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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 169 54143 Office: CALIFORNIA SERVICE CENTER Date: JAN 31 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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, California Service Center on July 21, 2004. The petitioner appealed the director's decision on August 20, 2004.[1] The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the case to the director. After reviewing additional evidence submitted in the matter, the director denied the petition on December 5, 2006. The director certified the decision to the AAO for review. The director's decision is affirmed. The appeal will be dismissed.

The petitioner is an international long distance corporation. It seeks to employ the beneficiary[2] permanently in the United States as a public relations specialist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 shows that the appeal is properly filed, 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.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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 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 U.S. Department of Labor. *See* 8 CFR § 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 the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] According to the record of proceeding, the petition was filed in the name of International Gateway Exchange, as was the Application for Alien Employment Certification. The appeal (CIS Form I-290B) was filed in the name of International Gateway Exchange.

[2] The beneficiary is also known as [redacted]

Here, the Form ETA 750 was accepted on October 9, 2001.[3] The proffered wage as stated on the Form ETA 750 is $23.85 per hour ($49,608.00 per year). The Form ETA 750 states that the position requires a Bachelor's degree or foreign equivalent in "Mass Communications."

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

The evidence in the record of proceeding shows that [redacted] trades and does business as International Gateway Exchange (hereinafter "International Gateway Exchange"). [redacted] does business as International Gateway Exchange according to a letter dated May 13, 2004, from Mr. attorney, [redacted] According to that letter International Gateway Exchange was established as the management "company" for employees and sales agents who performed services for other entities. Although at various times in the record, International Gateway Exchange is referred to as a company, there is no evidence submitted of the form of its organization although it does have employer status based upon the wage and tax statements submitted in the record. Mr. [redacted] is the sole shareholder of all the corporate entities mentioned in this discussion.

In the petition, [redacted] claimed to have been established in 1993, to have a gross annual income of over $700,000.00, and, to employ 14 workers at the time the petition was prepared. On the Form ETA 750B, signed by the beneficiary on September 28, 2001, the beneficiary stated he has worked for the petitioner since September 2000 to the present date.

With the petition, International Gateway Exchange submitted a labor certification and a U.S. federal tax return Form 1120 for another company, International Gateway Services Inc., for 2001.

Because the director determined that the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on March 17, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns, and audited financial statements from October 9, 2001, to the present. The director requested the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements for 2002 and 2003, and, the beneficiary's pay statements for the last four months specified as November and December 2003, as well as January and February 2004. Further, the director requested the petitioner provide copies of California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of

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[3] It has been approximately five years since the Alien Employment Application 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."

[4] The submission of additional evidence on appeal is allowed by the instructions to the 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).

California. The director stated that the forms should include the names, social security numbers and number of weeks worked for all employees.

In response to the request for evidence, counsel submitted copies of the following documents: explanatory letters dated May 13, 2004, June 3, 2004 and June 8, 2004; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports; the beneficiary's Wage and Tax Statement (W-2) for 2002 and 2003 for International Gateway Services Inc; a balance sheet as of March 31, 2004, for Access International; and, the U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002 for International Gateway Services Inc.[5]

According to the letter submitted into evidence dated May 13, 2004, from the counsel, [redacted], for [redacted] and the affiliated companies" [redacted] the 100% owner of the stock of the corporate entities. These entities are [redacted] Communications Inc., and, International Access Inc. doing business as Access International. Each of these entities has a separate FEIN number.

The petitioner in this matter is International Gateway Exchange. [redacted] trading and doing business International Gateway Exchange and, International Access Inc. doing business as Access International are separate entities according to the record of proceeding.

On appeal from the director's decision dated July 21, 2004, present counsel asserted, *inter alia*, that the tax returns submitted in response to the request for evidence (from International Gateway Services Inc.) do not provide the "full picture" of the "organization's" ability to pay the proffered wage. According to Exhibit D to Counsel brief, he contends that the figure totals for current assets, "depreciable assets before depreciation" and "depreciable assets after depreciation" for International Access Inc. doing business as Access International, [redacted]., and, [redacted] are evidence in the aggregate for years 2000, 2001, 2002 and (2003 year to date) of the ability to pay the proffered wage.

Counsel submitted copies of the following documents on appeal: a legal brief; corporate information concerning [redacted]., and, [redacted].; CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; a "spreadsheet" for [redacted]. doing business as Access International, International Gateway Services Inc., and, [redacted] balance sheet for Access International as of July 2004, and a profit/loss statement for November 2003 through July 2004; a balance sheet for [redacted]. as of July 2004, and a profit/loss statement for October 2003 through July 2004; International Access Inc.'s U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002; Miracle Communications Inc.'s U.S. Internal Revenue Service (IRS) Form 1120 tax returns for year 2002; International Gateway Services Inc. for years 2001 and 2002; Wage and Tax Statements (W-2) for 2001, 2002 and 2003 for [redacted]; Wage and Tax Statements (W-2) for 2003 for [redacted].; Quarterly Wage Reports for International Access Inc. doing business as Access International and for International Gateway Exchange for the four quarters of 2001 and 2002, and the quarters ending March 31, 2003, June 30, 2003; September 30, 2003.

