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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

Date: **AUG 2 7 2012** Office: TEXAS SERVICE CENTER File: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth M'Cormack

Perry Rhew
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 computer consulting and software development company. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst. 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 determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record 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 September 22, 2009 denial, the 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. In addition, the information in the record indicates that the petitioner is no longer conducting business in the same Standard Metropolitan Statistical Area (SMSA) as listed on the labor certification application, and therefore the petition is not accompanied by a valid labor certification application.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on December 15, 2004. The proffered wage as stated on the Form ETA 750 is $65,000 per year. The Form ETA 750 states that the position requires four years of college culminating in a Bachelor's degree in Information Technology or Engineering and two years of experience in the position offered as a computer systems analyst.

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]

At the outset, it is noted that the labor certification submitted is for an alien other than the named beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). Although substitution would be permitted in this case as the filing of the instant petition predates the final rule, the petitioner did not submit a completed ETA Form 750B signed by the beneficiary. The petitioner submitted a letter dated July 11, 2007 stating that the position offered in the 750 was open to the instant beneficiary and briefly set forth her qualifications for the position, however, the petitioner did not submit the ETA Form 750B. For this reason alone, the petition must be denied. In any further filings, the petitioner should submit a completed ETA Form 750B signed by the beneficiary.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, have a gross annual income of $1.5 million and to currently employ 9+ workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

[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).

petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the following Forms W-2:

- The 2007 Form W-2 states that the petitioner paid the beneficiary $27,417.
- The 2008 Form W-2 states that the petitioner paid the beneficiary $66,000.

The amount paid to the beneficiary by the petitioner in 2008 exceeded the proffered wage, so the petitioner established its ability to pay the proffered wage in that year. The petitioner must establish its ability to pay the difference between the proffered wage and actual wage paid in 2007 which was $37,583.[2]

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. *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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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:

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[2] The petitioner also submitted a copy of the beneficiary's Form W-2 for 2007 from another company. The other company's resources cannot be used to demonstrate the petitioner's ability to pay the proffered wage. Use of a third party contractor to pay the beneficiary's wage does not absolve the petitioner of its responsibility to establish that it can pay the proffered wage from the priority date.

> 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, 558 F.3d 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*, 719 F.Supp. 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 February 9, 2009 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2005 through 2007, as shown in the table below.

- In 2004, the Form 1120 stated net income of $1,432.
- In 2005, the Form 1120 stated net income of $2,520.
- In 2006, the Form 1120 stated net income of $25,128.
- In 2007, the Form 1120 stated net income of $22,754.

The petitioner's net income in 2004, 2005, and 2006 was less than the proffered wage. The petitioner's net income in 2007 was less than the difference between the proffered wage and the actual wage paid. The petitioner, therefore, did not establish its ability to pay the proffered wage in these years.

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 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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 through 2007 as shown in the table below.

- In 2004, the Form 1120 stated net current assets of $0.[4]
- In 2005, the Form 1120 stated net current assets of $23,420.
- In 2006, the Form 1120 stated net current assets of $48,548.
- In 2007, the Form 1120 stated net current assets of $61,876.

The petitioner's net current assets are less than the proffered wage in 2004, 2005, and 2006. Although the petitioner's net current assets in 2007 exceed the difference between the actual wage paid and the proffered wage, according to USCIS records, the petitioner has filed 17 Form I-140 petitions on behalf of other beneficiaries and 160 Form I-129 petitions for other workers since the priority date. The petitioner must thus demonstrate its ability to pay the proffered wage not only to the current beneficiary but to all sponsored workers.

On appeal, counsel stated that the petitioner filed only two Form I-140 petitions between the priority date in 2004 and the approval of the labor certification in 2006, so the petitioner would only need to prove the ability to pay all sponsored workers for those years. Further, counsel stated that the two Form I-140 petitions did not represent actual workers as one was withdrawn and the other petition was denied. The petitioner would need to demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence or until the petition is withdrawn or denied and such denial is final. *See* 8 C.F.R. § 204.5(g)(2). The petitioner did not submit evidence that it withdrew the one petition and we note that the petitioner has appealed the denial of the other petition referenced by counsel, receipt number [redacted]. Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Although the petitioner's Form 1120 may demonstrate net income or net current assets sufficient to demonstrate the ability to pay the difference between the proffered

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[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.

[4] For 2004, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than $250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. *See* http://www.irs.gov/instructions/i1120 (accessed August 2, 2012).

wage and actual wage paid in 2007, it presented no evidence demonstrating its ability to pay the instant beneficiary as well as all other sponsored workers.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner submitted a letter from [redacted] Assistant Branch Manager with Chase Bank, dated June 1, 2007 stating that the petitioner has an account with the bank in good standing with a current balance of $90,497.42. In addition, the petitioner submitted bank statements covering the period November and December 2004 and all months of 2005 and 2006. 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. On appeal, counsel states that the overall average monthly balance should be considered, however, 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(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

On appeal, counsel asserts that the proffered wage should be prorated for 2004 since the priority date falls so late in the year. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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 the DOL.

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 (Reg'l Comm'r 1967). 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. 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 petitioner's gross receipts in 2004 were $89,285, which is less than $15,000 more than the proffered wage for the instant beneficiary even though the petitioner claimed to employ 9 workers at that time. The petitioner's total amount of salaries and wages paid for 2004 was only $11,250, less than the proffered wage for the beneficiary, and the total wages for 2005 were $71,703, around $6,000 more than the proffered wage to the beneficiary. In addition, the petitioner has sponsored 16 other workers for permanent residency and a large number of temporary workers and must demonstrate its ability to pay the proffered wage to each of these workers. On appeal, counsel asserts that the petitioner's growth should be considered in determining its ability to pay the proffered wage. Although the petitioner's gross receipts and net income have increased every year, the petitioner's net income in 2004, 2005, and 2006 was insufficient to demonstrate the ability to pay the proffered wage to the instant beneficiary and the petitioner has a large number of additional sponsored workers and must demonstrate its ability to pay the wages to all of these workers as it expands. The petitioner did not submit any evidence of its reputation or standing in the community nor any evidence that it suffered an extraordinary or unusual year to liken its situation to the one presented in *Sonegawa*. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the director's decision, the petitioner submitted a labor certification that is not valid for the petition. The regulation at 8 C.F.R. § 204.5(l)(3)(i) provides the following:

> (i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market

> Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The labor certification states that the petitioner's location is in Kenosha, Wisconsin and that the beneficiary would work at the petitioner's address in Kenosha, Wisconsin.[5]. The Form I-140 indicates that the petitioner's location changed to Baton Rouge, Louisiana.[6]

The DOL maintains a website at http://www.flcdatacenter.com which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location where the occupation is being performed geographically. The city, state, and county of the employment location must be known in order to identify the prevailing wage rate. If the city, state, and county changes, the prevailing wage on the labor certification is not correct. The petition is not accompanied by a labor certification with a specific job offer valid for the area of intended employment. 8 U.S.C. § 204.5(l)(3)(i). The petition is denied for this additional basis as well.

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.

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[5] The petitioner's 2004 and 2005 tax returns indicate an address in Kenosha, Wisconsin. The 2006 and 2007 tax returns indicate an address in Louisiana.

[6] Information with the Wisconsin and Louisiana Secretaries of State webpages indicate that the petitioner has changed its corporate registration from Wisconsin to Louisiana.