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U.S. Citizenship and Immigration Services

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[redacted]

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File: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 25 2007

LIN-05-046-50710

In re: Petitioner:
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:

[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 Director, Nebraska Service Center ("director"), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is in the business of freight forwarding, and seeks to employ the beneficiary permanently in the United States as a manager, traffic ("Transportation/Freight Forwarding Manager"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's December 8, 2005 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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.[1]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The 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

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[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 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).

> shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 30, 2003. The proffered wage as stated on Form ETA 750 is $63,470.00 per year, based on 40 hour work week. The labor certification was approved on December 23, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on December 2, 2004.[2] On the I-140, the petitioner listed the following information: date established: March 9, 2000; gross annual income: $248,677; net annual income: $30,499; current number of employees: three.

On May 27, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: evidence that the beneficiary met the qualifications of the certified labor certification, including evidence of the beneficiary's education, and documents translated if necessary. The RFE also requested that the petitioner provide additional evidence related to the petitioner's ability to pay the proffered wage, including the petitioner's federal tax returns, annual reports, or audited financial statements, as well as copies of the petitioner's Forms 941, and additional evidence in the form of bank account records, personnel records, and/or profit and loss records. The petitioner responded.

On September 24, 2005, the director then issued a Notice of Intent to Deny ("NOID"), which provided that the petitioner had not established its ability to pay, and allowed the petitioner an opportunity to respond.[3] The NOID also provided that "there was also some concern about the beneficiary's educational qualifications . . . as the only evidence submitted of the required Bachelor's degree was the diploma and a summary of marks at the end of schooling," but the director did not find that the petitioner failed to establish the beneficiary's qualifications for the position.[4] The petitioner responded. Following consideration of the petitioner's response, on December 8, 2005, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.[5] The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, the beneficiary did not list that the petitioner employed him. Further, the petitioner did not assert or provide evidence that it previously employed the beneficiary. Instead, the petitioner has provided that it will employ the beneficiary after the I-140 Petition is approved.

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[2] A separate petitioner previously filed an I-140 petition on behalf of the beneficiary for a different position. That petition was denied due to abandonment for failure to respond to a Request for Evidence.

[3] The notice sent to the petitioner was labeled "Decision," rather than a "Notice of Intent to Deny," but properly directed that CIS intended to deny the petition, and allowed the petitioner the requisite thirty-three day time period to respond to the notice.

[4] The petitioner provided an educational evaluation of the beneficiary's education to show that the beneficiary completed a degree in the requisite field.

[5] On appeal, counsel addresses the issue of the beneficiary's qualifications at length. We note that the decision was based only on the petitioner's failure to establish the petitioner's ability to pay, and did not assert that the petitioner had not established the beneficiary's qualifications for the position.

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 federal income tax return. 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). 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 record demonstrates that the petitioner is an S corporation. 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists a small amount of interest income on Schedule K in the years 2000, 2001, 2003, and 2004, so that we will take the petitioner's net income from Schedule K for these years. In the year 2002, the petitioner does not list any additional income so we will take the petitioner's net income from line 21:

Tax year	Net income or (loss)
2004	$8,921
2003	-$5,878
2002[6]	$10,158
2001	$2,010
2000	$5,749

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

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[6] We note that the priority date is in 2003, so that the petitioner's federal tax returns for the years 2000, 2001, and 2002 are not required. We will, however, consider the tax returns for these years generally.

Tax year	Net current assets
2004	$33,427
2003	$62,935
2002	-$8,210
2001	$2,829
2000	$12,749

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well. We note, however, that the petitioner's net current assets were only $535 below the proffered wage of $63,470.00 in 2003.

We additionally note the following information from the petitioner's tax returns:

Tax year	Gross Receipts	Salaries Paid
2004	$44,695	$0
2003	$248,677	$10,200
2002	$494,312	$16,200
2001	$2,008,373	$9,296
2000	$1,338,321	$10,254

The petitioner also submitted Forms 941, Quarterly Federal Tax Returns for the four quarters of 2003, and the first quarter of 2004. While the Forms 941 exhibit that the petitioner has paid some employees, the forms do not establish that the petitioner has paid the beneficiary the proffered wage, or that the petitioner can pay the beneficiary the proffered wage.

The petitioner additionally submitted bank statements for December 31, 2003, December 31, 2004, January 31, 2005, and June 30, 2005. The four statements show significant variation in the amount that the petitioner had in its account from a low balance of $0 (as of December 31, 2004) and $168.65 (as of January 31, 2005) to a high balance of $70,405.36 (as of December 31, 2003). The month end balance reflects a large deposit of $58,000 on December 15, 2003.

First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. The bank statements would reflect the amount that the petitioner had in its account as of the dates issued, and would not demonstrate the petitioner's ability to pay from May 30, 2003 to the present.

