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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: [redacted] Date: AUG 11 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee [redacted] Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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 failed to establish its continuing ability to pay the proffered wage and denied the petition, accordingly.

On appeal, the petitioner submits additional evidence and asserts that petitioner demonstrated its ability to pay the certified salary.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and 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.

An application or petition that 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); *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts).

At the outset, and in addition to the grounds cited by the director, the petition is not eligible for approval in the second preference visa classification because the ETA 750 indicates that the petitioner would accept less than the equivalent of an advanced degree as required by statute and regulation.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree."[1] *Id.*

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[1]Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or

Further, the regulation at 8 C.F.R. § 204.5(k)(4) provides in relevant part that:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements. In this case, Block 14 indicates that an applicant must have a master's degree in computer science. Block 15 states that "in lieu of a master's degree in computer Science we also accept *3 years of IT experience*. [emphasis added].

As stated above, the regulation at 204.5(k)(2) and (k)(4) clearly require that the equivalency of a master's degree is a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. Further, that the regulations require that the labor certification filed with the employment-based petition for a second preference visa, must correctly support that category. Here, the alternative requirements for the position described in Block 15 state that the petitioner would accept only 3 years of IT experience, which is clearly less that the regulatory equivalent of a master's degree or a bachelor's degree followed by five years of progressive experience. Although the regulations clearly state that while post-baccalaureate experience can be substituted for a master's degree, there are no provisions that permit 3 years of IT experience to be substituted in lieu of the underlying bachelor's degree and five years of progressive experience. Therefore, the petition must be denied on this basis, as well as for the reasons cited below.[2]

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educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

[2]The record suggests that the beneficiary is the second substitution for the original beneficiary named on the labor certification. The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any formation contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS continued to accept Form I-140 petitions that requested labor certification substitution, which were filed prior to July 16, 2007. In this case, the Immigrant Petition for Alien Worker (I-140) was accepted for filing on July 16, 2007. The I-140 that was submitted on behalf of the first substitution for the original beneficiary was denied. The petitioner has provided a copy of that decision to the record. However, it is unclear why the petitioner has submitted a substitution request again as the ETA 750 remains flawed for the reason explained above. It does not support the visa classification

Relevant to the petitioner's ability to pay the proffered wage, 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 the DOL. *See* 8 C.F.R. § 204.5(d); *SeeMatter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

It is noted that the I-140 claims on Part 5 that the petitioner was established in 1996, currently employees twenty workers and claims a gross annual income of three million dollars.

Here, the Form ETA 750 was accepted on November 15, 2001.[3] The proffered wage as stated on the Form ETA 750 is $75,000 per year. On the ETA Form 750 B, signed by the current beneficiary on July 9, 2007, the beneficiary claims to have worked for the petitioner since March 2007 until the present (date of signing).

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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in the advanced professional category.

[3] If the 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 is clear.

The petitioner has submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation[4] for 2001, 2002, 2003, 2004, 2005, 2006 and 2007.[5] These returns reflect that the petitioner's fiscal year is a standard calendar year. The returns additionally contain the following information:

Year	
Net Income	
Current Assets	
Current Liabilities	
Net Current Assets	
Net Income	
Current Assets	
Current Liabilities	
Net Current Assets	

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. 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. *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000). 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. A petitioner's net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS 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* (1997-2003), line 17e* (2004-2005), line 18* (2006-2007) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed 08/04/10) (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 income, credits, or deductions and other adjustments as shown on its Schedule K for the years 2001 through 2007, the petitioner's net income is found on Schedule K of its tax return for each of those years.

[5] The petitioner's tax returns for 2004, 2005, 2006, and 2007 identify the company's business as one engaged as an IT staffing agency providing "temporary help." The position offered by the petitioner must be for permanent and full-time employment. *See* 8 C.F.R. § 656.3.

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. A petitioner's total assets and total liabilities as set forth on Schedule L of a corporate tax return are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage.

The petitioner also submitted copies of a list of personal expenses, W-2s, and individual tax returns for the sole shareholder of the petitioner for 2005 and 2006. In his denial, the director noted that the petitioner's evidence indicated that although it established the ability to pay the proffered wage for the other years, it failed to demonstrate its financial ability to cover the proffered wage for either 2005 or 2006. The director rejected consideration of the sole shareholder's personal assets, noting that the petitioner was a separate corporate entity from its shareholders.

