telecommunications corporation. It seeks to employ the beneficiary permanently in the United States as a technical support specialist. 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 regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen. There are new facts presented here by counsel that related to the initial evidence accompanying the petition together with supporting documentation.

The record shows that the motion is properly filed and, timely. 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 notice of denial of the petition dated August 1, 2005, 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).

Here, the Form ETA 750 was accepted on February 6, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$40,000.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; an explanatory letter dated August 19, 2005 from counsel; a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; pages from a website [REDACTED] that was accessed on August 15, 2005, providing the corporate information concerning the petitioner's corporate presence in the State of Florida; a partial copy of the petitioner's U.S. Internal Revenue Service Form 1120 tax return for 2004; the petitioner's Internal Revenue Services (IRS) Form 941 for 2005; three pay statements from the petitioner to the beneficiary issued in 2005 stating year-to-date wage payments of \$19,999.98; a letter to the CIS service center from the petitioner dated August 18, 2005; explanatory letters from counsel dated April 29, 2004, April 13, 2005 and June 8, 2005; the petitioner's Internal Revenue Services (IRS) Form 941 for 2005 with five pay statements in 2005 from the petitioner to the beneficiary stating year-to-date wages paid of \$16,666.85; a support letter dated March 2, 2004, by [REDACTED], president, of the petitioner for the beneficiary; the petitioner's U.S. Internal Revenue Service Form 1120 tax return for 2003; and eight business services invoices.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and employed two workers at the time the petition was prepared. 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 January 28, 2003, the beneficiary did not claim to have worked for the petitioner.

In the motion, counsel asserts that sufficient evidence was submitted to demonstrate that [REDACTED] provided consulting services to the petitioner during 2003. This is correct.

¹ It has been approximately four 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."

² 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).

Counsel contends that evidence was submitted that the beneficiary was an employee for Nogame Inc. from July 2003 to November 2004. According to Form ETA 750, Part B, Section 15 a., the beneficiary stated that she was employed by Nogame Inc. from June 2002 to present (i.e. January 28, 2003).

Counsel contends that the petitioner established the ability to pay the proffered wage in 2003.

Counsel asserts that several unpublished AAO decisions³ have determined that payments to subcontractors may be used as evidence of the ability to pay the proffered wage. This is correct in certain factual circumstances.

Counsel also cites an unpublished AAO decision and a federal court case concerning the standard of proof to be used in these matters, that is, a "preponderance of the evidence." Counsel is correct concerning the standard of proof in these matters.

Counsel states that the petitioner's 2004 U.S. federal tax return Form 1120 did not demonstrate the ability to pay the proffered wage but the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and the evidence submitted, demonstrates that the petitioner had a reasonable expectation of increased business and profits and also that the beneficiary's professional skills would provide additional profits.

According to counsel, the petitioner paid the beneficiary the proffered wage in year 2005. Counsel has submitted three pay statements from the petitioner to the beneficiary issued in 2005 stating year-to-date payments of \$19,999.98.

Counsel then qualified the above statement to reflect the evidence. The petitioner has submitted evidence that it was paying the beneficiary during 2005 *at the rate* of the proffered wage. Since the proffered wage is \$40,000.00 per year, this monthly rate is \$3,333.33. In her motion, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 2005, according to the language in the CIS memorandum,⁴ it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts the petitioner is currently paying (in 2005) the proffered wage. Counsel urges CIS to consider the wage rate paid in 2005 as demonstrating the petitioner's ability to pay.

The CIS memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the CIS memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and it does not comport with the plain

³ Counsel refers to decisions issued by the AAO concerning payments to contractors and the ability to pay the proffered wage, 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 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).

⁴ See Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by the interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 6, 2003. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2003 and 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Accompanying the motion, counsel submits a legal statement and additional evidence: four project proposals all dated December 27, 2002, by [REDACTED] of Miami, Florida, directed to the petitioner; an undated employment reference by [REDACTED], president of [REDACTED], for the beneficiary; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2003 and 2004; seven business services invoices with seven cancelled checks indicating that the petitioner had paid [REDACTED] a total of \$29,300.00 during year 2003; four cancelled checks from the petitioner to [REDACTED], totaling \$9,500.00 in year 2004; the petitioner's Internal Revenue Services (IRS) Form 941 for 2005 with five pay statements in 2005 from the petitioner to the beneficiary stating year-to-date wages paid of \$16,666.85; a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; and a support letter dated March 2, 2004, by [REDACTED] president of the petitioner, prepared for the beneficiary.

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, Citizenship and Immigration Services (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 Sonogawa*, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120 stated net income of \$8,883.00.
- In 2004, the Form 1120 stated net income of \$14,919.00.

