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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 01 2007

WAC 06 082 52556

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a dental supply dealer. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the director denied the petition.

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.

According to the director's July 14, 2006 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 is accepted for processing by any office within the employment system of the DOL. *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 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on December 18, 2001. The proffered wage as stated on the Form ETA 750 is $14.66 per hour, 40 hours per week, or $30,492 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position, as well as four years of high school and eight years of grade school.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the

federal courts. *See,* e.g. Dor v. INS, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003 and 2004, together with certain attachments filed with these forms;
- a balance sheet dated May 31, 2006 for Speedco, Fax and Pack and Atwater World;
- a balance sheet dated December 31, 2004 for Speedco, Fax and Pack and Atwater World;
- counsel's letter dated June 21, 2006 submitted in response to the director's Notice of Intent to Deny; and
- counsel's appeal brief dated August 7, 2006.

The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner listed November 11, 1998 as the date it was established. The petitioner also stated that it had one employee and a gross annual income of over $206,000. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on November 2, 2001, the beneficiary claimed to have worked for the petitioner from December 1995 or approximately three years prior to the petitioner's date of establishment through the date that form was signed.

On appeal, counsel indicates that the petitioner has demonstrated the ability to pay the proffered wage in 2001, 2002 and 2003 through its federal tax returns. Counsel also asserts that the petitioner has shown the ability to pay the proffered wage during 2004 through the petitioner's 2004 balance sheet submitted into the record, and in that the petitioner has shown that it is well-established with a history of being able to meet the proffered wage and with reasonable expectations of increased profits in the future.

The petitioner must show that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form ETA 750, the petitioner must show 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).

[1] 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 this 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).

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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards, or that it paid the beneficiary any portion of the wage during the relevant period of analysis. While on the Form 750B the beneficiary did state that she worked for the petitioner, counsel indicated in his letter dated June 21, 2006 that there was no documentation to establish that the beneficiary had worked for the petitioner. Counsel indicated that the beneficiary was not and had not been on the petitioner's payroll.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. It is also not sufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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* 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* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of $30,492.80 from the priority date of December 18, 2001 onwards:

- Petitioner's 2001 Form 1120S states a net income or loss [2] of $20,557.
- Petitioner's 2002 Form 1120S states a net income or loss of -$10,217.
- Petitioner's 2003 Form 1120S states a net income or loss of -$46,757.
- Petitioner's 2004 Form 1120S states a net income or loss of -$35,602.

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[2]For purposes of this analysis, net income is equal to ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S.

Therefore, for the years 2001, 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, contrary to counsel's assertions, the petitioner's total assets must be balanced against the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's Schedule L, lines 1 through 6 and lines 16 through 18 for 2004 were left blank. Thus, this office is not able to calculate its net current assets for that year. Any assertion that CIS might rely instead on the figures found on the petitioner's unaudited balance sheet dated December 31, 2004 to calculate its 2004 net current assets is not persuasive. Similarly, CIS shall not rely on the petitioner's unaudited balance sheet for 2006 to determine the petitioner's net current assets for that year. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are not sufficient to demonstrate the ability to pay the proffered wage. This office notes further that while the date on the second unaudited balance sheet submitted into the record is December 31, 2004, not May 31, 2006, the two balance sheets list the exact same information under all the various categories within current assets. For instance, both the December 31, 2004 balance sheet and the May 31, 2006 balance sheet list accounts receivable for "Speedco" at exactly $8,993; both sheets list total current assets for "Speedco" at exactly $93,202; etc. It is not clear to this office how certain current assets which in the course of doing business tend to change on a daily basis such as, cash on hand, accounts receivable, amounts in checking accounts, etc. might be at precisely the same amounts on dates which fall almost a year and one-half apart. This casts doubt on the authenticity, not only of the two balance sheets, but on all of the petitioner's evidence. As noted by the Board in *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988):

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Id.*

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[3]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.

The federal tax returns in the record indicate the following regarding the petitioner's net current assets:

- The petitioner's net current assets during 2001 were $173,294.
- The petitioner's net current assets during 2002 were $151,015.
- The petitioner's net current assets during 2003 were $105,383.
- The petitioner's current assets and current liabilities for 2004 were not listed on the Schedule L, as such CIS is not able to calculate the petitioner's net current assets for that year.

Thus, for the years 2001, 2002, and 2003 the petitioner has shown that it had sufficient net current assets to pay the proffered wage. Regarding 2004, the petitioner has not shown that it had sufficient net current assets to pay the proffered wage.

In sum, the petitioner has demonstrated an ability to pay the wage during 2001, 2002 and 2003. It has not established that it had the ability to pay the beneficiary the proffered wage during 2004 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Under certain circumstances, CIS will consider the petitioner's expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. However, in this matter, any reliance on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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 not able to conduct business. The Regional Commissioner determined 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. Also, 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. The instant petitioner has not shown that unusual circumstances, parallel to those in *Sonegawa,* exist in this case. Further, the record indicates that the petitioner has been in business for less than ten years and that it employs only one worker. During the relevant period of analysis its gross profits have steadily decreased from $387,911 in 2001 to $206,406 in 2004. Its net current assets have also steadily decreased. Its net income decreased from $20,557 in 2001 to -$35,602 in 2004.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.