

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
Mail Stop 2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B/L



FILE: [Redacted]
LIN 07 154 51966

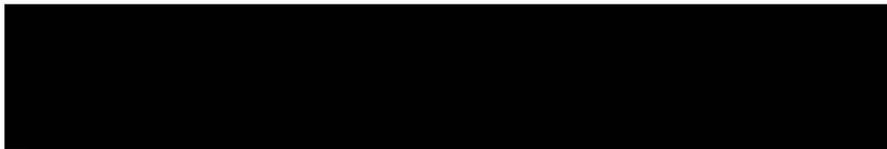
Office: NEBRASKA SERVICE CENTER

Date: NOV 25 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:



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.

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a software services firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the continuing ability to pay the proffered 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)(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 that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on February 15, 2006. The proffered wage is set forth as \$48,984 per year. The substituted beneficiary signed page 8 of the ETA Form 9089 on April 30, 2007. Page 6 of this portion of the ETA Form 9089 indicates that he has worked for the petitioner as a programmer analyst since April 28, 2007.

On part 5 of the Immigrant Petition for Alien Worker, (I-140) that was filed on May 4, 2007, the petitioner claims that it was established in September 2005, has twenty-two employees, a gross annual income of \$974,635 and a net annual income of \$10,171.

In support of the petitioner's ability to pay the proffered wage of \$48,984 per year and in response to the director's request for additional evidence issued on May 9, 2007, the petitioner provided a copy of its 2006 Form 1065, U.S. Return of Partnership Income. It indicates that the petitioner filed the return using a standard calendar year. The tax returns also contain the following information:

	2006
Net Income ¹	\$ 10,171
Current Assets (Sched. L)	\$ 1,610
Current Liabilities (Sched. L)	\$ 13,830
Net Current Assets	-\$ 12,220

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner additionally submitted a letter, dated May 10, 2007, from its general manager stating that the petitioner had employed the beneficiary since April 9, 2007 and that his annual salary is \$61,300. A copy of a May 2007 payroll record accompanying this letter reflects that the beneficiary had earned year-to-date \$5,120 as of May 6th. The petitioner also provided a copy of its federal quarterly employer's tax return (Form 941) for the first quarter of 2007, as well as copies of several subcontractor agreements with other entities in which the petitioner was retained to provide consultant or subcontractor services in the IT field, including an

¹ It is noted that a limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of Delaware is considered as a partnership for tax reporting purposes. In this case, it reports additional income or additional deductions and credits on Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner's net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

agreement, dated February 1, 2006, with Keypeople Resources, Inc., a Texas corporation, to provide such services on a month to month basis; an agreement dated September 19, 2005, with Global Commerce & Information, Inc. in which the petitioner agrees to pay referral or finder's fees of \$25,000 per individual who provides services to Global's third-party clients to whom Global has introduced the petitioner; a subcontractor agreement, dated January 31, 2006, with Obverse, Inc., a District of Columbia business, under which the petitioner performs quality assurance support for a maximum value of \$45,000; a subcontractor agreement with Digital Intelligence Systems Corp., a Virginia company, dated October 4, 2006, under which the petitioner provides consulting services to third party clients, accompanied by a work order for one individual to provide such services at \$75.00 per hour for billable hours worked, up to fifteen months for a third party client identified as Freddie Mac.

The petitioner further provided employment and financial information relating to another beneficiary of an I-140 filed by the petitioner on October 30, 2006 under the second preference classification as a member of the professions with an advanced degree or of exceptional ability, according to the copy of the CIS receipt notice submitted. A letter from the general manager states that this beneficiary, _____ was hired on July 1, 2006 and earns an annual salary of \$61,000. The accompanying copy of her labor certification indicates that the proffered wage was set at \$58,677 and that the priority date was February 28, 2006. A copy of her Wage and Tax Statement (W-2) reflects that the petitioner paid \$26,610 in wages to her in 2006.

