

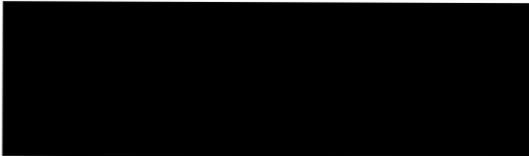
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U.S. Citizenship  
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FILE: [REDACTED]  
EAC-03-224-53801

Office: VERMONT SERVICE CENTER

Date: **MAY 19 2006**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: 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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is an Internet development company. It seeks to employ the beneficiary permanently in the United States as a Systems Analyst/Developer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

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

As set forth in the director's October 5, 2004 denial, the single issue in this case is whether the evidence establishes the petitioner's 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is May 18, 2001. The proffered wage as stated on the Form ETA 750 is \$34.61 per hour, which amounts to \$71,988.80 annually.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence. Relevant evidence submitted on appeal includes copies of deposit summaries and bank statements for an account of the petitioner, copies of

investment account statements, business summary documents, and letters of reference. Other relevant evidence in the record includes copies of individual federal tax returns of the petitioner's owner.

The submission of additional evidence on appeal is allowed by the instructions to the 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).

On appeal, the petitioner's owner states that the petitioner experienced temporary business difficulties in 2001 and 2002, caused by the collapse of the 2000 NASDAQ, which the owner states was the financial support of the Internet and of information technology industries, and by the attacks of September 11, 2001 on the World Trade Center. The owner states that the petitioner remains a viable business and that the beneficiary is vital to the petitioner's business success.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 9, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 2000 and continuing through the date of the ETA 750B. However, the record contains no copies of any Form W-2 Wage and Tax Statements of the beneficiary, nor any other evidence indicating the amount of any compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The name of the petitioner ends with the abbreviation "LLC" indicating that the petitioner is a limited liability company. (I-140 petition, Part I.) Limited liability companies with a single member are generally

“disregarded” for the purpose of filing a federal tax return. See Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, available at <http://www.irs.gov/pub/irs-pdf/p3402.pdf>. If the only member of an LLC is an individual, the income and expenses of the LLC are reported on Form 1040, Schedule C, E, or F, and if the only member of an LLC is a corporation, the income and expenses of the LLC are reported on the corporation’s return, usually on Form 1120 or on Form 1120S. *Id.* LLC’s which have more than one member file a partnership return, Form 1065. *Id.*

The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner’s owner for 2000, 2001 and 2002. On those tax returns, the income and expenses of the petitioning business are stated on the Schedule C’s attached to each return. By filing the income and expenses of the petitioner on Schedule C’s, the owner indicates that he the only member of the petitioner.

No request for additional evidence was issued by the director, therefore the record before the director closed on July 19, 2003 with the receipt by the director of the I-140 petition and supporting documents. As of that date, the federal tax return of the petitioner’s owner for 2002 was the most recent return available.

Although a limited liability company owned by a single individual is treated for federal income tax purposes as if it were a sole proprietorship, the tax treatment does not change the fact that the business is legally a limited liability corporation. The liability of the LLC’s single member for LLC debts is limited by state law. *Id.* For the foregoing reasons, the relevant net income of the petitioner in the instant petition will be considered to be the figure on line 31 of the Schedule C for the petitioning business attached to each Form 1040, rather than the figure for the owner’s adjusted gross income shown on line 31 of the Form 1040 U.S. Individual Income Tax Returns.

The Schedule C’s attached to the Form 1040 tax returns in the record show the petitioner’s net profit on line 31 as shown in the table below.

| Tax year | Net income or (loss) | Wage increase needed to pay the proffered wage | Surplus or (deficit) |
|----------|----------------------|--|----------------------|
| 2000     | \$2,492.00           | not applicable                                 | not applicable       |
| 2001     | \$(62,764.00)        | \$71,988.80*                                   | \$(134,752.80)       |
| 2002     | \$(16,964.00)        | \$71,988.80*                                   | \$(88,952.80)        |

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002, which are the two years at issue in the instant petition.

As an alternative means of determining the petitioner’s ability to pay the proffered wages, CIS may review the petitioner’s net current assets. Net current assets are a corporate taxpayer’s current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. In the instant case, however, no balance sheets for the petitioning business are a part of the Schedule C’s attached to the Form 1040’s in the record. Therefore, the tax returns of the petitioner’s owner provide no basis for calculating the net current assets of the petitioner.