Relevant to the petitioner's employment and payment of compensation to the beneficiary, on appeal, counsel submitted copies of the beneficiary's Wage and Tax Statements (W-2s) for 2007, as well as a copy of a payroll check and record for the pay period ending June 15, 2008. The 2008 payroll record indicates that the beneficiary is currently receiving [redacted] in salary for two weeks work. This calculates to approximately [redacted] per year if multiplied by 26 weeks. It is not clear that the beneficiary is being employed at the wage rate of [redacted] per annum. The 2007 record indicates the following:

Year	W-2	Comparison to Proffered Wage of $75,000 yearly
[redacted]		

On appeal, counsel asserts that the corporation's tax status as an S corporation, along with the sole shareholder's available funds make it appropriate to consider the shareholder's personal assets in adding to the net current assets and net income of the corporate petitioner for 2005 and 2006. Counsel also relies upon *Matter of Sonegawa,* contending that the petitioner's expectations of increasing net profit support approving the petition.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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, the record does not indicate that the petitioner employed the beneficiary prior to 2007. The wages paid in that year, as noted above,

are less than the proffered wage. The petitioner must establish that it can pay the full proffered salary from 2001 through 2006 and the difference between the proffered wage and wages paid in 2007.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in [redacted] noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." at 537 (emphasis added).

The AAO concurs with the director that it is reasonable to reject consideration of personal assets when the petitioner is a corporation. This cannot be considered as persuasive evidence of the corporate petitioner's ability to pay the proposed wage offer. A corporation is a separate and distinct legal entity from its owners or stockholders or other corporations or enterprises. *See Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Although counsel asserts that the facts of the case in *Sitar v. Ashcroft*, 2003 WL 22203713 serve to distinguish it, the AAO does not agree. The corporate petitioner in that case was described as a "tightly knit family business," in which one of the directors offered an affidavit and a joint individual tax return in an attempt to support the corporate petitioner's ability to pay the proffered wage. As noted by the court, the petitioner failed to counter the argument that, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The court determined that on this issue, where the corporate petitioner had not submitted sufficient evidence of its own ability to pay the proffered wage, it could not say that the USCIS decision to restrict itself to the review of assets under the petitioner's legal control was an abuse of discretion. We would further note that there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed regulatory financial documentation.

An additional factor which affects the whether the job offer is realistic is that USCIS electronic records reflect that the petitioner has filed at least 320 petitions since 2000, including at least nine I-140 petitions and over 300 I-129 petitions. These petitions are reflected as being filed under "Taj Software Systems" and ' ' Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must demonstrate that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089; *see also* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 8 C.F.R. § 655.715.

In this matter, information relevant to these multiple petitions is lacking as to: 1) wages paid; 2) job title; 3) dates of employment; 4) nature of termination; and 5) proffered or prevailing wage. 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)). Even without

considering other sponsored workers, as noted by the director, neither the petitioner's net income of in 2005 or was sufficient to cover the proffered wage of Further, the net current assets of $2,186 in 2005 and - in 2006 were also insufficient to cover the proffered wage during those years. Moreover, without additional information, the petitioner has not established its *continuing* ability to pay the proffered wage in any of the relevant years given the multiple beneficiaries that it has sponsored.

As noted by counsel, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in had been in business for over 11 years and routinely earned a gross annual income of about 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry.

In the instant case, counsel asserts that the petitioner has demonstrated increasing net profits in 2007 and that it is paying the beneficiary the proffered wage in 2008. First, although the petitioner has reported substantial net current assets in all but two years, its net income has declined from $ in 2001 to in 2007. Second, it is not perfectly clear that the petitioner is paying the proffered salary to the beneficiary, as his wage rate for two weeks amounted to slightly less than the proffered wage. Third, in the context of the multiple petitions that the petitioner has filed, it has failed to submit sufficient information relevant to all of its wage obligations, so the AAO is hindered in determining whether it has sufficient net income or net assets sufficient to satisfy all of its obligations. Assessing the totality of the circumstances, it may not be concluded that the petitioner has established its continuing ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to establish that the job offer portion of the labor certification, demonstrates that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The petitioner has additionally failed to establish its *continuing* financial ability to pay the proffered salary. 8 C.F.R. § 204.5(g)(2).

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