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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 06 145 50128

Office: NEBRASKA SERVICE CENTER

Date: **OCT 03 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based 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 installs glass, mirrors, store fronts and windows. It seeks to employ the beneficiary permanently in the United States as a mirror installer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 demonstrated its financial ability to pay the proffered salary.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Here, the ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Part A of the ETA 750 is \$18.05 per hour, which amounts to \$37,544 per year. On Part B of the ETA 750, signed by the beneficiary on April 26, 2001, the beneficiary claims to have worked for the petitioner from March 1997 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on April 12, 2006, the petitioner states that it was established on May 19, 1995 and currently employs ten workers.

With the petition and in support of the petitioner's ability to pay the proffered salary, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001, 2002 and 2003. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns also contain the following information:

	2001	2002	2003
Net Income <sup>1</sup>	\$104,295	\$ 78,522	\$ 84,583
Current Assets	\$ 28,065	-\$ 19,872	\$ 22,742
Current Liabilities	\$ 95,415	\$143,239	\$ 6,919
Net Current Assets	-\$ 67,350	-\$163,111	\$ 15,823

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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 director issued a request for additional evidence on August 4, 2006, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage in 2004 or 2005 or evidence that it continues to have

<sup>1</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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) and line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2001 through 2005 the petitioner's net income is found on Schedule K of its tax returns for those years.

<sup>2</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.

that ability. The director additionally requested that the petitioner provide copies of the beneficiary's Wage and Tax Statements (W-2s) for 2004 and 2005, as well as documentation that if he was paid less than the proffered wage the petitioner could pay the difference between the actual compensation and the certified wage. The beneficiary's most recent pay voucher was also requested as well as copies of the petitioner's 2004 and 2005 tax returns if it failed to provide copies of the W-2s and pay voucher. The director further advised the petitioner that the employment verification letter submitted with the petition had not included a certified English translation. He instructed the petitioner to submit documentation consisting of a letter(s) from the current or former employer(s) establishing that the beneficiary had acquired two years of experience in the job offered as of April 30, 2001, as set forth on the labor certification.

The petitioner's response included copies of its 2004 and 2005 tax returns. They contain the following:

	2004	2005
Net Income	\$ 58,560	-\$ 44,411
Current Assets	\$ 24,637	\$ 25,109
Current Liabilities	\$ 14,846	\$ 19,285
Net Current Assets	\$ 9,791	\$ 5,824

The petitioner further provided copies of its 2005 bank statements as well as copies of payroll documents beginning with the pay period beginning July 17, 2006 and ending with the pay period of October 21, 2006, which showed the beneficiary's year-to-date wages as \$9,892.60. The petitioner also provided a letter, dated October 26, 2006, from Polixeni Trikoulis, one of its two shareholders. He advises that the \$406,909 deduction taken on line 5 of Schedule A -Other Costs- of the 2005 tax return includes \$90,549 paid to subcontractors which could be considered as funds available to pay the beneficiary. He also states that the loss reported in 2005 was due to aged account receivables, which if paid in full would have added \$185,000 to the firm's profit.

Counsel's transmittal letter that was submitted with the petitioner's response claims that the petitioner had placed the beneficiary on the payroll in July 2006 based on the receipt of employment authorization, but that he had been employed as an independent contractor prior to that time.

Following a review of the evidence submitted, the director denied the petition on April 30, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record. The director noted that petitioner had not provided any documentation demonstrating compensation paid to the beneficiary prior to July 2006. He also determined that although the ability to pay the proffered salary was established in the years of 2001 through 2004, it was not demonstrated in 2005 because neither the petitioner's net income nor its net current assets could cover payment of the \$37,544 certified wage. The director additionally concluded that payment of other subcontractors in 2005 does not establish the ability to pay the beneficiary's proposed wage offer as no documentation of such payment to either them or the beneficiary was provided to the record.

On appeal, the petitioner, through counsel, offers several contentions on appeal in support of the petitioner's ability to pay the proffered wage. He initially asserts that no legitimate purpose is served by requiring that a

petitioner demonstrate the ability to pay a given wage other than at the time of filing and at the point that the alien immigrates. Counsel also contends that the petitioner has been in business since 1995 and that, citing a prior AAO decision, the totality of the circumstances should have been considered in that it had established its ability to pay the certified salary in 2001 through 2004.

