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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 06 175 52055 Office: NEBRASKA SERVICE CENTER Date: FEB 04 2009

IN RE: Petitioner: [redacted]
Beneficiary

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

IN 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).

Grissom

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is an internet business. It seeks to employ the beneficiary permanently in the United States as an international account executive. 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 demonstrated its financial ability to pay the proffered wage beginning as of the priority date. The director also determined that the petitioner had not established that the beneficiary had acquired the necessary qualifying training as of the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner, submits additional evidence and asserts that the petitioner has had the continuing ability to pay the proffered wage and that the beneficiary possesses the requisite training.

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.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on July 10, 2002. The proffered wage is set forth on the labor certification application as $40,000 per year.

On part 5 of the Immigrant Petition for Alien Worker (I-140), filed on May 16, 2006, the petitioner claims that it has approximately 10 employees, was established in 2000, and claims a gross annual income of more than 1 million and a net annual income of $50,000.

The ETA 750B, signed by the beneficiary on June 19, 2002, does not indicate that he has worked for the petitioner, however, two documents submitted with the petition indicate that the petitioner employed the beneficiary. One document is part of an internally generated multi-page description of the company which lists the beneficiary as a senior vice president (svp) and chief operation officer (coo). The other document is a letter, dated April 12, 2006, signed by the [redacted]. He states that the petitioner currently employs the beneficiary as an international account executive at a salary of $40,706.

It is further noted that the beneficiary lists three previous jobs on Part B of the ETA 750. He states that he worked for [redacted] in Glendale, California as an international account executive from July 1997 to March 2001. The beneficiary also claims to have worked as an international account executive from 1994 to 1997 for [redacted] of Tokyo, Japan, and also in the same job for [redacted] of Yokohama, Japan from 1991 to 1994.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must have a bachelor's degree in economics, 2 years of training and 2 years of work experience in the job offered as an

international account executive or in a related occupation specified as business administration.[1] The duties are described in item 13 of the ETA 750A:

> Identify, actively pursue and manage E-business and business opportunities arising from Japanese investments in the U.S., develop marketing strategies and solicits E-business to offer Internet solutions such as Web Sites and Web portals.

The record contains evidence that the beneficiary graduated from the University of Wisconsin-Parkside with a bachelor's degree in economics in 1991. With the petition and in response to the director's request for evidence dated August 31, 2006, in support of the ability to pay the certified wage of $40,000 and request for evidence that the beneficiary had the requisite training and work experience, the petitioner provided copies of compiled financial statements for the year ending September 30, 2005.

As evidence that the beneficiary had obtained 2 years of training and 2 years of experience, the petitioner submitted two employment verification letters, consisting of the following:

1) A letter, dated June 6, 2002, from the [redacted], signed by [redacted] as vice-president. He certifies that the beneficiary worked for his company as an international account executive form July 1997 to June 2000. [redacted] description of the beneficiary's duties is virtually identical to the duties of the certified position as described on the ETA 750.
2) A letter, dated June 8, 2002, from [redacted] of Tokyo, Japan, signed by [redacted] as general manager. Mr. [redacted] confirms that the beneficiary worked as an international account executive from June 1994 to May 1997

The director denied the petition on March 8, 2007. The director noted that copies of the 2005 financial statements submitted in response to his request for evidence did not demonstrate the petitioner's continuing financial ability to pay the proffered wage of $40,000 per year as of the July 10, 2002, priority date. He also declined to accept that the employment verification letters established that the beneficiary had acquired two years of training as of July 10, 2002.

On appeal, relevant to the petitioner's ability to pay the proffered wage, the petitioner submits copies of its compiled financial statements representing the six months ending as of March 31, 2007. The petitioner subsequently provides copies of reviewed financial statements consisting of two duplicates of a balance sheet covering the year ending September 30, 2001. In a brief submitted by the beneficiary's counsel on appeal in August 2007, a 2004 AAO case is cited in support of the proposition that the petitioner's overall circumstances justify approval of the petition. Counsel asserts that the petitioner's September 30, 2001 balance sheet, which is described as an audited document, reflected total assets of $867,307 which supports its ability to pay the proffered wage. He

[1] Item 15 also specifies that the applicant must be fluent in both English and Japanese and must have at least two years experience of working knowledge of Japanese business operation environment.

additionally asserts that the September 11, 2001, terrorist attacks detrimentally affected the petitioner's business in its New York office in the lower Manhattan area and the petitioner's business did not regain significant profit improvement until recently. Counsel claims current profits are reaching $342,540 with an estimation of annual profit of $700,000 based on the investors' infusion of funds. Counsel also states that the petitioner is repaying the beneficiary outstanding wages owed and the beneficiary received $70,141.67 by March 2007.

