U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 27 2009
SRC-07-800-05749

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 construction company. It seeks to classify the beneficiary pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i) as a carpenter (woodwork artisan). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present. Accordingly, the petition was denied on January 25, 2008.

On February 27, 2008, counsel filed the instant appeal timely but without a brief and any supporting documents. On the Form 290B, counsel indicated that she would submit a brief and additional evidence to the AAO within 30 days. Counsel dated the appeal February 25, 2008. As of this date, more than 13 months later, the AAO has received nothing further.

On appeal counsel merely stated that the petitioner disagrees with the director's determination regarding its ability to pay the proffered wage and that the director did not take into consideration the petitioner's corporate bank records to evaluate its financial standing.

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 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 was accepted for processing by the 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 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).

The instant petition is for a substituted beneficiary.[1] The original Form ETA 750 was accepted on October 2, 2003. The proffered wage as stated on the Form ETA 750 is $26.05 per hour ($54,184 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $2,079,699, to have a net annual income of $28,921, and to currently employ five workers. The petitioner also submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on January 26, 2007, the beneficiary did not claim to have worked for the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner or its predecessor employed and paid the beneficiary during that period. If the petitioner or the predecessor 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 record does not contain any evidence showing that the petitioner hired and paid the beneficiary during the relevant years.

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.[2] 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).

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[1] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm /fm96/fm_28-96a.pdf (March 7, 1996).

[2] The record shows that the petitioner is structured as 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

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, 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.

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 and 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.

The record contains copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003 through 2006. According to the tax returns, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The petitioner did not submit its annual reports or audited financial statements for these years. The tax returns for 2003 through 2006 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $54,184 per year from the priority date:

- In 2003, the Form 1120S stated a net income of ($22,774) and net current assets of ($109,148).
- In 2004, the Form 1120S stated a net income of $(19,167) and net current assets of ($116,334).
- In 2005, the Form 1120S stated a net income of $28,921 and net current assets of ($119,458).
- In 2006, the Form 1120S stated a net income of $104,496 and net current assets of (21,175).

Upon a careful review, the AAO finds that the director correctly determined that the petitioner did not have sufficient net income to pay the proffered wage in the years of 2003 through 2005, nor did the petitioner have sufficient net current assets to pay the proffered wage in the years 2003 through 2006.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, i.e. October 2, 2003 in this case, the petitioner had not established that it had the continuing ability to pay the

[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.

beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income or net current assets.

Counsel asserts on appeal that the director failed to consider the petitioner's corporate bank records in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return that was considered in determining the petitioner's net current assets.

Counsel refers March 4, 2004 Yates' memorandum to support this assertion. The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, interpretation of the language in that memorandum must comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. As discussed above, the regulation at 8 C.F.R. § 204.5(g)(2) does not list bank statements as one of the three types of evidence to establish the petitioner's ability to pay the proffered wage. If USCIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect.

In addition, although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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*, nor has it been established that 2003 through 2006 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has not established the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by DOL. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.