

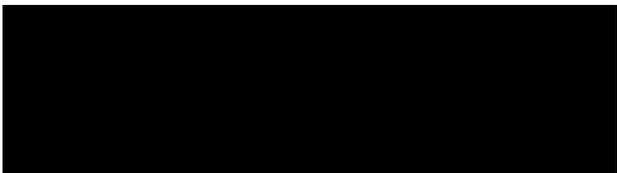
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U.S. Citizenship  
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FILE: [REDACTED]  
WAC 06 119 52006

Office: TEXAS SERVICE CENTER Date: OCT 06 2008

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:



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 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 a computer web program and consulting company. It seeks to employ the beneficiary permanently in the United States as a software developer 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, prior counsel submitted a brief and additional evidence. For the reasons discussed below, we find that the petitioner has not overcome the director's valid concerns. Moreover, the record raises additional concerns. On May 19, 2008, we advised the petitioner of derogatory information obtained by this office. Specifically, the California Business Portal, <http://kepler.ss.ca.gov>, a publicly searchable website maintained by the California Secretary of State, reflected that the petitioner's current status was "suspended." This office also questioned whether the fact that the beneficiary's spouse is the sole owner of the petitioner invalidates the valid job offer. The petitioner's response will be considered below.

#### **Ability to Pay**

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 Form ETA 750 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 Form ETA 750 was accepted for processing on February 7, 2003. The proffered wage as stated on the Form ETA 750 is \$40 per hour, which amounts to \$83,200 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1998, a gross annual income of \$851,563, a net income of \$29,656 and three employees. In support of the petition, the petitioner

submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2001, 2003 and 2004.

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 June 3, 2006, the director requested additional evidence pertinent to that ability. In response, the petitioner submitted its 2005 IRS Form 1120 tax return and bank statements covering the first six months of 2006.

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 August 4, 2006, denied the petition.

On appeal, prior counsel asserted that the petitioner "aims at obtaining a compromise between profit gain and service to the community." Prior counsel cited *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986), for the proposition that the director should have considered the petitioner's total income, gross income less costs of goods sold. Prior counsel further asserted that the total income shows that the petitioner has "an upward trend in the recent years and is in the process of becoming a multi-cultural business entity." In addition, prior counsel asserted that Citizenship and Immigration Services (CIS) does not have business expertise and that the petitioner's employment of the beneficiary "will ultimately prove positive in the company's expansion of its business." Finally, prior counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the proposition that the director should have considered the income a new employee would generate. The petitioner submitted a list of its employees, including freelancers, for the first seven months of 2006; its 2006 income expenses for the same period and its bank statements for the same period. Finally, the petitioner submitted its 2002 IRS Form 1120 tax return. In response to our May 19, 2008 notice, the petitioner submitted the first page of its 2006 and 2007 tax returns.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), 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 any year.

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 information on the petitioner's federal tax returns, audited financial statements or annual reports. 8 C.F.R. § 204.5(g)(2). As stated by the director, CIS relies on "the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses." Relying on *Elatos Restaurant Corp.*, 632 F. Supp. at 1054, prior counsel interpreted this statement as indicating that CIS will examine total income less cost of goods before deductions for depreciation and other expenses. Prior counsel misinterpreted both the director and the court in *Elatos Restaurant Corp.* In that case,

the petitioner sought to add back deductions for depreciation to its *net income*. *Id.* The court rejected that request, stating:

Reliance on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both INS and judicial precedent. *See, e.g., Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir.1984); *In re Sonogawa*, 12 I. & N. Dec. 612 (A.R.C.1967). Precedent also establishes that, in weighing a tax return as evidence of a prospective employer's financial viability, the INS may reasonably rely on **net taxable income** as reported on the employer's return. *See Ubeda v. Palmer*, 539 F.Supp. 647, 649-50 (N.D.Ill.1982), *aff'd*, 703 F.2d 571 (1983).

(Bold emphasis added.) *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989). In addition the court in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), held that the legacy Immigration and Naturalization Service (INS), 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. *Id.* The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *Id.* Thus, the director did not err in considering the petitioner's net taxable income rather than total income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The tax returns reflect the following information for the following years beginning in 2003, the year the priority date was established:

	2003	2004	2005	2006	2007
Compensation of officers	\$0	\$0	\$0	\$0	\$0
Salaries and Wages	\$0	\$0	\$0	\$0	\$0
Net income	\$1,327	\$88	\$8,339	\$10,657	\$12,521
Cost of Labor (Schedule A)	\$0	\$0	\$0	Unknown	Unknown
Current Assets (Schedule L)	\$13,426	Blank	Blank	Unknown	Unknown
Current Liabilities	\$6,321	Blank	Blank	Unknown	Unknown
Net current assets	\$7,105	Unknown	Unknown	Unknown	Unknown

As stated above, the petitioner has not demonstrated that it paid any wages to the beneficiary. In 2003 through 2007, the petitioner shows a net income of no more than \$12,521 and documented net current assets of no more than \$7,105. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage of \$83,200 out of its net income or net current assets. We further note that the petitioner's tax returns show no evidence of wages paid to any employee or freelance contractor (which would be included under cost of labor) during these years. Significantly, no wages are reflected on the petitioner's 2006 tax return despite the petitioner's submission of a list of employees and wages for that year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Prior counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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. Third, cash represented by bank statements should be reflected as cash on the petitioner's tax return, Schedule L, and cannot be considered without being balanced against the petitioner's current liabilities, not documented in most years in this matter.

