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U.S. Citizenship and Immigration Services

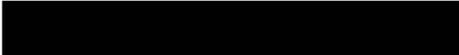
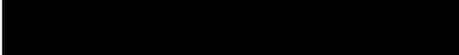
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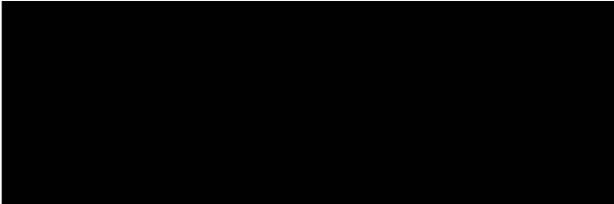
File:   
EAC-06-120-54644

Office: TEXAS SERVICE CENTER Date: **NOV 29 2007**

In re: Petitioner:   
Beneficiary: 

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (“director”), denied the immigrant visa petition.<sup>1</sup> The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development company, and seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s July 11, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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).<sup>2</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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<sup>1</sup> The petitioner initially filed its petition with the Vermont Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

<sup>2</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).

*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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on July 11, 2001. The proffered wage as stated on Form ETA 750 is \$79,312 per year based on a 40 hour work week.<sup>3</sup> The labor certification was approved on October 28, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on March 20, 2006. The petitioner listed the following information: established: 1992; gross annual income: \$2,335,372; net annual income: not listed; and current number of employees: 9.

On May 31, 2006, the director issued a Notice of Intent to Deny ("NOID") for the petitioner to provide evidence of its ability to pay the proffered wage in the form of the petitioner's federal tax returns, annual reports, or audited financial statements for the years 2001 to 2005. Additionally, the NOID provided that the petitioner may also submit the beneficiary's Forms W-2, if the petitioner employed the beneficiary. The petitioner responded. On July 11, 2006, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on June 18, 2001, the beneficiary listed that he was employed with the petitioner from June 1998 to "date" (date of signature). The petitioner submitted the following evidence of wage payment:

<u>Year</u>	<u>W-2 Wages</u>
2005	\$8,750.00
2004	not submitted <sup>4</sup>

<sup>3</sup> The petitioner initially listed a wage of \$55,000 per year, however, the Department of Labor ("DOL") required that the petitioner increase the proffered wage to what appears to be \$79,312 per year prior to certification. As noted in the director's decision, the change to the wage is hard to read based on the handwriting, and the DOL stamp.

Further, we note that Form ETA 750 reflects "white out" over section 15 "other special requirements." It is unclear when the white out was done, prior to submission, prior to certification (we note that the form contains no stamp that DOL approved any correction), or at some other time.

<sup>4</sup> In response to the NOID, the petitioner provided that the beneficiary had previously worked for the petitioner, and left the petitioner's employment in May 2001. The beneficiary then rejoined the company in

2003	not submitted
2002	not submitted
2001	\$35,416.65
2000	\$102,949.29 <sup>5</sup>

On appeal, the petitioner additionally submitted evidence to show that the beneficiary had been paid \$64,166.63 for the year to July 19, 2006. The petitioner submitted several paychecks for 2006, which showed that the beneficiary was paid \$9,166.66 per month, an amount, which on an annual basis would result in a salary above the proffered wage.

Based on the foregoing, the petitioner would not be able to establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone. For the years 2001, and 2005, the petitioner would need to demonstrate that it could pay the difference between the wages paid, and the proffered wage. The petitioner would need to demonstrate that it could pay the full proffered wage for the years 2002, 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. 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). 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 argument that the Service should have considered income before expenses were paid rather than net income.

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The petitioner in the present matter submitted financial statements in lieu of federal tax returns. The regulation 8 C.F.R. § 204.5(g)(2) allows for the submission of federal tax returns, audited financial statements, or annual reports.

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November 2005. On appeal, the petitioner provided evidence of the beneficiary's pay and employment in 2006.

<sup>5</sup> The beneficiary's 2000 Form W-2 reflects payment from and employment by Software Services International Inc., a different entity than the petitioner. First, we note that the priority date is in July 2001, so that the beneficiary's 2000 W-2 statement is not relevant to determining the petitioner's ability to pay the proffered wage. Second, we note that on appeal, the petitioner submitted documentation to show that Software Services International, Inc. filed a Certificate of Amendment to change the name of the corporation from Software Services International, Inc. to "Aithent, Inc.," the entity that sponsored the beneficiary.

