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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 06 081 50227 Office: NEBRASKA SERVICE CENTER Date: FEB 20 2008

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 employment based visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

On appeal, counsel contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence , such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on April 28, 2001. The proffered wage as stated on Part

A of the ETA 750 is $22.75 per hour, which amounts to $41,405 per year.[1] On Part B of the ETA 750, signed by the beneficiary on April 26, 2001, the beneficiary claims to have worked for the petitioner since March 1996.

On Part 5 of the I-140, the petitioner states that it was established on April 11, 1991, currently employs eleven workers, and reports an annual gross income of $1,229,563.

With the petition and in response to the director's June 5, 2006, request for evidence, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005. Relevant statements and attachments were included on the 2001 return provided, but not for the other returns. For the reasons discussed below, we concur with the director's decision to deny the petition, however, it is noted that the petitioner's failure to include all statements and attachments which may have included relevant information related to the identity of the petitioner's principal shareholders should have been included with the petitioner's submission. The returns did contain the following information:

	2001	2002	2003	2004	2005
Net Income[2]	$ 33	$ 51,811	$19,505	$91,877	$184,202
Current Assets	$ 5,083	-$ 2,641	-$ 692	$27,726	$102,834
Current Liabilities	$ 19,352	$ 7,511	$ 20,287	n/a	$ 16,889
Net Current Assets	-$ 14,269	-$ 10,152	-$ 20,979	$27,726	$ 85,945

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the

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[1] This calculation is based on the 35 hour work week as claimed on item 10a of Part A of the ETA 750.

[2] Where an S Corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. The petitioner's net income is shown on line 21 of its 2003 tax return. 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) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2001, 2002, 2004, and 2005 the petitioner's net income is found on Schedule K of its tax returns for 2001, 2002, 2004 and 2005.

[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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also supplied copies of Wage and Tax Statements (W-2s) that it issued to the beneficiary for the years 2002, 2003, 2004, and 2005. They indicate that the following compensation was paid to the beneficiary:

Year	Wages
2002	$24,521.31
2003	$24,102.50
2004	$28,878.00
2005	$30,824.00

Following a review of the evidence submitted, the director denied the petition on September 15, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage, noting that the documentation failed to establish that the petitioner had the ability to pay the proffered wage in 2001 and 2003.

On appeal, the petitioner, through counsel, contends on appeal that the petitioner demonstrated its ability to pay the proffered wage. Counsel cites the petitioner's payment of cumulative wages through the relevant period and its increase in net income and net current assets. Counsel relies on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) as a basis to approve the petition based on the petitioner's expectation of an increase in revenues.

Counsel further states that because the petitioner has not employed the beneficiary at the full proffered wage does not mandate a denial of the immigrant visa petition. As to this matter, we concur with counsel. Current regulations do not actually require the obligation to pay the wage offered in the labor certification to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification.[4]

We do not find counsel's remaining assertions to be persuasive. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. 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 *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is April 28, 2001.

[4] This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant to different regulatory provisions applying to aliens with non-immigrant status.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the petitioner submitted evidence of compensation paid to the beneficiary for 2002, 2003, 2004 and 2005. The shortfall between the wages paid to the beneficiary and the proffered wage of $41,405 was $24,107.26 in 2002; $23,688.45 in 2003; $12,527 in 2004; and $10,581 in 2005.

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, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* and *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983)*; see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

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.

In this case, the petitioner demonstrated its ability to pay the proffered wage in 2002, 2004, and 2005 because in 2002, its net income of $51,811 could cover the $24,107.26 shortfall between the beneficiary's actual wages and the proffered wage; in 2004, its net income of $91,877 could cover the shortfall of $12,527; and in 2005, the petitioner's reported $184,202 in net income could meet the shortfall of $10,581 resulting from a comparison of the actual wages paid to the beneficiary and the certified wage of $41,405.

The petitioner failed to demonstrate its ability to pay the proffered wage in either 2001, the year the priority date was established, or in 2003. In 2001, neither its net income of $33 nor its net current assets of -$14,269 could cover the proposed wage offer of $41,405. No evidence of wages paid to the beneficiary in this year was submitted.

In 2003, neither its net income of $19,505 nor its net current assets of -$20,979 could pay the $23,688.45 shortfall between the proffered wage and the actual compensation that the beneficiary received.

Counsel is correct that *Matter of Sonegawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, although the petitioner has established its ability to pay in three of the relevant years, neither its net income nor its net current assets were sufficient to demonstrate its ability to pay in the other two years, including the year that it filed the application for labor certification. It cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonegawa,* or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 28, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Beyond the decision of the director, it is further noted that the petitioner failed to submit any evidence of its ability to pay the proffered wage during 2006, although the director's request for additional evidence issued on June 5, 2006, advised the petitioner of the regulatory requirements to establish a continuing ability to pay the certified salary.

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), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The 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.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at 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.