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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 02 2009

SRC 07 226 51370

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 or reopen, 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a contracting firm. It seeks to employ the beneficiary permanently in the United States as a painter. 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 and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

Counsel indicated on the notice of appeal (Form I-290B) that a brief and /or additional evidence would be submitted to the AAO within 30 days. Nothing further has been received to the record in the last fifteen months since the appeal was filed. Therefore, this decision will be rendered on the record as it currently stands.

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, 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 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that it has the continuing financial 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 April 1, 2001.[1] The proffered wage is stated as $14.36 per hour, which amounts to $29,868.80 per year. The current beneficiary was accepted by the United States Citizenship and Immigration Services (USCIS) as a substitution for the original beneficiary.[2]

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[1] 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 importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

[2] DOL amended the administrative regulations at 20 C.F.R. part 656 through a final rulemaking published on May 17, 2007, which took effect on July 16, 2007 (72 Fed. Reg. 27904). The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any information contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750, Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS will continue to accept Form I-140 petitions that request labor certification substitution that were filed prior to July 16, 2007. An additional USCIS update, dated July 13, 2007, and superseding an announcement, dated May 24, 2007, advises that the new DOL regulations prohibit substitution of an alien beneficiary on any application for permanent labor certification *after* July 16, 2007.

The visa preference petition was filed on July 16, 2007. Part 5 of the petition indicates that the petitioner was established on March 22, 2001. The tax returns submitted in support of the petitioner's ability to pay the proffered wage reflect that the corporate petitioner was incorporated on April 1, 2001. Part B of the Form ETA 750, signed by the beneficiary on July 11, 2007, instructs the beneficiary to list all jobs held during the past three years as well as any other experience that would qualify the beneficiary for the certified job opportunity. The only work experience that is listed is a job for an employer identified as "[redacted]" in Brazil where the beneficiary claims to have worked from January 1997 to June 2006. There is no claim on the ETA 750 B that he has worked for the petitioner.[3]

In support of its continuing financial ability to pay the certified wage $29,868.80 per year, the petitioner provided copies of its 2001, 2002, 2003, 2004, 2005, and 2006 Form 1120, U.S. Corporation Income Tax Return. They reflect that the petitioner's fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2001	2002	2003	2004
Net Income[4]	-$ 20,392	$ 5,171	$ 4,098	-$10,931
Current Assets	$ 5,349	$12,819	$ 2,874	-$ 981
Current Liabilities	$ 24,812	$21,694	$42,389	$36,970
Net Current Assets	-$ 19,463	-$ 8,875	-$39,515	-$37,951

Year	2005	2006

The new procedures outlined in the previous [May 24, 2007] announcement would take effect on July 17, 2007 instead of July 16, 2007. As the instant I-140 was filed on July 16, 2007, the request to substitute the beneficiary was accepted.

[3]Part H of the Form ETA 750 indicates that the position of painter requires no education, no training and 2 years of experience in the job offered.

[4] The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Net Income	$14,496	$10,967
Current Assets	$ 8,904	$ 8,671
Current Liabilities	$45,972	$32,481
Net Current Assets	-$37,068	-$23,810

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] 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 proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[6]

The director denied the petition on April 3, 2008, concluding that neither the petitioner's net income nor its net current assets as shown on its tax returns demonstrated sufficient resources to pay the proffered wage of $29,868.80 in any of the pertinent years.

On appeal, counsel asserts that the director should have issued a request for evidence, which would have permitted the petitioner to further demonstrate its ability to pay.

The AAO does not find this assertion persuasive. The regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." The regulation at 8 C.F.R. § 204.5(g)(2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. As the federal tax returns submitted with the petition failed to establish the petitioner's ability to pay the proffered wage at the time of filing and thereafter, the director could reasonably conclude that the evidence was sufficient to render a final decision of ineligibility based on the petitioner's failure to establish its continuing ability to pay the proffered wage beginning at the priority date.

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[5] 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.

[6] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

Moreover, 8 C.F.R. § 204.5(g)(2) also allows in appropriate cases, that additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director. Here, the director's decision was not made until eight months after the filing of the petition. If the petitioner had wanted additional evidence to be considered, there was sufficient time to offer it. Further, the petitioner had the opportunity to submit any additional evidence it had of its ability to pay the wage on appeal, which it failed to submit.

As a general matter, in order to determine a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, Part B of the Form ETA 750, signed by the beneficiary on July 11, 2007, does not indicate that the petitioner employed the beneficiary. However, it is noted that the biographic information form (G-325A) signed by the beneficiary on August 3, 2007 and submitted with the beneficiary's application for permanent resident status claims that he has worked for the petitioner beginning at an unspecified date until the present time (date of signing). Additionally, Form G-325 fails to reflect the beneficiary's experience abroad as a painter listed on Form ETA 750B and relied upon to document that the beneficiary has the experience for the position offered. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In this case, as set forth above, the petitioner's 2001 federal tax return reflected that neither its net income of -$20,392 nor its net current assets of -$19,463 was sufficient to cover the proffered wage of $29,868.80.

In 2002, the tax return failed demonstrate the petitioner's ability to pay the proposed wage offer as neither the net income of $5,171 nor the net current assets of -$8,875 was sufficient to pay the proposed wage offer.

In 2003, neither the petitioner's net income of $4,098 nor its net current assets of -$39,515 was sufficient to cover the proffered wage.

Similarly, in 2004, the petitioner failed to establish its ability to pay the certified wage as neither its net income of -$10,931 nor its net current assets of -$37,951 was sufficient to pay the proffered wage.

In 2005, each of the petitioner's net income of $14,496 and its net current assets of -$37,068 was insufficient to cover the proffered wage or demonstrate the petitioner's ability to pay.

Finally, in 2006, the tax return failed to show that either the petitioner's net income of $10,967 or its net current assets of -$23,810 was sufficient to demonstrate its financial ability to pay the proffered wage. None of the tax returns submitted demonstrated the petitioner's ability to pay the proffered wage of $29,868.80 per year.

Beyond the decision of the director, it is noted that the petitioner failed to provide probative evidence of the beneficiary's qualifying work experience. The English translation of the employment verification letter submitted from [redacted] failed to comply with the terms of 8 C.F.R. § 103.2(b)(3), which requires that the translator certify the English translation as complete and accurate and that he or she is competent to translate from the foreign language into English. The translation provided contained no certification and failed to identify the name and title of the person signing the letter from [redacted] pursuant to the requirements of 8 C.F.R. § 204.5(l)(3). 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)).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage,[7] or that the petitioner adequately documented that the beneficiary had the required experience for the position.

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[7] *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) 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

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 at 1002 n. 9.

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.

ORDER: The appeal is dismissed.

Sonegawa was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere. In this case, the petitioner filed the application for an alien worker a few weeks after it was established. It also did not submit any evidence of reputation similar to *Sonegawa.* Moreover as noted above, the tax returns provided failed to demonstrate that either the petitioner's net income or net current assets were sufficient to demonstrate its continuing financial ability to pay the proposed wage offer of the beneficiary during any of the pertinent years.