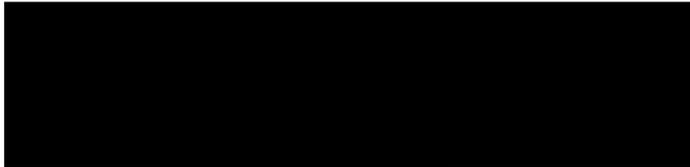




U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 04 2008
LIN 06 182 51861

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.


Robert P. Wiemann, 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 software consultancy firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the 2006 tax return submitted on appeal, not available to submit to the director, does not demonstrate the petitioner's ability to pay the proffered wage as of the priority date in this matter in addition to the other nonimmigrants and immigrants for whom the petitioner has petitioned. Thus, the petitioner has not overcome the director's sole ground of denial, which was based on the record before him. Moreover, the record does not contain the official academic records of the beneficiary's degrees and the record does not resolve whether the beneficiary is related to the petitioner's shareholder with the same last name.

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, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on March 2, 2006. The proffered wage as stated on the ETA Form 9089 is \$79,539 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2005.

On the petition, the petitioner claimed to have an establishment date in 2003, a gross annual income of \$1,000,000 (projected for 2006), an unlisted net income and four employees. In support of the petition, the petitioner submitted the beneficiary's 2005 pay stubs and Form W-2 Wage and Tax Statement reflecting that the petitioner paid the beneficiary wages of \$15,648.32 in 2005. The

petitioner also submitted its quarterly return, Form 941, for the first quarter of 2006 reflecting total wages of \$31,305 paid to all employees that quarter and its bank statements reflecting two checks issued to the beneficiary between January and March 2006 for a total of \$6,271.87.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 5, 2006, the director requested additional evidence pertinent to that ability. Specifically, the director requested evidence of the petitioner's Forms 941 for the second and third quarters of 2006, its 2005 tax return and recent pay vouchers for the beneficiary.

In response, the petitioner submitted its Forms 941 for the first, second and third quarters of 2006 reflecting total wages of \$31,305, \$52,733.69 and \$75,370.71 respectively. The beneficiary's individual wages are listed as \$14,383, \$8,814.68 and \$15,172 for a total of \$38,369.68. The petitioner also submitted pay stubs showing year-to-date wages paid to the beneficiary of \$44,204 as of September 30, 2006, \$5,834.32 more than indicated on the Forms 941 covering this period. The pay stubs for January through March 2006 reflect that the beneficiary was paid by direct deposit. As noted above, the petitioner's bank statements for January and February 2006 reflect payments by check to the beneficiary. Finally, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for 2005. The tax return reflects net income of \$250 and current liabilities that exceed current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 24, 2006, denied the petition.

On appeal, filed November 24, 2006, counsel asserts that the petitioner has paid the beneficiary \$43,271 through October 2006 and had a net income during that period of \$38,688. While counsel acknowledges that the financial statements being submitted to support the petitioner's net income during the first ten months of 2006 are unaudited, counsel notes that the petitioner is submitting its bank statements during that period as additional support. The petitioner submits the beneficiary's pay statement for October 2006 reflecting year-to-date payments of \$50,037.57, including overtime, an unaudited profit and loss statement for January through October 2006 and a balance sheet as of October 31, 2006. Finally, the petitioner submits bank statements that reflect a much higher balance on October 31, 2006 than on January 31, 2006. Rather than showing a steady increase in funds during the first ten months of 2006, however, the statements show large fluctuations, with a low of \$20,500.02 on May 31, 2006.

Subsequently, the petitioner submitted its 2006 IRS Form 1120S tax return. The return reflects net income of \$39,338 and current assets that exceed current liabilities by \$49,293. The petitioner did not provide evidence of the final amount of wages paid to the beneficiary in 2006.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006. Rather, the petitioner has documented no more than \$50,037.57 in wages paid to the beneficiary in 2006, \$29,522.43 less than the proffered wage.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 CIS, 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.

In 2006, the petitioner shows a net income of \$39,338, slightly more than the difference between the wages paid and the proffered wage (\$29,522.43). Nevertheless, the petitioner filed 11 nonimmigrant petitions in 2006 for aliens other than the beneficiary in this matter. Only two of the aliens for whom those petitions were filed are reflected on the Forms 941 for 2006 in the record. The petitioner also filed 13 nonimmigrant petitions and one immigrant petition in 2007. While a nonimmigrant petition need not be supported with evidence of the petitioner's ability to pay, the number of nonimmigrant petitions is relevant when considering an ability to pay the beneficiary of an immigrant petition. The record does not resolve the petitioner's need to demonstrate an ability to pay the proffered wage for the beneficiary in this matter in addition to paying all of the prospective employees represented by the other nonimmigrant petitions filed by the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage to the beneficiary in light of the additional prospective employees the petitioner seeks to hire and for whom it must demonstrate an ability to pay. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Moreover, the record contains other issues that prevent the petition from being approvable at this time. 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 regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) provides that the evidence required to demonstrate that the beneficiary holds the requisite degree is an “official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree.” On the ETA Form 9089, Part J, the petitioner indicated that the beneficiary has a Master’s degree in computer science. The petitioner did not include a copy of this degree with the initial submission. On October 5, 2006, the director requested the official academic record and an evaluation of the beneficiary’s education. In response, the petitioner submitted an evaluation concluding that the beneficiary’s foreign Master’s degree was equivalent to a U.S. Master’s degree. The petitioner, however, did not submit a copy of the official academic record for this degree. The director could have denied the petition based on this failure, but did not do so. This petition is not approvable without this document.

In addition, we note that on the ETA Form 9089, the petitioner responded in Part C, Line 9, that there was no familial relationship between the owners, stockholders, partners, corporate officers, incorporators and the alien. Should such a relationship exist, the petitioner would have acquired the alien employment certification through misrepresentation and the certification would be subject to invalidation. 20 C.F.R. § 656.30(d); *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 405 (Commr. 1986); *see Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). We note that the Schedules K-1 submitted with the Forms 1120S reflect that one of the petitioner’s shareholders has the same last name as the beneficiary. While sharing a last name does not necessarily demonstrate a familial relationship, the petition is not approvable without a resolution of this issue.

For the above stated reasons, considered both in sum and as separate grounds for denial, 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 met that burden.

ORDER: The appeal is dismissed.