The director denied the instant petition on May 29, 2007. Based on his review of the petitioner's net income and net current assets as set forth on the petitioner's 2006 tax return, the director determined that the petitioner had failed to demonstrate sufficient net income or net current assets to cover the proffered wage and had failed to demonstrate that the petitioner had employed and paid the sufficient compensation to the beneficiary in 2006. As the priority date is February 15, 2006, the director concluded that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage as of this date.

On appeal, relying on a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), counsel states that this supports a finding of an ability to pay the proffered wage because the petitioner is currently paying in excess of the proffered wage to the beneficiary. Counsel asserts that _____'s record of employment and wages paid in excess of her certified salary also supports this proposition. With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.³ The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 15, 2006, as established by the labor certification filed on behalf of the original beneficiary. Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time.

Relying on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), counsel asserts that the director erred in failing to give weight to other evidence such as the copies of the petitioner's contracts with other entities in lieu of the 2006 federal tax return provided to the record. Counsel points to this evidence as proof that the petitioner has an ongoing business with sufficient work to provide employment to the beneficiary and others.

It is noted that if a petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear. It remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. See *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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As suggested by the record, there is no evidence that the petitioner employed the beneficiary in 2006 and did not hire him until either April 28, 2007 as set forth on Part K, a, 6 of the ETA Form 9089 or April 9, 2007, as claimed in the general manager's letter. At that time, he was paid in excess of the proffered wage. However, the priority date occurred over a year earlier and that obliges the petitioner to establish its *ability to pay* the proffered wage in order to utilize the priority date set by the labor certification.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other

expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; 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, *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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.

Although it is noted that the petitioner began compensating the beneficiary at a rate in excess of the proffered wage in April 2007, neither the petitioner's net income of \$10,171 nor its net current assets of -\$12,220 were sufficient to pay the proffered wage of \$48,984 as of the priority date of February 15, 2006, or establish its ability to pay as of that date. It is further noted that while the petitioner employed the other beneficiary, Ms. [REDACTED], as of July 2006, which was approximately four months after her priority date was established, her rate of compensation according to her paystubs provided, did not appear to reach her proffered wage level of \$58,677 until the following year. To the extent that both petitions were pending as of February 2006, it was incumbent upon the petitioner to demonstrate its ability to pay both salaries until [REDACTED]'s employment in July and incumbent to show that its ability to pay included the ability to cover the shortfall between her wages in 2006 and her proffered salary, as well as the beneficiary's certified salary. Further, although the petitioner's federal quarterly tax return for the first quarter of 2007 reflects information pertinent to cumulative wages paid and withholding of taxes for that quarter, it provides no information as to the employer's net income or net current assets and thus does not outweigh the evidence set forth in a federal income tax return or an audited financial statement.

Relevant to the assertion that the employee's ability to generate revenue and the employer's expectation of increased 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. Although the petitioner has submitted copies of agreements for subcontractor or consultant services, it is noted that three out of the four predate the priority date of February 15, 2006, and the agreement with Global

Commerce & Information, Inc. does not appear to be a contract for the petitioner to provide services to Global but for the petitioner to pay finder's fees to Global for providing clients. The other two contracts with Keypeople Resources, Inc. and Obverse, Inc. respectively, albeit renewable, represented a month to month contract with Keypeople Resources, Inc. and a \$45,000 maximum contract value with Obverse, Inc. They do not, standing alone, support a hypothesis that the petitioner has established its ability to pay the proffered wage based on projected future earnings. 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 at the priority date, within the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. 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 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, 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 application of *Matter of Sonogawa* is not applicable in this case where the record indicates that the petitioner was established less than a year before the application for labor certification was filed and provided one tax return for consideration. This case does not contain such a framework of success such as that discussed in *Sonogawa*, or that reputational or other factors were pertinent. The petitioner has demonstrated that such unusual circumstances exist in this case, which is analogous to the facts set forth in that case.

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its continuing ability to pay the proffered wage 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.