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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 04 185 52041

Office: TEXAS SERVICE CENTER Date: **JUL 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:

[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 nature of the petitioner's business is marble and starstone fabrication and installation. It seeks to employ the beneficiary permanently in the United States as a marble setter. 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 October 31, 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 April 30, 2001.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$14.41 per hour (\$29,972.80 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.<sup>2</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns (partial copies) for 2002 and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director issued a request for evidence to the petitioner dated May 6, 2005. Specifically the director requested the petitioner's tax return for 2001 and the beneficiary's W-2 statements for 2001, 2002, 2003 and 2004. The petitioner provided the requested evidence.

The director issued another request for evidence to the petitioner dated May 30, 2006. Specifically the director requested, *inter alia*, the petitioner's tax returns including Schedule L for 2001, 2002, 2003, 2004 and 2005 and the beneficiary's W-2 statements from the priority date. The director also requested the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements and employees' names listings for the last three years.

In response to the above, the petitioner submitted, *inter alia*, the following relevant evidence: the petitioner's U.S. federal tax return Form 1120X for 2001 amending and increasing the net loss; the petitioner's U.S. federal tax returns Form 1120 for 2002, 2003, 2004 and 2005; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for 2004, 2005 and 2006; and the beneficiary's W-2 statements for 2001, 2002, 2003, 2004 and 2005

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 1976 and to currently employ 52 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's net annual income and gross annual income were not stated on the petition. On the Form ETA

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<sup>1</sup> It has been approximately seven years since the Application for Alien Employment Certification has been 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."

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

750, signed by the beneficiary on April 4, 2001, the beneficiary did claim to have worked for the petitioner since February 1999.

On appeal, counsel asserts that the petitioner is a viable business and has sufficient revenue and assets to pay the proffered wage. Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and states that it is applicable to the present case. Counsel also cites unpublished cases of the AAO as are referenced in counsel's brief.

Further counsel contends that the director ignored all of the assets of the petitioner to conclude erroneously that the petitioner does not have the ability to pay the proffered wage. Counsel asserts that the director has applied an incomplete analysis to require that the petitioner's net income must match or exceed the proffered wage. Counsel contends that the director's calculation of the petitioner's net current assets is inaccurate.

Accompanying the appeal, counsel submits a legal brief and submits the petitioner's unaudited income statements and balance sheets for the years 2002, 2003 and 2004.

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. at 612.

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. Although counsel is correct that an employer does not have to pay the beneficiary the prevailing wage until the visa petition is approved, payment of the proffered wage is one indication that the petitioner has the 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 W-2 Wage and Tax statements from the petitioner to the beneficiary for years 2001, 2002, 2003, 2004 and 2005 showing wage payments in the amounts of \$25,723.15, \$26,571.21, \$26,623.37, \$24,005.97 and \$25,590.43 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$29,972.80 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage for the period for which evidence was submitted (2001-2005) which is \$4,249.65, \$3,401.59, \$3,349.43, \$5,966.83, and \$4,382.37 respectively.

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. See *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:

- In 2001, the Form 1120,<sup>3</sup> as amended, stated net income (Line 28) of <\$8,226.00>.<sup>4</sup>
- In 2002, the Form 1120 stated net income of <\$693.00>.
- In 2003, the Form 1120 stated net income of <\$7,735.00>.
- In 2004, the Form 1120 stated net income of <\$301,679.00>.
- In 2005, the Form 1120 stated net income of <\$26,876.00>.

Since the proffered wage is \$29,972.80 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003, 2004 and 2005.

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, 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>5</sup> 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 2001, 2002, 2003, 2004, and 2005 were \$75,497.00, <\$59,046.00>, \$1,891.00, <\$2,997.00> and \$16,049.00.

<sup>3</sup> The Form 1120 for 2001 was amended, decreasing taxable income.

<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>5</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003 and 2004, but did have sufficient net current assets to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001 and 2005.

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,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel contends that the director erred in her analysis of the petitioner's ability to pay the proffered wage from the priority date. According to counsel citing unpublished decisions of the AAO,<sup>7</sup> the director must review the gross receipts, assets, cash on hand, and deposits together with the ordinary income of the company to determine the petitioner's financial ability to pay the proffered wage. Counsel's assertion must be qualified for the following reasons.

Counsel suggests by implication that the petitioner's net income can be added to its net current assets to show the total amount of funds available to pay the wage. It appears that counsel wants to combine the petitioner's taxable income with the cash also received by the business for that year as part of the Schedule "L" current assets. Net income includes income earned over 12 months while net current assets are a "snapshot" figure representing assets as of a date certain. We are not persuaded that adding these two numbers would avoid double counting funds or otherwise produce a meaningful number.

*Matter of Sonogawa*, 12 I&N Dec. at 212, 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.

*Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. That is not the case here. Specifically, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2005 was an uncharacteristically unprofitable period of time for the petitioner.

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<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

<sup>7</sup> Counsel refers to decisions issued by the AAO but does not provide their published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its 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).

The petitioner has not paid the beneficiary the proffered wage for the period under examination 2001 through 2005. Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage during that period through payment of wages to the beneficiary. Net losses in 2001, 2002, 2003, 2004 and 2005 were <\$8,226.00>, <\$693.00>, <\$7,735.00>, <\$301,679.00>, and <\$26,876.00> respectively. We acknowledge that the petitioner's net current assets in 2001 exceed the proffered wage and its net current assets of \$16,049 in 2005 exceed the difference between the proffered wage and the wages paid in that year, \$4,382.37. The petitioner's current liabilities, however, exceeded its current assets in 2002 and 2004. Moreover, in 2003, the petitioner demonstrated net current assets of \$1,891, less than the \$3,349.43 difference between the proffered wage and wages paid.

On appeal counsel submits the petitioner's unaudited income statements and balance sheets for the years 2002, 2003 and 2004. Counsel'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.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage in 2002, 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.