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FILE: [Redacted]
WAC 06 038 50726

Office: TEXAS SERVICE CENTER Date: NOV 25 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 matter will be remanded to the director to obtain the original Form ETA 750 which is not found in the record of proceedings, and to revoke the approval of a prior petition previously submitted with the same Form ETA 750.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a software engineer 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 (DOL).¹ 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 2001 priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The record shows that the appeal is properly filed and 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.

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

¹ The AAO notes that the instant beneficiary is substituted for the original beneficiary, [REDACTED] (WAC 01 236 58779). USCIS computer records indicate that the I-140 petition that accompanied the original ETA Form 750 was approved on September 17, 2001. The petitioner then submitted a copy of the original ETA 750 with the instant I-140 petition. In an RFE dated April 12, 2006, the director requested the original Form ETA 750 from the petitioner. The petitioner responded that USCIS had the original Form ETA 750, and that at the time it filed the instant petition, it submitted a letter withdrawing the previous I-140 petition. The record of proceedings contains a copy of the petitioner's letter dated November 10, 2005 that states the petitioner withdrew the previous I-140 petition; however, United States Citizenship and Immigration Services (USCIS) computer records do not indicate any withdrawal or revocation of the earlier I-140 petition. The record reflects no original Form ETA 750. The petition will be remanded to the director to obtain the original ETA Form 750 and to revoke the prior approval of a previous petition based on the petitioner's request for withdrawal of the petition.

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 U.S. Department of Labor. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the copy of the Form ETA 750 found in the record was accepted on March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$37.02 an hour or \$77,001.60 per year.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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 an establishment date in 1998, to have a gross annual income of \$3,000,000, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on November 11, 2005, the beneficiary did not claim to have worked for the petitioner.

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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

² 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).

On appeal, counsel submits a letter dated April 3, 2007 from [REDACTED] Sunnyvale, California. [REDACTED] states that the petitioner received a letter from USCIS on March 14, 2007 requesting additional information regarding the petitioner's ability to pay the proffered wage.³ ⁴ The letter writer refers to the petitioner's Form 1120 tax returns for tax year 2004 to 2006 submitted with the I-140 petition and states that under generally accepted accrual method of accounting, the petitioner's financial statement would have had increases as account receivables in tax years 2004 to 2006. The letter writer also states that based on Forms 940,⁵ the petitioner paid wages of \$646,180 in 2004; \$811,113 in 2005; and \$1,016,926 in 2006, which establish the petitioner's ability to pay the proffered wage. [REDACTED] also notes that as of December 31, 2006, the petitioner had positive cash flow and \$695,675 cash available in the bank. [REDACTED] states that the petitioner has gone through the typical hard cycle of a software service provider company and that the liabilities of the company have been decreasing over the last couple of years. [REDACTED] refers to the petitioner's gross profit margin and net income for fiscal years 2003 to 2006. [REDACTED] concludes by stating the petitioner has the ability to pay the proffered wage of \$47 an hour⁶ to the beneficiary in 2006. The petitioner also submits an unaudited Compilation Report prepared by [REDACTED] company for the petitioner's financial information as of December 31, 2006.

The AAO notes that the petitioner's Forms 1120 tax returns for tax years 2004 to 2006 are not found in the record. The petitioner submitted its tax returns for tax years 2000 to 2003, apparently with the initial I-140 petition. Thus, [REDACTED] statements are not persuasive or relevant to these proceedings. The AAO further notes that the petitioner's 2000 tax return is not probative in these proceedings, based on the 2001 priority date for the copy of the ETA Form 750 found in the record. The AAO will not discuss the petitioner's 2000 tax return further in these proceedings.

Finally, the compilation report prepared by [REDACTED] is not audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the

³ The AAO does not find any RFE letter from USCIS in the record requesting further evidence of the petitioner's ability to pay the proffered wage.