The petitioner additionally submitted an unaudited balance sheet and income statement for the year ending December 31, 2002, as well as an unaudited projected income statement and projected balance sheet for the year ending December 31, 2001. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The

unaudited financial statements submitted with the petition are not persuasive or reliable evidence, and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted evidence of a $25,000 business loan agreement dated October 9, 2002. The petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner additionally provided copies of contracts with a number of companies: one contract was in the amount of $79,082 dated October 17, 2005; one other contract was for an amount not to exceed $3000, and was dated February 19, 2004; and the three additional contracts, for the years 2004 and 2005, did not contain an amount the petitioner was to be paid.

While the contracts do exhibit that the petitioner does business with various entities, the contracts would not be sufficient to demonstrate that the petitioner can pay the proffered wage. Several of the contracts do not list the amount to be paid to the petitioner. Further, the earlier contracts for 2004 would be reflected in revenue earned on the petitioner's tax returns and already considered above.

The petitioner's shareholder additionally provided copies of settlement statements for personal property owned. We note that a corporation is a separate and distinct legal entity from its owners and shareholders. The assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the assets of an owner or shareholder cannot be used to demonstrate the petitioner's ability to pay the proffered wage.

Upon consideration of all the evidence, the director concluded that the petitioner could not pay the beneficiary the proffered wage, and that the petitioner's business showed a "downward or at least static trend in the business."

On appeal, counsel asserts that CIS did not fully examine the record, and misstated or omitted facts, which led to the petition's denial; that the decision was "arbitrary and capricious;" that the adjudicator abused his or discretion in failing to consider good faith evidence, policy guidance, and legal precedent; and that the adjudicator failed to properly explain the denial in terms of legal precedent, as well as to give proper notice of appeal.

Counsel contests that CIS's suggestion that the petitioner employed the beneficiary is incorrect and provides that it has not employed the beneficiary, but will do so on approval of the I-140 petition. The petitioner provided a payroll summary for 2005, which showed that it paid one employee $10,800 for the first eight

months of 2005, and a "lump sum of $7,850" in August 2005. Counsel provides that CIS improperly attributed payments instead to the beneficiary based on the similar name of the other female employee.[7]

Counsel further cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo), and provides that the May 4 Yates Memo instructs that CIS should give reasons for a petition's denial. Further, the May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary in its determination of whether the petitioner can pay the proffered wage.

Counsel asserts that CIS did not sufficiently elaborate the reason for denial. Further, counsel provides that the petitioner can demonstrate positive net current assets in 2003 and could pay the proffered wage, and that the petitioner's tax returns in 2001, and 2002 demonstrate the petitioner's ability to pay.

Counsel is wrong in this assertion. Following the Yates Memo, and examining the petitioner's 2001 and 2002 net income and net current assets, as set forth above, both are deficient to show the petitioner's ability to pay. Although, we note further that the tax returns for these years are before the priority date, and are not required to show the petitioner's ability to pay the proffered wage. The petitioner's income was close to the proffered wage in 2003, only $535 below, and we could conclude that the petitioner could pay the wage in that year.

The petitioner asserts that the filing was supported with the petitioner's bank statements, and contracts. We have addressed the issue of bank statements above, which aside from one statement reflecting a large amount of funds (which also appears as cash on the petitioner's Schedule L, and was therefore considered in the petitioner's net current assets), did not show sufficient funds to pay the proffered wage.

Counsel further asserts that the decision was arbitrary and capricious, that the petitioner has lucrative contracts, including one contract where it received $80,000. Counsel asserts that CIS is capricious when it says the company is not one of growth.

We note that the tax returns above reflect a significant, continued and unexplained decline in the petitioner's gross receipts from the year 2002 onward, which factually demonstrates a lack of growth. Based on the lack of growth, and the significant decline in gross receipts, the decision was not capricious. While the revenue from the contract presented was sizable, it cannot be viewed separately from the petitioner's liabilities, and the petitioner did not provide its 2005 federal tax return.[8]

Counsel asserts that 2004 is the only year in which the petitioner cannot demonstrate its ability to pay the proffered wage. Further, counsel asserts, but provides no evidence, that 2004 was a bad year for the economy, and particularly for the transportation industry. She states that a number of companies larger than the petitioner went bankrupt, but the petitioner has in contrast continued its business. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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.

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[7] We note based on other documentation in the record, the petitioner's "other female employee" may be the beneficiary's wife. Her surname is the same with the exception of an "a" as the last letter of her name, as compared to the beneficiary with the last letter of a "y," which likely led to the confusion.

[8] We do note that based on the date of appeal, the petitioner's 2005 federal tax return was likely not available.

158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, asserts that the beneficiary is a leader in his field and will contribute to the petitioner's business and, therefore, like *Sonegawa*, the petition should be approved. Further, counsel contends that the business has a future expectation of growth based on the contracts provided. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In reviewing the petitioner's net income, net current assets, gross receipts, and salaries paid, for both the time period since the priority date, and before, we cannot conclude that the petitioner has established its ability to pay the proffered wage. The petitioner's tax returns reflect minimal net income, and salaries paid in all years, as well as significantly declining gross receipts, which occurred over a series of years, and was not limited to the year 2004, the year that counsel has indicated was a bad year. In examining the totality of the circumstances, we would not conclude that the petitioner can pay the proffered wage.

Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. 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.