Since the proffered wage is \$40,000.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2002 and 2003.

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.⁵ 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 2003 and 2004 were \$6,009.00 and \$10,098.00 respectively.

Therefore, for tax years 2003 and 2004, the years for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, based upon the tax returns submitted, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date or its net income or net current assets.

As stated above, counsel contends that the petitioner established the ability to pay the proffered wage in 2003. Counsel asserts that several unpublished AAO decisions have determined that payments to subcontractors, in this case Nogame, Inc., may be used as evidence of the ability to pay the proffered wage. In support of this contention, counsel has submitted seven business services invoices with seven cancelled checks indicated that

⁵ 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.

the petitioner had paid [REDACTED] a total of \$29,300.00 for business services during year 2003. [REDACTED] Inc. business invoice numbers 1006, 1007, 1010, 1011, 1012, 1013, 1014, supported by seven cancelled checks in the amounts of the invoices.) We note that prior to the appeal the petitioner had submitted into the record eight invoices for 2003 between the petitioner and [REDACTED]. According to counsel's motion the total amount of these eight invoices, including invoice 1009, marked paid in the amount of \$9,000.00, is \$32,000 [sic \$38,300.00].

Further, according to a letter from [REDACTED], president of [REDACTED] of Miami, Florida, the beneficiary was employed as a technical support manager in similar duties to those stated in the labor certification between July 2002 and November 2004. According to [REDACTED] the beneficiary worked on projects for four customers including the petitioner. The beneficiary's name is noted on the invoices.

Therefore, by implication, counsel is asserting that the beneficiary will replace subcontractors or outside contracted labor, which in this instance was the beneficiary.⁶ The record does name the beneficiary working as a technical support manager, does not state her wages but does state by invoice the projects cost to the petitioner in 2003, and verified her full-time employment during 2003. Generally business expenditures 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, but in this one instance are evidentiary of the ability to pay the proffered wage. Moreover, there is evidence that the position of the technical support manager involves the same duties as those set forth in the Form ETA 750 for the occupation technical support specialist. The petitioner has documented the position and duties of the worker who performed the duties of the proffered position. In 2003 the Form 1120 stated net income of \$8,883.00 and the total invoiced amount paid to the contractor [REDACTED] was \$38,300.00. Since the proffered wage is \$40,000.00 per year, that total amount of the net income and amount paid to Nogame Inc. in 2003 is more the proffered wage. Therefore, by an examination of the petitioner's net income and contractor expenditures that could have been accomplished in-house in 2003, the petitioner had the ability to pay the proffered wage in year 2003.

Counsel contends that with the permanent employment of the beneficiary as technical support specialist, its business income that will increase. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a technical support specialist will significantly increase petitioner's profits since the beneficiary has been in the petitioner's employ since January 2005. The petitioner's assertion is erroneous. Proof of ability to pay begins on the priority date, that is February 6, 2003, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel states that the beneficiary's professional skills as a technical support specialist would provide additional profits. Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. Counsel

Four scope of work business proposals all dated December 27, 2002, by [REDACTED], of Miami, Florida, directed to the petitioner were introduced into evidence that described in schematic fashion the relationship between the petitioner as principal and [REDACTED] as contractor.

has not introduced independent objective evidence that would support this contention. 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).

Counsel states that the petitioner's 2004 U.S. federal tax return Form 1120 did not demonstrate the ability to pay the proffered wage but the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and the evidence submitted demonstrates that the petitioner had a reasonable expectation of increased business and profits.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Matter of Sonogawa 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.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the present case, the petitioner had been in business for five years at the time the Form ETA 750 was filed. The petitioner reported \$431,146.00 in gross receipts, paid out \$13,200.00 in wages and salaries and \$32,00.00 as costs of labor⁷ during the year 2003 in which the priority date was established. In 2004, the petitioner reported \$242,441.00 in gross receipts, paid out no wages and salaries and reported only \$11,852.00 as costs of labor. By the information provided, the petitioner's revenues were in decline. Finally, the Immigrant Petition for Alien Worker (Form I-140) indicated that the proffered position was a new position, thereby implying that the beneficiary would not be replacing a previously hired employee. Although the director did not inquire into this question in the request for evidence, the validity of the job offer and labor

⁷ Actually \$38,300.00 based on eight invoices submitted all marked paid in 2003.

cost savings would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. In 2003 the petitioner's gross revenues were 178% more than those stated in 2004. There is no explanation in the record for this decline or evidence of the petitioner's revenues in year 2005, although there has been sufficient time since the director's and AAO's decisions to submit the tax return for 2005.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage in 2004 and continuing to the present.

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 is granted and the decision of the AAO dated January 25, 2006, is affirmed. The petition is denied.