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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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File: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 17 2009

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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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, on January 22, 2007. The petitioner filed a motion to reopen on May 8, 2007. Although the motion was untimely filed, the director granted the motion, and after further review, the petition remained denied. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a travel agent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denials dated January 22, 2007, and September 25, 2007, the single issue in this case is whether or not 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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 DOL. *See* 8 C.F.R. § 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001.[1] The proffered wage as stated on the Form ETA 750 is $35,797.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.[2]

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 upon appeal.[3]

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS)

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[1] It has been approximately eight years since the Application for Alien Employment Certification 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." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

[2] The labor certification requires two years of experience in the offered job which is a prerequisite for the skilled worker classification. This fact was noted by the director when the petition was reviewed since the petitioner had selected the other worker classification on the petition as filed. Responding to an inquiry of the director, counsel by his letter dated July 20, 2006, stated that the petitioner is requesting the classification of skilled worker.

[3] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

Form 1120 tax returns for 2003, 2004, and 2005; the petitioner's Articles of Incorporation; the petitioner's "Certificate of Use and Occupancy;" a letter from counsel dated March 29, 2006; an amended I-140; the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2003, 2004, and 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were $10,216.00 and $702,948.00 respectively. On the Form ETA 750, signed by the beneficiary on April 29, 2001, the beneficiary did not claim to have worked for the petitioner.

In support of the appeal counsel submits legal briefs and additional evidence which is a statement from the petitioner's accountant dated May 7, 2007; an application for an extension to file a federal tax return for 2006; the petitioner's amended U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2003, 2004, and 2005; and, the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001 and 2002.

On appeal, counsel recites portions of the regulations, USCIS adjudicators' instructions, and an U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004 in support of his assertions. According to counsel, the director issued a denial of the petition without first issuing a Request for Evidence (RFE) or a notice of intent to deny the petition. Since the director in this matter issued two RFE notices dated January 6, 2006, and May 10, 2006, to which the petitioner provided responses, counsel's contention is misplaced and not supported by the record of proceeding.

According to counsel, since the petitioner paid the beneficiary "said salary ... at the time of the filing of the labor application" that this is proof of the petitioner's ability to pay the proffered wage. According to ETA Form 750, Part B, the beneficiary stated under penalty of perjury that it was not employed by the petitioner as of April 29, 2001, and there is insufficient evidence of such salary payments in the record of proceeding. The beneficiary's personal tax returns submitted did not contain a W-2 statement issued by the petitioner, and the petitioner did not submit Wage and Tax Statements (Form W-2) or MISC-1099 compensation statements to show that it employed the beneficiary.

Further counsel contends that the director "attempted to serve as IRS in determining the timeline of Tax Returns for the years 2001 through 2006," and that the director's inquiry to this issue was inappropriate to the issue at hand, the "validity of the Petitioner's I-140 petition."

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, U.S. Citizenship and Immigration Services (USCIS) 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 (BIA 1967).

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

As already stated, on appeal, counsel contends that the petitioner paid the beneficiary "said salary ... at the time of the filing of the labor application" and that this is proof of the petitioner's ability to pay the proffered wage. Counsel did not submit W-2 Wage and Tax statements or MISC-1099 statements to show that the petitioner paid the beneficiary. The beneficiary's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2003, 2004, and 2005 did not include Forms W-2 or Form MISC-1099 statements. According to the personal tax returns submitted, the beneficiary received income for those years from his self-employment as a travel agent, not from the petitioning entity.

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. 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 that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns as initially submitted demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120-A stated net income (Line 24) of $31,969.00.
- In 2002, the Form 1120 stated net income (Line 28) of $6,550.00.
- In 2003, the Form 1120 stated net income of $252.00.
- In 2004, the Form 1120 stated net income of $10,216.00

- In 2005, the Form 1120 stated net income of $11,115.00

Since the proffered wage is $35,797.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002, 2003, 2004 and 2005. The petitioner later submitted amended tax returns for 2003, 2004, and 2005 with different figures as discussed below.

If the net income the petitioner demonstrates it had available during the 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, USCIS 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, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Form 1120-A Tax Return

USCIS 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.[4] The petitioner's year-end current assets and liabilities are shown on Part III of the Form 1120-A return. A corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 13 and 14. 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 net current assets during 2001 were $20,490.00.

