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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 169 53132

Office: TEXAS SERVICE CENTER

Date: SEP 14 2009

IN RE:

Petitioner:

Beneficiary:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner claims to be a transportation solutions company. It seeks to employ the beneficiary permanently in the United States as a database administrator. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the Department of Labor (DOL).

As set forth in the director's May 23, 2007 denial, the primary 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.

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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.¹

The evidence in the record of proceeding includes the following:

- Petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2006.
- Petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2007.
- Beneficiary's 2006 Form W-2, Wage and Tax Statement, issued by the petitioner.
- Petitioner's unaudited financial statements for the five month period ended May 31, 2007.
- Petitioner's monthly bank statements from January 2006 through April 2007.
- Letter from [REDACTED] branch manager of American First National Bank, dated May 17, 2007, stating that the petitioner has been a customer of the bank since 2002 and maintains an average balance in the "low six figures."
- Petitioner's payroll report for the beneficiary for January 2007 through June 2007.
- Beneficiary's paychecks dated January 1, 2007, February 1, 2007, February 13, 2007, March 9, 2007, April 8, 2007, and May 1, 2007.

¹The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

- Letter from the petitioner, dated June 18, 2007, stating that the beneficiary is replacing an outsourced database management service. The letter also claims that the petitioner has entered into a new contract that will increase its revenues. A copy of the contract is attached to the letter.
- Beneficiary's master of business administration diploma and transcript from the University of Central Oklahoma.
- Employment experience letter by [REDACTED] of DTG-Kingsley Tools, Inc., dated October 1, 2006, stating that the beneficiary was employed by the company as a database administrator from January 2001 to October 2006.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2) provides immigrant classification to members of the professions holding advanced degrees. In order to obtain classification in this employment-based preference category, the labor certification must require a member of the professions holding an advanced degree,² and the petitioner must demonstrate that the beneficiary is a member of the professions holding an advanced degree³ who meets the requirements of the job offered as set forth in the labor certification.⁴

The petitioner must also establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also establish that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The priority date of the instant petition is March 7, 2007. The proffered wage stated on the labor

²8 C.F.R. § 204.5(k)(4).

³8 C.F.R. § 204.5(k)(3).

⁴8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

certification is \$60,070.00 per year. The labor certification states that the offered position requires a master's degree in "computer science or equivalent" and two years of experience in the job offered. On the labor certification, signed by the beneficiary on May 4, 2007, the beneficiary claimed to have worked for the petitioner since November 1, 2006.

On the petition, the petitioner claimed to have been established in 1979, to have a gross annual income of \$2,588.453 and to employ six workers. According to the tax returns in the record, the petitioner is structured as a C corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The record contains the beneficiary's 2006 Form W-2. The labor certification states that the beneficiary initiated employment with the petitioner on November 1, 2006. Accordingly, the Form W-2 only reflects earnings of \$3,900.00. The record also contains a payroll report for January 2007 through June 2007. This report indicates that the petitioner paid the beneficiary \$3,900.00 per month during that period. An internally generated and unaudited report is not reliable evidence that the petitioner paid the beneficiary the stated amounts. The record also contains copies of the beneficiary's paychecks dated January 1, 2007, February 1, 2007, February 13, 2007, March 9, 2007, April 8, 2007, and May 1, 2007. However, there is no evidence that the paychecks were cashed since the petitioner only provided copies of the front sides of the paychecks. Therefore, the petitioner has established that it paid the beneficiary \$3,900.00 in 2006, but the submitted payroll report and paychecks are not sufficient to establish that the beneficiary was paid \$3,900.00 per month from January 2007 through June 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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).

At the time the director issued the request for evidence (RFE) on May 17, 2007, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available.⁵

⁵The regulation at 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The regulation also states that, "[i]n appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner." *Id.* In the instant case, less than four months elapsed from the filing of the labor certification on March 7, 2007, and the submission of the appeal on June 22, 2007. At the time the petitioner filed the appeal, its 2007 federal tax return was not yet due. Given the unusually abbreviated timeline, the AAO will consider the petitioner's 2006 federal tax return in determining its ability to pay the proffered wage, notwithstanding the fact that it covers the year prior to the priority date. In addition, all other additional evidence in the

The petitioner's 2006 tax return indicates a net income of \$5,506.⁶ Therefore, in 2006, the petitioner did not have sufficient net income to pay the difference between the wage paid and the 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, USCIS will review the petitioner's assets. The petitioner's total assets are not 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, 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.⁷ 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 2006 tax return establishes that the petitioner had net current assets of \$32,243.⁸

record of proceeding that is relevant to the petitioner's ability to pay the proffered wage will be considered. *See id.*; *see also Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

⁶For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

⁷According 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.

