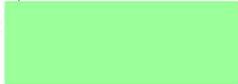


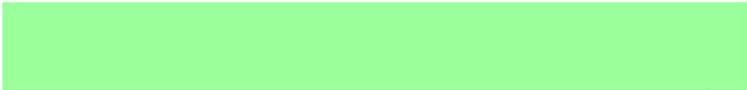
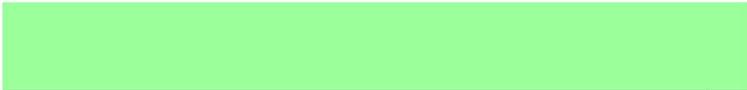


U.S. Citizenship
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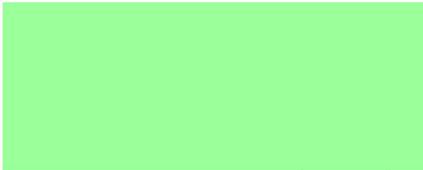
Date: **APR 15 2013** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



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 with the field office or service center that originally decided your case by filing a 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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is self-described as a scientific research consulting business. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a research and development (R & D) manager. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits a brief and additional evidence. In the Form I-290B, notice of appeal, counsel asserts as follows:

The Director based his decision on erroneous calculation of the Beneficiary's 2011 earnings, in which he failed to prorate the Beneficiary's 2011 wages to a full year salary. This lead to an underestimation of the Beneficiary's wages and a much too large difference between the proffered wage and the Beneficiary's supposed wages.

In an accompanying letter, counsel contends that the beneficiary's prorated salary for 2011 would be approximately \$38,723, and "as such, the difference between the beneficiary's proffered wage and this new prorated salary would only be \$19,456."

Counsel asserts that the documentation submitted by the petitioner on appeal establishes its ability to pay the proffered wage.

For the reasons discussed below, the AAO finds that the petitioner has not established that the petitioner had the ability to pay the proffered wage.

I. Law

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --

(i) the alien is recognized internationally as outstanding in a specific academic area,

(b)(6)

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

II. Ability to Pay the Proffered Wage

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date, here the date the petitioner filed the petition. *See* 8 C.F.R. § 204.5(d). The petitioner filed the petition on June 27, 2012. The petitioner must also demonstrate the continuing ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989).

The proffered wage as stated on the petition is \$58,178 per year. On the petition, the petitioner also claimed an establishment date in June 2007. The petitioner further claimed to have a gross

annual income of \$420,000 and to currently employ six workers.¹ The record indicates that the petitioner is structured as an S corporation. The record also indicates that the beneficiary has been employed by the petitioner since February 2011.

The director issued a request for evidence (RFE) noting that at the time of filing the petitioner did not submit the requisite initial evidence set forth at 8 C.F.R. § 204.5(g)(2). As evidence of the petitioner's ability to pay, the director requested that the petitioner submit annual reports, federal tax returns and accompanying schedules, or audited financial statements. The director noted that at filing the petitioner submitted the beneficiary's 2011 Form W-2, showing that beneficiary was paid \$32,270, significantly less than the proffered wage. The director noted that the beneficiary's Form W-2 may be accepted in addition to, but not in lieu of, the required initial evidence.

In response to the RFE, the petitioner submitted an Internal Revenue Service (IRS) Form 1120S U.S. Corporation Income Tax Return for 2010. The petitioner further submitted the petitioner's payroll statement for the period from January 1, 2012 through July 20, 2012 covering the petition's priority date. The payroll statements show that for this period the beneficiary was paid \$14,942. In response to the RFE counsel asserted that the beneficiary was not paid from April 2, 2012 to May 22, 2012 because she was on unpaid sick leave due to a car accident. The petitioner did not submit any documentation in support of counsel's assertions. 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). In addition, even if the beneficiary's wages for that period were annualized to take into account the claimed period of unpaid sick leave, the beneficiary's wage would be significantly below the proffered wage.

Also in response to the RFE the petitioner submitted a letter from its chief executive officer, [REDACTED], confirming the beneficiary's employment and summarizing data on the petitioner's 2010 and 2011 federal corporate income tax returns.

On appeal, the petitioner submitted its Form 1120S U.S. Corporation Income Tax Return for 2011 and bank account statements for the period from January 1, 2012 through July 31, 2012.

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, as stated above, the evidence in the record establishes that the petitioner employed the beneficiary from February 2011 to of June 27, 2012 at a wage significantly below the full proffered wage.

Neither has the petitioner established that it had the ability to pay the beneficiary the full proffered wage as of the priority date. In determining the petitioner's ability to pay the proffered

¹ The AAO notes that the information in the petition is inconsistent with information contained in the petitioner's support letter from chief executive officer [REDACTED], stating the petitioner was founded in 2008 and has seven full-time employees.

wage, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both USCIS and 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. Tex. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau 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. 623 F.Supp. at 1084.

The petitioner's Form 1120S for 2011 shows ordinary income of \$22,781. It claimed compensation of officers in the amount of \$66,462 and salaries/wages of \$6,544. The tax return is not signed, dated, or authenticated in any way. In contradiction, the petitioner submitted the beneficiary's Form W-2 for 2011 which claimed that the petitioner paid the beneficiary wages of \$32,270.² This document contradicts the tax return under the petitioner's employer identification number for that year.

Matter of Ho, 19 I&N Dec. 582 (BIA 1988) states:

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.

Upon review, the AAO concurs with the director's conclusion that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the above stated reasons the petition may not be approved. 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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² In addition to the beneficiary's wages, the petitioner submitted four W-2 Forms for 2011 for other employees of the petitioning company, including that of the petitioner's chief executive officer, which claim that the petitioner paid wages of \$172,893 in total.