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U.S. Citizenship
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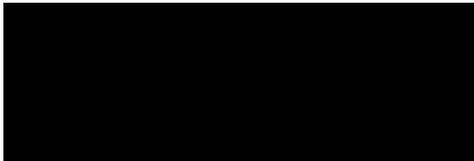
Office: VERMONT SERVICE CENTER

Date: **DEC 17 2008**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Kieran S. Poulos for
John F. Grissom, Acting Chief
Administrative Appeals Office

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

The nature of the petitioner's business activity is contractors (building restoration). It seeks to employ the beneficiary permanently in the United States as a contractor, building restoration. 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 (DOL). 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 September 26, 2006, 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 either 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 DOL. 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 DOL 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 March 17, 1997.¹ The proffered wage as stated on the Form ETA 750 is \$35.40 per hour (\$73,632.00 per year). The Form ETA 750 states that the position requires four years of experience in the proffered position.

¹ It has been approximately 11 years since the Application for Alien Employment Certification has been

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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a letter by [REDACTED] general manager of the petitioner dated September 8, 2005;³ a letter from the petitioner's accountant dated January 3, 2006; Jetco Contracting Corp.'s U.S. Internal Revenue Service Form 1120 tax return for 1997; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000, 2001, 2002, 2003 and 2004; Form W-2 Wage and Tax Statements for 1997 and 2000 issued by Jetco Contracting Corp. to the beneficiary in the amounts of \$73,632.00 for each of those years; and Form W-2 Wage and Tax Statements for 2001 and 2002 issued by the petitioner to the beneficiary in the amounts of \$73,632.00 for each of those years.

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 2000 and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.⁴ The gross annual income stated on the petition was \$568,559.00. On the Form ETA 750, signed by the beneficiary on March 7, 1997, the beneficiary did claim to have worked for Jetco Contracting Corp. since May 5, 1996.

On appeal, counsel asserts the following:

- Had the beneficiary been employed by the petitioner in 2003 and 2004, the "advent of his services" would have produced the additional income to cover the difference between the proffered wage and net current assets in 2003 and 2004.
- Counsel cites the case⁵ of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the propositions that a petitioner's expectations of a continued increase in business and an increase in

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 U.S. Citizenship and Immigration Services (USCIS) 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).

³ According to a letter from Umberto Spasiano of Lion Restoration Corp., that company acquired the assets of Jetco Contracting Corp. including some workers one of which is the beneficiary as of May 14, 2001. All the tax returns in the record were submitted by Lion Restoration Corp. Therefore Lion Restoration Corp is the successor to Jetco Contracting Corp.

⁴ Except for year 2000.

⁵ Counsel refers to a decision issued by the AAO concerning the same propositions, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its

profits as a result of an additional employee are reasonable expectations and such expectations should be considered in the totality of the circumstances concerning the petitioner's ability to pay the proffered wage.

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 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, USCIS 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, USCIS 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.

Counsel submitted Form W-2 Wage and Tax Statements for 1997 and 2000 issued by Jetco Contracting Corp. to the beneficiary in the amounts of \$73,632.00 for each of those years; and Form W-2 Wage and Tax Statements for 2001 and 2002 issued by the petitioner to the beneficiary in the amounts of \$73,632.00 for each of those years. In the instant case, the petitioner has established that it and its predecessor employed and paid the beneficiary the full proffered wage in years 1997, 2000, 2001 and 2002.

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, USCIS 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 that 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 petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay for those years in which it or its successor did not pay the beneficiary the proffered wage

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).

- In 1997, 1998 and 1999, the petitioner failed to submit tax returns.⁶
- In 2000, the Form 1120 stated net income of \$ -0-.
- In 2001 the Form 1120 stated net income of <\$2,297.00.>
- In 2002 the Form 1120 stated net income of <\$1,331.00.>
- In 2003, the Form 1120 stated net income of \$7,362.00.
- In 2004, the Form 1120 stated net income of \$5,629.00.

With regard to payment of wages to the beneficiary, the petitioner has established that it had the ability to pay the proffered wage of \$73,632.00 in years 1997, 2000, 2001 and 2002. However, the petitioner has not established its ability to pay the proffered wage for years 1998, 1999, 2003 and 2004.

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, USCIS 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 2003 and 2004 were 49,892.00 and \$53,344.00 respectively

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, 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 its net income, wages paid or net current assets for years 1998, 1999, 2003 and 2004.

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 the petitioner's ability to pay is determined.

⁶ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). A petitioner must provide reasonably obtainable documentation when requested. *See Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), and, *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

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).

Counsel contends with the employment of the beneficiary as a building restoration contractor its business income would have increased. The assertions of the counsel do not constitute evidence. *Matter of Obaighena*, 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 building restoration contractor would have significantly increase petitioner's profits. Counsel's assertion is erroneous. Proof of ability to pay begins on the priority date, that is, March 17, 1997. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. This unsupported hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

As restated here, counsel cites the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the propositions that a petitioner's expectations of a continued increase in business and an increase in profits as a result of an additional employee are reasonable expectations and such expectations should be considered in the totality of the circumstances concerning the petitioner's ability to pay the proffered wage. 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.

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.

The petitioner had paid the beneficiary the proffered wage for years 1997, 2000, 2001 and 2002. Therefore, the petitioner had established that it had the ability to pay the beneficiary the proffered wage for those years. Since the petitioner has not submitted its predecessor's tax returns for 1998 and 1999, the AAO is unable to determine the profitability of the petitioner to pay the proffered wage for those years. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years, which is not the case here. Although the petitioner has submitted tax returns for years 2003 and 2004, both its net income and net current assets are insufficient to pay the proffered wage. Other than counsel's unsupported assertions concerning expectations of increased profits with the services of an additional employee, no detail was provided to explain this statement. Further, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage for years 1998, 1999, 2003 and 2004.

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.