Form 1120 Tax Returns as Initially Submitted

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on 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.

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[4] 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 petitioner's net current assets during 2002, 2003, 2004 and 2005 were $26,839.00, $693.00, $205.00, and $102.00.

Therefore, for Form 1120-A and Form 1120 tax returns as initially submitted[5] for 2001, 2002, 2003, 2004 and 2005 the petitioner did not have sufficient net current assets to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal and motion that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to the regulation,[6] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As already stated, on appeal counsel contends that the director "attempted to serve as IRS in determining the timeline of Tax Returns for the years 2001 through 2006" and that the director's inquiry to this issue was inappropriate to the issue at hand, the "validity of the Petitioner's I-140 petition."

The discrepancy noted by the director occurs in the petitioner's amended tax returns for 2003, 2004 and 2005, which the petitioner submitted in response to the director's RFE. Relative to the computation of the petitioner's net current assets, in each instance, the corporation's beginning and year-end current assets are shown on Form 1120, Schedule L, lines 1 through 6. They include cash-on-hand, the only one entry in the tax returns "Assets" section (lines 1-6) which is "cash." For each year cash-on-hand is re-stated upwards upon amendment of the returns. "Liabilities and Shareholders Equity," lines 16, 17 and 18 were left blank in 2003, 2004 and 2005. Therefore, whatever the petitioner stated in Schedule L, line 1(d) was the petitioner's net current assets.

In 2005, Schedule L, Line 1(b), "Cash," was in the original tax return stated "beginning-of-the-year" as $250.00, and "end-of-the-year" as $102.00. However, after an amendment in April 17, 2007, Schedule L, Line 1(b), "Cash," was in the amended 2005 tax return stated beginning-of-the-year as $39,739.00, and end-of-the-year as $50,508.00.

- In 2004, Schedule L, Line 1(b), "Cash," was in the original tax return stated beginning-of-the-year as $693.00, and "end-of-the-year" as $250.00. However, after an amendment in April 17, 2007, for tax year 2004, Schedule L, Line 1(b), "Cash," was in the amended tax return stated beginning-of-the-year as $29,214.00, and end-of-the-year as $39,739.00.
- In 2003, Schedule L, Line 1(b), "Cash," was in the original tax return stated "beginning-of-the-year" as $450.00, and "end-of-the-year" as $693. However, after an amendment in April 17, 2007, for tax year 2003, Schedule L, Line 1(b), "Cash," was in the amended tax return stated beginning-of-the-year as $26,839.00, and end-of-the-year as $29,214.00.

[5] On appeal of the denial of the I-140 petition, the petitioner submitted amended tax returns for 2003, 2004 and 2005, that stated different figures on their respective Schedule L statements.
[6] 8 C.F.R. § 504.5(g)(2).

There is no explanation regarding why the petitioner's Schedule L cash entries were revised so significantly on the amended returns other than a statement in the petitioner's accountant letter of May 7, 2007, that "the Balance Sheet entries were not correctly adjusted." Since there were admitted discrepancies between the figures stated on the petitioner's Schedule L statements for the years 2003, 2004 and 2005, the director's finding on this inconsistent evidence submittal was appropriate. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Even if we accepted the amended tax returns, the petitioner still would be unable to demonstrate its continued ability to pay the proffered wage from the priority date onward as neither the petitioner's net income nor net current assets would demonstrate its ability in 2001, 2002, or 2003.

Further, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence. No reasonable explanation was given for the changes to the tax returns for 2003, 2004 and 2005. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), 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*, nor has it been established that 2001, 2002, 2003, 2004 and 2005 were uncharacteristically unprofitable years for the petitioner. During this five year period at no time did the petitioner generate sufficient net income to pay the proffered wage. Although the petitioner contends that an accounting adjustment for years 2004, and 2005, would demonstrate sufficient net current assets to pay the proffered wage, there is insufficient substantiation for the change. By implication, the petitioner is asserting it can shift expenses around for each year to serve some present purpose. A visa petition

may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Further, we note that both the petitioner's net income and net current assets for the years 2001, 2002, and 2003 are also insufficient to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on 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.