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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 0 1 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference 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 civil engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as a CADD technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director found that the petitioner did not have 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 shows that the appeal is properly filed, timely and makes 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 July 20, 2007 denial, 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. In addition, Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and 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 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 any office within the employment system of 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).

In the instant proceeding, the Form ETA 750 was accepted for processing by the DOL on May 15, 2002. The proffered wage stated on that form is $44,283 per year. The Form ETA 750 further states that the position requires the prospective employee to have a two-year associate's degree in civil drafting, four years work experience in the job offered, and Autodesk certification. The record includes photocopies of various school transcripts, diplomas, and certificates of completion issued in 1992, 1998, 1999, and 2003. It also contains two letters of employment stating that the beneficiary had been working in the field of civil engineering since 1994.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record includes the following evidence of ability to pay:

- Photocopies of the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the years 2002 through 2005;
- Letters from [redacted] president of [redacted] and [redacted] president of [redacted] Inc., both stating that the petitioner has the need to hire one or two additional entry level engineers given its current volume of backlog; and
- Various photocopies of job contracts to demonstrate that the petitioner has secured multiple job contracts in the State of Maryland and that the petitioner is running behind schedule.

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 1983,[2] to currently employ 13 workers, and to have gross annual income and net income of $484,793 and $106,266, respectively.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

[1] The submission of additional evidence on appeal is allowed by the instructions to the 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).

[2] A search of the Maryland Department of Assessments and Taxation reveals that the [redacted] Consultants, Inc. d/b/a [redacted] Consultants was established on May 23, 1983.

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, United States 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 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, the AAO 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, no evidence has been submitted to show that the beneficiary has worked for the petitioner before or after the priority date. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay $44,283 per year through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 and wage expense 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.

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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 11, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet available. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002-2005, as shown in the table below.

- In 2002, the Form 1120 stated net income (loss) of $31,944.
- In 2003, the Form 1120 stated net income (loss) of ($38,269).
- In 2004, the Form 1120 stated net income (loss) of $106,266.
- In 2005, the Form 1120 stated net income (loss) of ($22,045).

Therefore, except in 2004, the petitioner did not have sufficient net income to pay the proffered wage during the qualifying period between 2002 and 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO may review the petitioner's net current assets. 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. 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 petitioner's tax returns demonstrate its end-of-year net current assets (liabilities) for the years 2002, 2003, and 2005, as shown in the table below.

- In 2002, the Form 1120 stated net current assets (liabilities) of $25,069.
- In 2003, the Form 1120 stated net current assets (liabilities) of ($1,286).
- In 2005, the Form 1120 stated net current assets (liabilities) of $27,667.

Based on this analysis, the AAO finds that the petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003, and 2005.

On appeal, counsel for the petitioner, citing *Masonry Master, Inc. v. Thornburgh,* 875 F.2d 898 (D.C. Cir. 1989) and the *Matter of Sonegawa,* 12 I&N Dec. 612, urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. He states that, by hiring an experienced CADD technician such as the beneficiary, the petitioner reasonably expects to generate sufficient income to pay the beneficiary's wage.

In the petitioner's business, counsel explains that employees' salaries or wages are paid by their clients. In her letter dated May 3, 2007, [redacted] the president of the petitioning company, specifically states:

> Our contracts with our clients, such as [redacted] the [redacted] the Baltimore Department of Transportation, the Baltimore Department of Public Works, the Baltimore Department of Recreation, and the Baltimore County Department of Public Works, are granted on a "cost plus" basis. This means that every month we send invoices to the client based upon the salaries we pay our staff plus other expenses and 10% of our total costs as our profit. For this reason, our profit margin is never more than 10%. Many times, if it takes us more time to finish the project than we had estimated, our "additional" efforts come out of our profits. This may, from time to time, result in a loss.
>
> Essentially, it is not possible for our company (or any similar consulting firm) to be able to show profit to cover the salary of any future employee. The new

[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.

> employee's salary is only generated when the new employee starts actually working on the assigned projects.
>
> At this time we have a backlog of signed contracts worth around $1 million. With the help of Mr. [redacted] [the beneficiary] we will be able to do additional work and will also be able to invoice more for his time spent. His salary will also come from the additional work he will be doing.

