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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED]  
SRC 04 150 50252

Office: TEXAS SERVICE CENTER

Date: JAN 09 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:

[REDACTED]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a photogrammetry and digital mapping business. It seeks to employ the beneficiary permanently in the United States as a photogrammetrist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 2002 priority date of the visa petition. The director 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 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 May 5, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2002 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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 CFR § 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 November 15, 2002. The proffered wage as stated on the Form ETA 750 is \$36,000 per year. On the ETA 750, the beneficiary indicated he had worked for the petitioner since October 1, 2000.

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<sup>1</sup>. On appeal, the petitioner submitted the first page of a contract with the National Geodetic Survey Division for shoreline mapping surveying services dated September 12, 2004. The petitioner also submitted a balance sheet and a profit and loss sheet for tax year 2002, and resubmitted its 2002 tax return.<sup>2</sup> Other relevant evidence in the record includes the petitioner's tax returns for tax years 2002 and 2003, as well as the beneficiary's W-2 Forms for tax years 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.<sup>3</sup>

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 1976<sup>4</sup> and to currently employ 10 workers. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since October 1, 2000.

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 (Reg. Comm. 1967).

On appeal, as previously stated, the petitioner submitted the first page of a contract with the National Geodetic Survey Division dated September 12, 2004. It is noted that the priority date in the instant petition is November 15, 2002. While the 2004 document establishes evidence of the petitioner's business operations in 2004, it does not constitute any of the regulatorily prescribed evidence to be submitted to establish the petitioner's ability to pay the proffered as of the 2002 priority date and onward. As stated previously, such evidence consists of annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). A petitioner must establish the elements for the approval of the petition at the time of filing. A

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<sup>1</sup> 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).

<sup>2</sup> Although the petitioner in a letter submitted to the record on appeal states it submits its 2004 tax return, this document is not found in the record.

<sup>3</sup> The petitioner also submitted its bank account records for pertinent years to the record. Although the director commented on these records in her decision, and counsel also refers to these documents on appeal, the AAO does not consider such documents as relevant evidence. The AAO will discuss the petitioner's bank account statements more fully further in these proceedings.

<sup>4</sup> The record is confused as to the petitioner's longevity. With the petition, the petitioner submitted articles of incorporation for a South Carolina business that did not indicate the date of incorporation; however, the accompanying lease is dated 1999. The petitioner's Form 1120S indicates an incorporation date of July 1, 1997.

petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Furthermore on appeal, the petitioner submits an unaudited balance sheet and profit and loss sheet for tax year 2002. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 submitted the beneficiary's W-2 Forms for tax years 2003 and 2004.<sup>5</sup> These documents indicate that the petitioner paid the beneficiary \$23,674.50 in 2003 and \$25,139.23 in 2004. Although these documents established that the petitioner employed the beneficiary, contrary to counsel's assertions, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$36,000 as of the priority date in 2002 and to the present. Furthermore since the petitioner did not submit any W-2 form for the beneficiary for 2002, the priority date year, it has the obligation to establish it can pay the entire proffered wage during tax year 2002, while it has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2003 and 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the

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<sup>5</sup> Although counsel in his response to the director's request for further evidence stated the petitioner was submitting the beneficiary's W-2 forms for tax year 2002 and 2003, the beneficiary's W-2 form for tax year 2002 is not found in the record.

<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." The petitioner in the instant petition did not indicate additional income on lines one through six of Schedule K, therefore the AAO considers the petitioner's net income to be identified on line 21 of the Form 1120S.

argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,000 per year from the priority date:

- In 2002, the Form 1120S stated net income<sup>7</sup> of -\$238,169.
- In 2003, the Form 1120S stated net income of -\$125,987.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage.<sup>8</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.<sup>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. In the director's decision, the petitioner's net current assets were not correctly calculated. Although the petitioner on appeal states that it submits its 2004 tax return to the record, no such document is found in the record. Therefore the AAO will examine the evidence contained in the petitioner's tax returns for 2002 and 2003:

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<sup>8</sup> As stated previously, the petitioner did not submit its 2004 tax return to the record. Therefore the AAO cannot evaluate the petitioner's ability to pay the proffered wage through its net income in tax year 2004.

<sup>9</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2002	2003
Net income	\$ -238,169	\$ -125,987
Current Assets	\$ 361,578	\$ 384,464
Current Liabilities	\$ 599,208	\$ 242,913
Net current assets	\$ -237,630	\$ 141,551

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, as previously illustrated, the petitioner shows a net income of -\$238,169, and negative net current assets of \$237,630, and has not, therefore, demonstrated the ability to pay the proffered wage of \$36,000. The petitioner has demonstrated that it paid \$23,674.50 to the beneficiary during 2003. In 2003, the petitioner shows a net income of -\$125,987 and net current assets of \$141,551. Thus, the petitioner had the ability to pay the difference between the beneficiary's actual wages and the proffered wage during 2003, namely, \$11,125.50. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it had the ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2002. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present, based on its net income or net current assets.

Counsel on appeal states that the petitioner's bank account statements were sufficient to pay the proffered wage. In his response to the director's request for further evidence, counsel also indicated that the petitioner had sufficient funds in its corporate bank account in the monthly statements submitted to the record to cover the remaining wages to be paid to the beneficiary even after paying all employees, including the beneficiary. The director in his decision also examined the bank statements submitted to the record by the petitioner.

However, the director's and the petitioner's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets.

As stated previously, CIS does allow for the examination of the petitioner's totality of circumstances. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This precedent decision 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

With regard to the instant petition, the petitioner, based on the evidence submitted to the record, has had one unprofitable year followed by a profitable year of business operations. However, the instant petition lacks sufficient documentation previously requested by the director to evaluate the petitioner's overall circumstances. For example, the record still lacks the beneficiary's W-2 form for tax year 2002 and/or any explanation for why it was not provided to the record, as stated by counsel. The petitioner's 2004 tax return is also not found in the record, although the petitioner states that it was submitted to the record. This document would possibly provide more evidentiary weight as to whether the petitioner continued to be profitable following tax year 2003. It is noted that at the time the petitioner responded to the director's request for further evidence, counsel stated that this tax return was not available. The director's decision, dated May 5, 2005, technically closed the record; however, by this date, the petitioner would have filed its 2004 tax return or requested an extension of time to do so. Indeed, on appeal, the petitioner states that it is submitting the document. However, the record reflects no such documentation. In addition, the record is confused with regard to the petitioner's business longevity. Without more documentary evidence, the AAO cannot evaluate the overall viability of the petitioner and its ability to pay the proffered wage as of the 2002 priority date and onward.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that all evidence indicated that the petitioner is able to pay the proffered wage, that it has been paying the proffered wage for more than three years, and that the petitioner's bank account statements show sufficient funds to pay the proffered wage from the priority date. However, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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.