Moreover, the bank statements only cover 2006, and, thus, cannot establish the petitioner's ability to pay the proffered wage in 2003 through 2005. Moreover, the petitioner's 2006 bank statements reflect end of month balances ranging from a low of -\$2,311.23 on July 31, 2006 to a high of \$9,618.34 on December 30, 2005. These amounts are not consistent with an ability to pay the annual proffered wage of \$83,200 during each of the years from 2003 through 2006.

Regarding prior counsel's reliance on *Masonry Masters, Inc.*, 875 F.2d at 903, for the proposition that the director should have considered the beneficiary's ability to generate income for the

petitioner, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Moreover, although part of the decision cited by counsel mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of legacy INS, now CIS, for failure to specify a formula used in determining the proffered wage. *Masonry Masters, Inc.*, 875 F.2d at 903. Further, in the matter before us, no detail or documentation has been provided to explain how the beneficiary's employment as a software developer will significantly increase profits for the petitioner, especially as the petitioner has no documented history of paying wages or salaries to any employee or contractor. Prior counsel's broad assertion that the beneficiary's employment will contribute to the petitioner's income cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage beyond the net income and net current assets considered by the director. The petitioner has not, therefore, shown the ability to pay the proffered wage as of the priority date in this matter.

Moreover, the petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. Therefore, 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 Regl. Commr. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

As we advised the petitioner in our May 19, 2008 notice, the petitioner's corporate status is currently suspended. According to the same website, <http://kepler.ss.ca.gov>, "suspended" means that the California corporation has lost all rights and powers for failure to meet statutory filing requirements of either the Secretary of State's office or the Franchise Tax Board. In response, counsel asserts that the petitioner "has always been running a bona fide enterprise." Counsel further asserts that on June 12, 2008, nearly two months after our notice, the petitioner "has applied for a reviver with the California Franchise Tax Board." Finally, the petitioner submits the first page of its 2006 and 2007 tax returns and 2006 and 2007 California Corporation Franchise or Income Tax Returns, which counsel asserts "should be able to effect a successful reviver of the corporation." The petitioner also submitted an Application for Certificate of Revivor dated June 12, 2008, but no evidence that this application was filed with the California Franchise Tax Board. Similarly, the new tax and franchise returns are not signed or dated. Moreover, the record contains no evidence that these returns were actually filed with the IRS or the State of California. Finally, as of September 18, 2008, the website <http://kepler.ss.ca.gov> still lists the petitioner's status as suspended. Thus, we cannot conclude that the job offer, if it ever was realistic, continues to be realistic.

### **Qualifications for the Job**

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).

As noted above, the ETA 750 in this matter is certified by DOL. DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (“Ninth Circuit”) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit revisited this issue, concluding that legacy INS, now CIS, “may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on Form ETA 750A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: “Master of Science”  
Major Field of Study: “Computer Education”

Experience: “3” years *in the job offered*.

Block 15: “Working knowledge of 3-Dimension programming [sic].”

The job offered, according to Box 9, is “Software Developer.” Thus, the Form ETA 750 indicates that the job requires three years experience as a software developer.

On the Form ETA 750B, signed by the beneficiary, she indicated that she had a Masters Degree in Computer Education from the Korea National University of Education and the following experience:

- Computer Teacher for an education center from March 1991 through August 2000,
- “Desigh [sic] and Development” for a university from March 1997 through Agusut 1998,
- “Design and Development” for an online educational center from April 1996 through December 1996,
- “Analysis, Design and Development” for an education center from Decembre 1998 through February 1999, and
- “Design and Development” for an Internet Provider from April 2000 through December 2001.

The petitioner did not initially provide any evidence of the beneficiary’s education and experience. In response to the director’s request for additional evidence, the petitioner submitted evidence that the beneficiary earned her Master’s Degree on August 28, 1998 and worked as a teacher from March 1991 through August 2000, with a break for maternity leave from September 1997 through February 1998. The petitioner submitted no evidence that the beneficiary ever worked as a software developer.

In light of the above, the petitioner has not established that the beneficiary has the three years of experience as a software developer required for the position.

### **Bona Fide Job Offer**

As stated in our May 19, 2008 notice, under the regulations at 20 C.F.R. §§ 656.20(c)(8) and 656.3, as in effect when the ETA 750 was filed in this matter, the petitioner has the burden, when asked, to show that a valid employment relationship exists and that a bona fide job opportunity is available to U.S. workers. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also Hall v. McLaughlin*, 864 F. 2d 868, 870 (D.C. Cir. 1989). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” *See Matter of Sunmart*, 374, 00-INA-93 (BALCA 2000).

As noted in our May 19, 2008 notice, the beneficiary’s spouse is the 100 percent shareholder of the petitioner. Counsel does not address this concern in his response. There is no evidence that DOL inquired as to whether there was a family relationship. Nevertheless, the beneficiary’s relationship to the sole shareholder in a company with three claimed employees, in combination with the petitioner’s failure to document wages paid to any employees, including the employee to whom the beneficiary will allegedly report according to the ETA 750, the petitioner’s suspended corporate status and the fact that the beneficiary does not meet the job qualifications, suggests that the petitioner’s representation to DOL that this is a bona fide job offer is at best questionable.

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.