⁸On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18. It is noted that the director incorrectly calculated the petitioner's net current assets for 2006. The director also incorrectly added the petitioner's net income to its net current assets. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage – one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective snapshot of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive its net current assets during the coming year. Given that net income is

The petitioner did not have sufficient net current assets to pay the proffered wage. Even considering that it paid the beneficiary \$3,900.00 in 2006. Therefore, the petitioner's 2006 net current assets, when added to the salary it paid the beneficiary in 2006, are not sufficient to pay the proffered wage.

The record contains the petitioner's unaudited financial statements prepared by the petitioner's accountant for the period ended May 31, 2007. The financial statements indicate that, for the first five months of 2007, the petitioner had net income of \$49,997.84 and net current assets of \$82,238.42. The accountant's letter accompanying the financial statements claim that they were prepared on an accrual accounting basis based on the representations of management. 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 financial statements of the business are free of material misstatements. The accountant's letter that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. 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.

The record also contains the petitioner's bank statements for the period from January 1, 2006 to December 31, 2006, and January 1, 2007 through April 30, 2007; and a letter from the petitioner's bank, stating that the petitioner has been a customer of the bank since 2002 and maintains an average balance in the "low six figures." The petitioner's monthly bank statements for 2007 show ending balances of \$167,097.14 in January, \$156,392.04 in February, \$156,611.34 in March, and \$109,714.28 in April. In addition, the petitioner's end of month bank account balances in 2006 range from \$64,000 to over \$250,000. 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. Bank statements, without more, are unreliable indicators of the petitioner's ability to pay the proffered wage because they do not identify funds that are already obligated for other purposes. Also, funds reported on bank statements are generally already reflected on the petitioner's tax return, such as taxable income or current assets

In addition to the preceding analysis, 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. 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

retrospective and net current assets are prospective in nature, the AAO does not combine the two figures to illustrate the petitioner's ability to pay the proffered wage. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

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 claims to have been in business since 1979. The petitioner's 2006 tax return indicates an annual payroll of \$178,537. The petitioner's Form 941 for the first quarter of 2007 indicates a quarterly payroll of \$62,165.75, which is an increase from 2006. The petitioner's 2006 tax return shows gross sales of \$2,588,453.⁹

The record contains a letter from the petitioner, dated June 18, 2007. The letter states that the petitioner "has been paying [a] Management Fee of \$5,000/month or \$60,000/year" to an outside company for database management services. The letter claims that the beneficiary will "manage, design and develop [the petitioner's] database and Enterprise Resources Planning (ERP) program," thereby replacing the \$60,000 per year management service. The letter is corroborated by the petitioner's 2006 tax return, which contains a \$60,000 operational expense itemized as a "management fee." The petitioner's statement, together with the corroborating tax return, is sufficient to establish that the beneficiary is replacing a \$60,000 outsourced service.¹⁰

⁹Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612.

¹⁰The letter also states that the petitioner entered into a new contract that resulted in an increase in its 2007 revenues. Attached to the letter is a translated copy of a contract between the petitioner and Rexchip Electronic Co., Ltd. The contract is undated and the record does not contain any invoices or evidence of payment arising from the contract. Future projected earnings are insufficient to show the petitioner's ability to pay the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states: "I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon

In summary, the size of the petitioner's operations and its longevity cannot be overlooked. The petitioner has over \$2.5 million a year in sales, has been in business for forty years, and remains in good standing with the State of Texas. Further, by employing the beneficiary, the petitioner is replacing an outsourced service costing \$60,000.00 per year.

Assessing the totality of circumstances in this individual case, it is concluded that the petitioner has established its financial strength and viability and that it has the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained and the petition is approved.

probability and projections." A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *See also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).