⁴ [REDACTED] letter conflicts with counsel's assertion on the Form I-290B that the petitioner had not received an RFE with regard to its ability to pay the proffered wage. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (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." The AAO also notes that the purpose of the appeal is to provide the petitioner with the opportunity to submit further evidence as to any issue raised in the director's decision.

⁵ While counsel refers to IRS Form 940, U.S. Employer's Annual Federal Unemployment Tax Return, for tax years 2004 to 2006, no Forms 940 are found in the record.

⁶ The proffered wage as established on the copy of the ETA Form 750 is \$37.02 an hour. The record is not clear as to what proffered wage [REDACTED] refers.

financial statements of the business are free of material misstatements. The unaudited financial statement that counsel submits on appeal is not persuasive evidence. The accountant's report that accompanied this financial statement makes clear that it was produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 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 has not established that it employed and paid the beneficiary any wages or the full proffered wage from the 2001 priority date and onward.

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). 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.

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 116. “[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 16, 2006 with the receipt by the director of the petitioner’s submission in response to the director’s request for evidence with regard to the original Form ETA 750. As of that date, the petitioner’s 2006 federal income tax return was due, and the petitioner’s federal income tax return for tax years 2004 and 2005 were available. Although the petitioner’s accountant refers to these tax returns on appeal, the petitioner did not submit them to the record.⁷ Without these tax returns, the petitioner cannot establish its ability to pay the proffered wage as of the 2001 priority date and onward. For illustrative purposes, and to withdraw parts of the director’s decision, the AAO will examine the petitioner’s income tax returns for 2001 to 2003. The petitioner’s tax returns demonstrate its net income for tax years 2001 to 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$0.
- In 2002, the Form 1120 stated net income of -\$39,741.
- In 2003, the Form 1120 stated net income of \$19,316.⁸

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net income to pay the proffered wage.

⁷ 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)).

⁸ The director determined that the petitioner had net income of \$0 in tax year 2003; however, the petitioner’s tax return, line 28, indicates net income of \$19,316. This part of the director’s decision is withdrawn.

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 assets. 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, USCIS 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.⁹ 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 tax years 2001 through 2003, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$2,552.
- In 2002, the Form 1120 stated net current assets of -\$29,072.
- In 2003, the Form 1120 stated net current assets of \$22,592.¹⁰

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 AAO further notes that USCIS computer records reflect that the petitioner filed 38 immigrant or non-immigrant petitions in the period of time between the 2001 priority date and to the present. If any of these I-140 petitions were filed for the same position with the same wages, and within the

⁹According 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.

¹⁰ The director in her decision determined that the petitioner's net current assets for tax year 2003 were sufficient to pay the proffered wage. However, the proffered wage is \$77,001.60. Thus, the petitioner's net current assets of \$22,592 are not sufficient to pay the proffered wage. This part of the director's decision is withdrawn.

2001 priority year, the petitioner must show that it had sufficient income to pay all the wages at the 2001 priority date.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage based on its net current assets; however, the record does not support counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 record reflects that the petitioner was established in 1998, and that as of the filing date of the instant petition, had 20 employees. The petitioner's gross receipts and wages and salaries in tax years 2001 and 2003 fluctuate from around \$2,042,541 in 2001 and 2002 to \$2,896,949 in 2003. The petitioner paid officer compensation to two officers during tax years 2001 to 2003; however this compensation was not significantly higher than the proffered wage. The record reflects no further evidence as to the petitioner's profile within the software development industry, or other similar issues. The petitioner provides no further explanation for its lack of net income during the 2001 priority year and negative net income in tax year 2002. The record also does

not contain any evidence as to the petitioner's ability to pay the proffered wage in the tax years subsequent to 2003. 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. 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. Further, the petition is remanded to the director to obtain the original Form ETA 750 which is not found in the record of proceedings, and to revoke the prior approval of a previous petition based on the petitioner's request for withdrawal of the petition.