The record also contains copies of deposit summary financial statements of the petitioner, a sales history chart for the petitioner for the period 1999 through 2004, and a lists of clients of the petitioner for 2000 and 2004. The foregoing documents appear to be statements prepared by the petitioner’s management. Unaudited

financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record contains copies of investment account statements for two accounts of the petitioner for December 2000 and March 2001 and of bank account statements for an account of the petitioner for December 2000 and May 2001. However, investment account statements and bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, account statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's investment account statements the ending balances are as follows:

|                |  |
|----------------|--|
| December 2000: | \$40,449.14 in one account and \$3,725.02 in the second account. |
| March 2001:    | \$499.30 in one account and \$3,716.84 in the second account.    |

On the petitioner's bank statements the ending balances are as follows:

|                |             |
|----------------|-------------|
| December 2000: | \$5,114.43. |
| May 2001:      | \$4,077.11. |

Since statements for only selected months were submitted in evidence, the account statements are insufficient to show the petitioner's liquid assets beginning on the priority date and continuing to the present.

The petitioner's owner states that the petitioner experienced temporary business difficulties in 2001 and 2002, caused by the collapse of the 2000 NASDAQ, which the owner states was the financial support of the Internet and of information technology industries, and by the attacks of September 11, 2001 on the World Trade Center. The owner states that the petitioner remains a viable business and that the beneficiary is vital to the petitioner's business success.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The record contains six letters of reference, each dated in November 2004, from clients of the petitioner. Each of the letters attests to the good quality of work performed by the petitioner and to the contribution of the beneficiary toward the petitioner's work. Those letters are relevant to an analysis under *Matter of Sonogawa* in that they indicate the good business reputation of the petitioner. The letters also indicate that the presence of the beneficiary on the petitioner's staff would continue to contribute to that good business reputation.

*Matter of Sonogawa* relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 \$100,000.00. 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 the petitioner's prospects for a

resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner's owner has stated that the petitioner was affected by temporary business difficulties in 2001 and 2002. However, the petitioner has not established that the petitioner was profitable before and after that period. The Schedule C for 2000, the year before the priority date, show a profit of only \$2,492.00. That amount would have been insufficient to pay the proffered wage in that year. The record lacks other acceptable evidence of the petitioner's financial condition. As noted above, the unaudited financial statements submitted for the record are not acceptable evidence. For these reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director considered the petitioner's net income to be the figures for adjusted gross income of the petitioner's owner. However, as discussed above, the petitioner is a limited liability company. Therefore the proper measure of net income is shown on the Schedule C for the petitioning business. Although the director's analysis was incorrect, the director's decision to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Systems Analyst/Developer. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14. Education (number of years)
- Grade School [blank]
  - High School [blank]
  - College X
  - College Degree Required BA or BS
  - Major Field of Study Bus, Engr, math or comp sci
- Training - yrs [blank]
- Experience
- Job Offered Yrs 2
  - Related Occupation Yrs [blank]
  - Related Occupation (specify) [blank]
15. Other Special Requirements [blank]

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

| Schools, Colleges and Universities, etc.     | Field of Study         | From  | To    | Degrees or Certificates Received     |
|--|------------------------|-------|-------|--------------------------------------|
| New Hampshire College<br>Manchester, NH      | Finance                | 08/93 | 08/95 | Master of Science<br>(MS Finance)    |
| New Hampshire College<br>Manchester, NH      | Business<br>Management | 08/93 | 08/95 | Master of Business<br>Administration |
| Universidad do Los Andes<br>Bogota, Colombia | Civil Engineering      | 01/88 | 12/92 | Civil Engineer                       |

[remaining blocks blank]

Despite the entries on the ETA 750, the record contains no documentation establishing the beneficiary's education, such as diplomas or academic transcripts. 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)).

On the Form ETA 750B the beneficiary also states experience in two positions related to computer work, but no experience in the offered position of Systems Analyst/Developer other than experience with the petitioner from April 2000 to the date of the ETA 750B, which was signed by the beneficiary on January 9, 2001. Since the priority date is May 18, 2001, even if the experience with the petitioner were considered as acceptable experience, it could have amounted to only twelve and one half months of experience as of the priority date. Moreover, no documentation corroborating the beneficiary's claim of employment with any previous employer was submitted. Therefore, even if one or more of the beneficiary's previous positions were considered as equivalent to the offered position, the evidence in the record fails to establish the beneficiary's experience with any previous employer.

For the foregoing reasons, the evidence fails to establish the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Beyond the decision of the director, the evidence fails to establish that the beneficiary had the minimum qualifications required for the offered position as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER:       The appeal is dismissed.