



U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **JUL 14 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:

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

The petitioner is a software consultancy firm. It seeks to employ the beneficiary permanently in the United States as a business operations and data analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. In light of the multiple petitions that the petitioner has filed, 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.

On appeal, counsel contends that the petitioner has established its continuing ability to pay the certified wage.

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).

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 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, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the ETA Form 9089 was accepted for processing on August 31, 2006. The proffered wage as stated on the ETA Form 9089 is \$42,702 per year. On the ETA Form 9089, signed by the beneficiary on December 17, 2006, the beneficiary claims to have worked for the petitioner since June 1, 2003.

On Part 5 of the Form I-140, which was filed on December 26, 2006, the petitioner claims that it was established in 1997, employs thirty-five workers and claims a gross annual income of \$2,768, 424 and a net annual income of \$71,346.

As the petitioner did not provide supporting documentation of its continuing financial ability to pay the proffered wage of \$42,702 per year, on May 4, 2007, the director requested additional evidence pertinent to the petitioner's ability to pay. He advised the petitioner that it had filed at least twenty Immigrant Petitions for Alien Workers Form (I-140s) in 2006 and 2007 and that it was obliged to demonstrate the ability to pay the proffered wage for each beneficiary that it had sponsored. The director instructed the petitioner to submit a list of all Form I-140s that it had filed with identifying information specifying the beneficiary, offered wage, priority date, receipt number and individual date of birth. He advised the petitioner that if it is unable to establish the ability to pay for all beneficiaries, then it must identify which petition or petitions it would be able to support. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) and copies of three of his most recent pay vouchers as well as a copy of its complete 2005 and 2006 federal income tax returns or audited financial statements and/or annual reports for 2005 and 2006.

In response, the petitioner provided a copy of its 2006 Form 1120, U.S. Corporation Income Tax Return. It reflects that the petitioner uses a standard calendar year to file its taxes. The return contains the following information:

Net Income ¹	\$ 53,599
Current Assets	\$384,747
Current Liabilities	\$247,564
Net Current Assets	\$137,183

Citizenship and Immigration Services (CIS) will initially examine a petitioner's net income. As an alternative method of reviewing a petitioner's ability to pay a proposed wage CIS will also review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner did not provide any of the beneficiary's Forms W-2 or its 2005 tax return. It supplied a spreadsheet of its current and past twenty-four workers, along with identifying information related to the proffered wage and current status. The beneficiary's name was not among those listed. The petitioner also submitted a letter from its director, who asserts that his employees are very mobile in his industry and that they generate resources from which the company's revenue grows and supports its ability to pay. In a subsequent submission, counsel summarizes the petitioner's past income and net current assets from 2003 through 2006 and asserts *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) supports the approval of the petition based on the petitioner's increasing revenue. Emphasizing the petitioner's profitability, counsel also cites *Masonry Masters, Inc. v.*

¹ For the purpose of this review, line 28, taxable income before net operating loss deduction and special deductions, will be treated as net income.

Thornburgh, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), contending that the employee's contribution to the company's revenue should be considered.

The director denied the petition on October 27, 2007. He noted that the petitioner's response to the request for evidence had included a list of twenty-four petitions which indicated whether they had been approved or were pending, as well as notations of five of the beneficiaries who had "ported" to employment with other companies under Section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21). The director further noted the amount of the petitioner's net income and net current assets as stated on its 2006 federal income tax return and determined that although these amounts were sufficient to cover the beneficiary's proposed wage offer, there were at least seven other petitions which had been pending with the beneficiary's petition (subsequently approved) and for which the petitioner's ability to pay their salaries would have been based on the net current assets and net income as reflected on the 2006 return. The director further noted that according to CIS records, the list submitted by the petitioner does not contain all of the petitions filed by the petitioner. The director noted that the petitioner was afforded the opportunity to select the petitions that it wished to support but the petitioner declined to specify which ones that it wished to pursue or withdraw. He concluded that the petitioner had failed to demonstrate that it had the ability to pay the respective wage offers to the multiple beneficiaries that it had sponsored on Form I-140s as of their respective priority dates.

On appeal counsel merely asserts that the petitioner is not required to show an aggregate ability to pay the proffered wage for multiple beneficiaries and that it flies in the face of business reality.

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, although the record suggests that the petitioner employed the beneficiary in the past, the petitioner did not provide any Form W-2s or other evidence of past or current employment.

If the petitioner does not establish that it employed and paid the instant beneficiary in an amount at least equal to the proffered wage from the priority date onwards, 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*, *supra*, (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) and *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Also, showing that the petitioner paid wages in excess of the proffered wage is not sufficient. 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.

Counsel also contends that the petitioner's increasing revenue supports the petition's approval under the principles set forth in *Matter of Sonogawa, supra.* It is noted that in some cases petitioners who have experienced unique and unusual business circumstances may be deemed to qualify for approval under the principles set forth in *Matter of Sonogawa* based on a petitioner's history of performance that supports its reasonable expectations of increasing profit. That case however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner, that had been in business for 11 years, changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, only one tax return was produced. Counsel's representations as to the petitioner's other financial information is not supported by the evidence. No evidence of outstanding reputation or other unusual facts pertinent to the petitioner was provided. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It cannot be concluded that these circumstances represent a framework of established success similar to *Sonogawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this matter, which are analogous to the facts set forth in that case.

Counsel's contention that a petitioner is not required to demonstrate the ability to pay the proffered wage for multiple beneficiaries is wrong. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. 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 each job offer was realistic as of the respective 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).

As a general proposition, either the petitioner's net income or net current assets can be examined to determine how many proposed salaries it can support. Ability to pay may also be demonstrated by actual payment of the respective certified wage as set forth on the ETA 750. This applies to other pending petitions as well. It is the petitioner's burden to demonstrate eligibility for all pending petitions as of their respective priority date(s). Otherwise an employer could file ten petitions with the same or similar priority dates and obtain approval of all ten based on the same financial data even though it could only pay one proffered salary. In this matter, the petitioner could have submitted state quarterly wage reports or other evidence pertinent to other pending petitions

and payment of wages to multiple beneficiaries, and as the director noted, it could have specified which petitions it wished to support, but the petitioner failed to do so.

Relevant to the assertion that the employee's ability to generate revenue should be considered in determining a petitioner's ability to pay a given wage, it is noted that the court in *Masonry Masters* was primarily concerned with the former INS' attempt to estimate the prevailing wage during a period where the wage had not been designated by the DOL. *See Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. at 684-685. The court's decision also included a criticism of the former INS' approach to analyzing the petitioner's ability to pay a proffered wage and its hope that the INS would identify its theory.

Although it is recognized that an employer's expectation of profitability based on an employee's ability to generate income may be reasonable, other costs are also incurred, and it does not follow in every instance, without specific detail or documentation to explain how a beneficiary's employment will significantly increase profits for a given petitioner, that a petition should be approved based only on this assumption. If that were the case, then every sponsored beneficiary would justify approval of a Form I-140. A hypothesis based on projected future earnings does not outweigh the evidence contained in the record. Moreover, as referenced above, the evidentiary guidelines that CIS considers that the court in *Masonry Masters* expressed concern about, are encompassed in the current regulation set forth at 8 C.F.R § 204.5(g)(2). While the beneficiary's employment may represent possible future revenue, it does not establish the petitioner's continuing financial ability to pay the proffered wage beginning as of the priority date within the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

Based on the foregoing, it may not be concluded that the petitioner has established its this ability to pay the proffered salary beginning at 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.