The petitioner submitted financial statements for the years ending December 31, 2001, 2002, 2003, and 2004, however, we note that the statements submitted for the years ending December 31, 2001, and 2002 were “reviewed,” but not audited in accordance with 8 C.F.R. § 204.5(g)(2).

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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant’s report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants’ Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account’s report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner’s 2003, and 2004 statements were audited, and, therefore, acceptable in accordance with 8 C.F.R. § 204.5(g)(2). We will consider the information from the reviewed statements generally, but note that the record of proceeding lacks regulatory prescribed evidence for the years 2001 and 2002.

The petitioner’s financial statements exhibit the following:

<u>Year</u>	<u>Net income or (loss)</u>
2004	-\$473,451
2003	-\$902,416
2002	-\$637,286
2001	-\$620,399

The petitioner would not be able to demonstrate its ability to pay the beneficiary the proffered wage any of the foregoing years based on its net income.

Next, we will examine the petitioner’s continuing ability to pay the required wage under a second test based on an examination of net current assets. In examining a petitioner’s federal tax return, net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>6</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.

As the petitioner has submitted financial statements, we will consider the statement’s current assets against the listed current liabilities. The petitioner’s net current assets were as follows:

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<sup>6</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.

<u>Year</u>	<u>Net Current Assets</u>
2004	-\$2,767,785
2003	-\$2,883,497
2002	-\$5,127,725
2001	-\$2,288,578

The petitioner's financial statements exhibit significant liabilities. Based on the foregoing, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage through its net current assets in any year.<sup>7</sup>

We additionally note the following statements, which appeared in the financial statements for the year 2003 and a similar not in 2004: "The company has a negative working capital and its future to continue as a going concern is dependent upon its ability to raise funds to meet its financial obligations as may be required," and "the company has a negative net worth as at December 31, 2003 [sic] and has been dependent on banks and third parties to fund operations and meet its financial obligations."

The petitioner additionally submitted Forms 941 Quarterly Tax Returns for the four quarters of 2004, as well as payroll records. The quarterly payments and records would exhibit wage payments made to other workers, but did not evidence payments to the beneficiary. Accordingly, the petitioner's wages payments made to other workers, would not evidence the petitioner's ability to pay the proffered wage.

On appeal, counsel provides that prior counsel<sup>8</sup> had not submitted "critical evidence" related to the petitioner's line of credit available with Citibank, which he asserts would exhibit the petitioner's ability to pay the proffered wage.

Counsel submitted evidence that the Citibank issued the petitioner a line of credit of \$200,000 in 1998, which was later reduced to \$150,000, and is still available to the petitioner for use.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine

<sup>7</sup> We additionally note that CIS records reflect that the petitioner has filed for permanent residence for more than one beneficiary, and the petitioner would be required to show that it could pay the proffered wage for each sponsored beneficiary in each year since the beneficiaries' respective priority date.

<sup>8</sup> A different attorney represented the petitioner with respect to filing the Form I-140.

whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

As the financial statements illustrate, the petitioner has consistently exhibited negative income and substantial negative net current assets. The financial statements also provide that the petitioner is heavily reliant on third parties to fund its operations so that the line of credit will not augment the petitioner's position, but add to its already substantial liabilities.

Counsel further cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and asserts that despite the petitioner's negative income in that petition, a positive determination was made on the petitioner's ability to pay the proffered wage. Counsel provides that CIS must consider the totality of the petitioner's circumstances, including assets, actual wages paid, lines of credit, and other information to determine the petitioner's ability to pay.

*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 has not outlined any unusual circumstances in this case, which would parallel those in *Sonogawa*, nor has the petitioner established that any of the years in question were uncharacteristically unprofitable years for the petitioner. Further, as the statements reflect, the petitioner has not provided evidence of any profitable years.

In examining the totality of the circumstances, the petitioner has not shown positive income or positive net current assets for any of the years where financial statements were provided. The petitioner has failed to provide regulatory prescribed evidence for the years 2001, and 2002. Further, the petitioner has sponsored more than one beneficiary and would need to show that it could pay the proffered wages for all sponsored workers. Therefore, in examining the totality of the circumstances, we conclude that the petitioner has not demonstrated its ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.