These assertions are not convincing. 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. As noted above, the language set forth in the regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that this ability is demonstrated at the time the priority date is established and is *continuing* until the beneficiary obtains lawful permanent residence. (Emphasis added.) See also *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). 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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as referenced by the director, except for the payroll records submitted for 2006, no other evidence of compensation such as negotiated checks for services rendered, state quarterly wage reports or Internal Revenue Service (IRS) Form(s) 1099-Miscellaneous Income were provided. It is further noted that although the payroll records show that from the period ending July 29, 2006 to the period ending October 21, 2006, the beneficiary's wages of \$780 per week exceeded the proffered wage, the previous payroll record for the period ending July 22, 2006, reflect that the petitioner paid a weekly wage of \$540 to the beneficiary, which was less than the proffered wage ( $\$18.05 \times 40 \text{ hours} = \$722$ ).

's assertion that \$90,549 itemized on the 2005 tax return (Statement 2-Form 1120S, Page 2, Schedule A, Line 5-Other Costs) as an amount paid to subcontractors would be available to pay the beneficiary is, as the director determined, not persuasive. Wages already paid to others are not generally available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In order to demonstrate that the beneficiary was intended as a replacement for a former employee, the record must identify the worker, state their wages, verify their full-time employment, and provide evidence that the position of the former employee encompassed the same duties as those set forth in the Form ETA 750. The petitioner has not documented the identity, position, duties, and termination of the worker who performed the duties of the proffered position for the period claimed. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her, particularly if the beneficiary was also simultaneously employed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).<sup>3</sup>

contention that if the petitioner's aged account receivables had been timely paid, then the funds would have been available to cover the proffered wage in 2005, is not persuasive. This assertion is consistent with the method of accounting indicated on line 1 of Schedule B of the petitioner's corporate tax returns. It reflects that they were prepared using the cash accounting method, in which revenue is recognized when it is received, and expenses are recognized when they are paid. As these tax returns represent those that the petitioner actually submitted to the IRS, this office will consider the amounts as stated on the returns and not as amended as suggested by [REDACTED]. The returns are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual method.

We note that the petitioner's 2005 bank statements will not be considered in lieu of the required evidence as set forth in the regulation at 8 C.F.R. § 204.5(g)(2). 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 profile of the petitioner. For example, such statements were not shown to demonstrate that the funds reported somehow reflect additional available funds that were not reflected on its 2005 tax return, such as the cash specified on Schedule L that would already be considered in determining the petitioner's net current assets.

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 (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*, 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

Relevant to an earlier AAO decision cited by counsel relating to the consideration of a petitioner's total circumstances, it is noted that such a decision may provide guidance in some cases but is not considered a binding precedent as is defined within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. That said, it is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is sometimes applicable where

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<sup>3</sup>The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

other factors such as 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, although the petitioner has reported profitable years in 2001-2004, the most recent 2005 tax return provided to the record reflected a net income loss of \$44,411 and net current assets of \$5,824. Neither amount was sufficient to cover the proffered wage of \$37,544. Moreover, no financial documentation was submitted covering 2006 until the provision of the beneficiary's payroll records beginning in July 2006. The existence of the petitioner since 1995 and the selection of a particular accounting method used to prepare all of its tax returns, including the 2005 return, such that only revenue actually received is recognized, does not represent the kind of uncharacteristic and unique business circumstances that were present in *Sonegawa* nor demonstrate the petitioner's continuing ability to pay the proffered wage.

In this case, the petitioner established the ability to pay the proffered wage out of its net income of \$104,295, \$78,522, \$84,583, and \$58,560 in the year(s) 2001 through 2004, respectively, but failed to demonstrate the ability to pay in 2005 as neither its net income of -\$44,411 nor its net current assets of \$5,824 was sufficient to cover the proffered wage in that year. Additionally, until the pay period ending July 22, 2006, the petitioner failed to provide evidence of payment of the full proffered wage to the beneficiary or other evidence, such as an audited financial statement, consistent with the provisions of 8 C.F.R. § 204.5(g)(2) that would demonstrate its ability to pay the proposed wage offer.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Based on a review of the underlying record and the arguments submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

Beyond the decision of the director, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) also provides that requirements of training or experience for skilled workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. In this matter, the ETA 750 requires two years in the job offered of mirror installer. As noted above, the petitioner initially submitted a letter in Spanish unaccompanied by a certified English translation as required by 8 C.F.R. § 103.2(b)(3). In response to the director's request for evidence, the petitioner submitted a letter from Ecuador, in English, signed by a different individual. The letter affirmed the beneficiary's past employment from 1993 to 1995. The last sentence of the letter, however, indicates that the letter was translated to the signer in Spanish and that she agrees with its contents. Although this letter is not in a foreign language, we do not find it to be sufficiently probative of the beneficiary's qualifying past employment as it fails to identify the translator or indicate that such a person is fluent in Spanish and English.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

This office notes that a petition which fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 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.