Counsel and the petitioner essentially contend that the beneficiary, if hired, would have the ability to pay his own wage, help the petitioning company reduce its backlog, and in turn, boost the petitioner's income. This is possible, according to Ms. [redacted] because the petitioning company currently has over two years backlog of signed contracts worth more than $1 million.[4]

On appeal, the petitioner also submits letters from [redacted] president of [redacted] and [redacted] of [redacted] to support its contention that it has sufficient contractual work in the backlog to pay the beneficiary the proffered wage out of income generated by the beneficiary in performing work under the contracts. Both [redacted] and [redacted] in their letters indicate that if the petitioner hires additional entry-level engineers, it will be able to complete its backlog of work on time and acquire additional projects. Further, both [redacted] and [redacted] indicate that the petitioner may have to rely upon a $50,000 guarantee from the petitioner's former shareholder, [redacted] to meet payroll.

A guarantee to meet payroll is not a current asset, but a liability. The petitioner would be obligated to pay [redacted] back in accordance with any agreement between the corporation and [redacted] If the petitioner wishes to rely on a loan guarantee from [redacted] as evidence of ability to pay, it must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that such loans will augment and not weaken the petitioner's overall financial position. Additionally, the AAO gives less weight to loans and debt as a means of paying the beneficiary's salary since the debts will increase the corporation's liabilities and will not improve its overall financial position.

Although counsel refers to the petitioner's two witnesses as experts, neither of the witnesses indicates how long he has been in the business, the extent of his education, his familiarity with industry practices, or sources utilized to support his conclusion that the beneficiary's salary will be covered by the income generated by his work. The letters are nearly identical, thus reducing their probative value as independent opinions. Because of these deficiencies, the AAO declines to accept the letters as expert testimony. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may

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[4] On appeal, [redacted] submits a letter dated August 13, 2007 in which she points out that currently the petitioning company maintains more than two years backlog of work worth over $1 million dollars.

give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner's and counsel's assertions that USCIS should follow the *Masonry Master* decision and find that the beneficiary's proposed employment will increase the petitioner's income are not persuasive. The AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of the *Masonry Master* decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[5] Further, in this instance, although the petitioner has demonstrated that it has remaining work on outstanding contracts, it has not specifically identified the contract(s) under which the beneficiary will work and generate income, or its need to place a CADD technician on one of the contracts. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

It is not clear from the evidence that the beneficiary, if hired, would help boost the petitioning company's net income. Simply stating the beneficiary will generate sufficient income for the petitioner to pay the beneficiary's proffered wage does not establish the reliability of the assertions and does not establish the petitioner's ability to pay the proffered wage. 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)). This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. The possibility of increased income to the petitioner through work to be performed by the beneficiary does not establish the petitioner's ability to pay the proffered wage to the beneficiary.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. 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

[5] Subsequent to that decision, USCIS implemented a formula to determine a petitioner's ability to pay that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the AAO acknowledges that the petitioner has been in a competitive business since 1983. Evidence of record shows that the petitioner's business is stable. A review of the tax returns submitted reveals that the petitioner's gross receipts or sales between 2002 and 2005 are around $350,000 per year and that its wages/salaries are around $120,000 per year.[6]

However, the record is devoid of evidence regarding the petitioner's business reputation or historical growth. Unlike *Sonegawa*, the petitioner in this case has not provided any evidence such as newspapers or magazine articles, awards, or certifications reflecting the company's reputation or historical growth since its inception in 1983. Nor has the petitioner presented evidence of any uncharacteristic business expenses or losses contributing to its inability to pay the proffered wage, specifically in 2002, 2003, and 2005.

On appeal, [redacted] also states that, from time to time, [redacted] the petitioning company's former owner, offers loans to the petitioner to pay salaries or wages of the employees, and when the invoices are paid, these loans are returned to [redacted] contends that the petitioner has always met its payroll since [redacted] is willing and always available to financially back or support the petitioner. For this reason, [redacted] implies that the petitioner has the ability to pay the beneficiary's wage.

We disagree. As noted above, loans from [redacted] are not current assets; they are liabilities. The petitioning corporation is obligated to pay those loans back at some point in time in accordance with the agreement between the corporation an[redacted] if any. If the petitioner wishes to rely on loans from [redacted] s evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that such loans will augment and not weaken the petitioner's overall financial position. Additionally, the AAO give less weight to loans and debt as a means of paying the beneficiary's salary since the debts will increase the corporation's liabilities and will not improve its overall financial position.

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[6] From 2002 to 2005, the petitioner's gross receipts or sales are $354,600; $334,043; $484,793; and $337,641; respectively. From 2002 to 2005, the petitioner's wages/salaries are $121,246; $121,602; $116,398; and $129,017; respectively.

Assessing the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by a preponderance of the evidence that it 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.