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 the above

[5] The Federal Employer Identification number (FEIN) of this corporation is [redacted] (the number is obscured for privacy purposes).

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.

On March 1, 2006, the AAO withdrew the director's decision and remanded the case to the director for further action and entry of a new decision. At that time the AAO noted that two issues, one a possibility of a successor ship event implied by counsel in his brief and exhibits, and also, the ability to pay the proffered wage issue was unresolved.

At this point in the case, the record contained no evidence that [redacted] doing business as Access International qualifies as a successor-in-interest to [redacted]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, if the sucessorship event occurs, [redacted] doing business as Access International must establish the financial ability of the predecessor enterprise, International Gateway Exchange, to have paid the certified wage at the priority date. See Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986). After the successorship occurs, then it is the successor's obligation to prove the proffered wage.

Also, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. According to W-2 Wage and Tax statements submitted into evidence, International Gateway Exchange paid the beneficiary[6] $30,762.50 in 2000, $35,120.39 and $39,314.84 in 2001, 2002 and 2003 respectively. Since the proffered wage is $49,608.00 per year, no evidence was submitted that International Gateway Exchange paid the beneficiary the proffered wage.

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

[6] In 2000, the petitioner paid the beneficiary $2,080.00. The statement can have no probative value in the determination of the ability to pay the proffered wage as of the priority date in 2001.

federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 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 or other corporations gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient.

Counsel has introduced into evidence statements of "depreciable assets before depreciation" and "depreciable assets after depreciation" for [redacted]. doing business as Access [redacted] and, [redacted]. 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.

The court in *Chi-Feng Chang* above noted further stated:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

On March 25, 2006, the director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, and, pertinent evidence "if a successor in interest occurred."

Counsel made two separate responses to the director's request.

On June 8, 2006, counsel submitted copies of the following documents: an explanatory letter dated June 8, 2006, that stated in pertinent part that [redacted] doing business as [redacted] purchased [redacted] on January 1, 2006; a fictitious business name statement; a proof of publication of intent to do business in that name; a purchase and sale agreement for the trade name [redacted] **"and other identified assets" to** [redacted] according to a schedule attached to this agreement Access International assumes the employees of [redacted] Exchange according to an attached employee listing;[7] a new uncertified Application for Alien Employment Certification dated June 5, 2006, in the name of [redacted]. naming the beneficiary; and, [redacted]s U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2000, 2001, 2002 and 2003.[8]

[7] This employee listing was not found in the record of proceeding.

[8] **In tax years 2000, 2001, 2002, 2003 and 2004** [redacted], stated a loss in each of those years from trade or business activities as reported on Line 28 of the Forms 1120 of <$632,848.00>, <$556,854.00>,

On June 30, 2006, counsel submitted a copy of [redacted] Form 1120 tax return for 2004.

[redacted]c. doing business as Access International purchased [redacted] on January 1, 2006 according to the sales agreement submitted in evidence. Therefore the tax returns of [redacted]c. submitted for the years 2001, 2002, 2003 and 2004 prior to the acquisition have no probative value as to International Gateway Exchange's ability to pay the proffered wage from the priority date, October 9, 2001 to the date of its acquisition on January 1, 2006.

Likewise, the tax returns[9] for International [redacted] submitted for year 2001 and 2002 have no probative value in this matter since CIS may not "pierce the corporate veil" and look to the assets of other the corporations to satisfy the corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958).

Similarly, CIS cannot look to the assets of [redacted] to pay the proffered wage.[10]

No annual reports, U.S. federal tax returns or audited financial statements were submitted for International Gateway Exchange or for [redacted]e although in 2001, 2002 and 2003 International Gateway Exchange had paid $490,763.46, $674,207.08, and $750,728.54 in wages respectively. No explanation was submitted for this failure to response to the director's request for evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel asserts in his brief accompanying the appeal that the case of *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), provides that not only taxable income but the totality of the petitioner's finances are appropriate areas of consideration to determine the ability to pay the proffered wage. *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa.* In fact in this case, neither International Gateway Exchange has presented any evidence of its finances nor International

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<$705,578.00>, <$703,508.00> and <$242,534.00> respectively. The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero. Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. Tax returns submitted prior to the date of the acquisition by

[9] In tax years 2001 and 2002 International Gateway Services Inc. stated a loss in each of those years from trade or business activities as reported on Line 28 of the Forms 1120 of <$0.00> and <$0.00> respectively.

[10] In 2002, [redacted]. stated a gain on Line 28 of Form 1120 of $8,657.00.

Access Inc. doing business as Access International has presented evidence from January 2006 of its own finances.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary 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.