We do not find these assertions to be persuasive or to be supported by the record. Further, with reference to a prior 2004 AAO decision, it is noted that there is no indication by counsel that it was designated as a precedent decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of the United States Citizenship and Immigration Services (USCIS) are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 was July 10, 2002. If the petitioner only commenced doing business in 2000, it could have delayed the submission of the ETA 750 to the Department of Labor until it was in a better financial position.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 the proffered salary for that period. Here, the record does not indicate that the petitioner employed the beneficiary prior to 2006. Further, no documentation was provided to corroborate the actual wages paid by the petitioner to the beneficiary during any period of employment. 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)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will next examine the net income figure (or net

current assets) as reflected on the petitioner's federal income tax returns without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income or net current assets to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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.

As noted above, USCIS will also review a petitioner's net current assets for a given period if its net income is not adequate to demonstrate its ability to pay the proffered wage during a given period. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return or on its audited financial statement or annual report based on audited financial statements. If the petitioner's end-of-year 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.

We reject, however, the idea the petitioner's *total* assets should be considered in the determination of the ability to pay the proffered wage. 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, as noted above, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage if supported by federal tax returns or audited financial statements.

In this case, the petitioner elected to provide financial statements for 2005 that were not audited. The compiled financial statements covering the period ending September 30, 2005 are not probative

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[2] 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.

in establishing its continuing ability to pay the proposed wage offer of $40,000. 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 accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. It is further noted that the financial statements provided on appeal were also not audited. Moreover, they consisted of two duplicate copies of a balance sheet which failed to indicate that current assets exceeded current liabilities by an amount sufficient to cover the proffered salary. Additionally, no financial information pertinent to 2002 or 2003 is contained in the record.

It is noted that in some cases, a petitioner's other overall financial circumstances may sometimes be applicable in approving a petition where factors such as the expectations of increasing business and profits overcome evidence of small profits. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). 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. The generalized assertion of unusual circumstances in this case is based upon the events of September 11, 2001. However, the record of proceeding contains no evidence specifically connecting the petitioner's business operation to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. An unsupported statement by counsel that, because of the location of the petitioner's business, it was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Moreover, the figures and current financial position of the petitioner as quoted by counsel on appeal relevant to 2007 are not supported by the record or relevant to its position in 2002, 2003, 2004, 2005 or 2006. 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). The petitioner was established only two years before the priority date set forth on the labor certification. No specific evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. The record contains no probative evidence establishing a framework of profitable years analogous to the *Sonegawa* petitioner or consistent with the requirements of the regulation of 8 C.F.R. §

204.5(g)(2). The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*. The petitioner has not established that it has had the *continuing* ability to pay the proffered wage as of the priority date.

Contrary to counsel's assertion on appeal, it is noted at the outset that USCIS has the authority to inquire as to whether the beneficiary is qualified for the classification sought:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,supra*.

With respect to the issue of the labor certification's required 2 years of training and 2 years of experience, as noted above, there is a discrepancy between the statement of the beneficiary's employment with [redacted] and the statement in the employment verification letter. The ETA 750B states that the beneficiary's employment began in July 1997 and ended in March 2001. Mr. [redacted] letter claimed that it began in July 1997 and ended in June 2000, which is more than a year's difference from the duration of employment claimed on the ETA 750B. No explanation for this inconsistency was offered to the record. As such, it raises a question as to the reliability of the evidence related to the beneficiary's actual employment with this company. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It may not be concluded that the petitioner established that the beneficiary obtained two years of training as of the priority date. The case will not be remanded on this matter because the petitioner also failed to establish its continuing financial ability to pay the proffered wage and the appeal is also dismissed on this basis.

Based upon a review of the underlying record and the evidence and argument submitted on appeal, the AAO finds that the petitioner has not established its continuing financial ability to pay the certified wage and has not established that the beneficiary acquired the necessary qualifying training as of the priority date of the visa petition.

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis for denial.

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.