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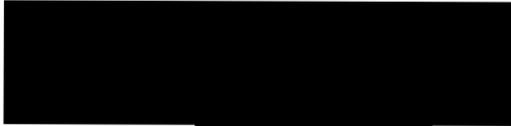
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED]
LIN 07 020 51105

Office: NEBRASKA SERVICE CENTER

Date: SEP 22 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:
SELF-REPRESENTED

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).

John E. Grissom
Acting 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 health/public health informatics firm. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, the petitioner contends¹ that it has demonstrated its ability to pay the proffered wage and requests a 90 day extension in which to submit additional tax returns and perform an audit.

As of this date more than two years later, nothing further has been submitted to the record of proceedings. Therefore this decision will be rendered as the record currently stands.

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).

Section 203(b)(2)(A) of the Act states in pertinent part:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees . . . whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) further states, in relevant 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.

¹The petitioner filed the appeal on its own, although the record demonstrates that the petitioner was formerly represented and that counsel had filed the Form I-140 on the petitioner's behalf.

Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also 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 DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on August 14, 2002.² The proffered wage is stated as \$78,600 per year. Part B of the Form ETA 750, signed by the beneficiary on June 22, 2002, indicates that the petitioner has employed the beneficiary since January 2002 to the present (date of signing).

The visa preference petition was filed on October 23, 2006. Part 5 of the petition indicates that the petitioner was established in 1997, claims a gross annual income of \$1.43 million and currently employs 24 workers.

In support of its continuing financial ability to pay the certified wage of \$78,600 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2002, 2003 and 2004. The tax returns indicate that the petitioner's fiscal year is a standard calendar year.³ The tax returns contain the following information:

	2002	2003	2004
Net Income	\$ 2,883	\$ 41,962	\$-0-
Current Assets	\$10,141	\$195,552	\$54,052

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

³ The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Current Liabilities	\$28,548	\$167,222	\$28,534
Net Current Assets	-\$18,407	\$ 28,330	\$25,518

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted copies of an Internal Revenue Service (IRS) form requesting an extension of time to file its 2005 federal tax return, copies of three payroll records indicating wages paid to the beneficiary in August and September 2006, as well as copies of Wage and Tax Statements (W-2s) issued to the beneficiary by the petitioner. They reflect the following compensation paid:

Year	Wages Paid	Difference from Proffered Wage
2002	\$60,000	-\$18,600
2003	\$62,000.03	-\$16,599.97
2004	\$64,360.04	-\$14,239.96
2005	\$65,991.57	-\$12,608.43
2006	\$71,002.64	-\$ 7,597.36

Additionally, the petitioner submitted a copy of a 2005 unaudited financial statement consisting of a balance sheet and income statement, copies of National Institute of Health grant award notices covering a period from 2002 to 2004, copies of two invoices issued in 2005 and 2006 to Johns Hopkins University for professional services and software, as well as a copy of a 2006 letter memorializing a 2006 agreement with Kennedy Krieger Institute to develop software relating to an interactive autism network, and a copy of a January 17, 2007 article referring to the petitioner's agreement to partner with three other entities in developing health research software.

Additionally, USCIS records reflect that the petitioner has filed for another beneficiary for permanent residence and has submitted a number of H-1B petitions.⁴ Where multiple

⁴ The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

beneficiaries are sponsored by a petitioner for permanent residence, it must show that it has had the ability to pay all the respective wages for the beneficiaries for whom it has filed employment-based petitions.

The director denied the petition on February 26, 2007. He determined that the petitioner failed to demonstrate its ability to pay the proffered wage in 2002, 2005 and 2006. The director noted that the financial statement provided to the record had not been audited in accordance with the requirements of 8 C.F.R. § 204.5(g)(2), and that the beneficiary's 2006 W-2 was inclusive of his earnings as reflected on the 2006 payroll records.

In order to determine a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, the record does not indicate that the petitioner employed the beneficiary. In this matter, as noted above, the petitioner has employed the beneficiary since 2002. The shortfalls reflected as the difference between the actual wages paid to the beneficiary and the proffered wage for the 2002-2006 years are reflected as -\$18,600 in 2002; -\$16,599.97 in 2003; -\$14,239.96 in 2004; -\$12,608.43 in 2005; and -\$7,597.36 in 2006.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during 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 receipts and wage expense is misplaced. 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 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 USCIS should have considered

income before expenses were paid rather than net income. In this regard, the copies of award notices covering the 2002 to 2004 period of time, as noted by the director, would have been included in the petitioner's gross income for those respective years. Although the copies of invoices and agreements from 2005 and 2006, as well as the 2007 media article indicate revenue generation during those years, without a tax return or audited financial statement to reflect the petitioner's expenses necessarily incurred to generate that income, it is not possible to determine that it has established its ability to pay the proffered wage during 2005 and 2006.

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).

It is noted that the 2005 financial statement submitted by the petitioner’s administrator are designated as “unaudited-for management purposes only.” USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). 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 unaudited financial statement that the

petitioner provided is not persuasive evidence. They are based on the representations of management and are not probative of the petitioner's ability to pay the proffered wage.

The petitioner must establish that each job offer was realistic as of the respective 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 this case, in 2003, the petitioner's net income of \$41,962 could cover the \$16,599.97 difference remaining from the comparison of the actual wages paid to the beneficiary and the proffered wage. However, the petitioner would need to demonstrate that it could pay the wage for both sponsored workers depending on the other priority date.

In 2004, the petitioner's net current assets of \$25,518 provided sufficient funds to cover the \$14,239.96 difference between the beneficiary's actual wages and the proffered wage. Similarly, while the petitioner could demonstrate its ability to pay the \$14,239.96 difference between the wages paid to the beneficiary and the proffered wage in 2004, the petitioner must be able to show that it could pay the other sponsored worker, depending on the priority date. We cannot determine on the record that the petitioner is able to do so.

However, in 2002, neither the petitioner's net income of \$2,883 nor its -\$18,407 in net current assets could cover the shortfall of \$18,600 remaining from the comparison of the beneficiary's actual wages of \$60,000 and the proffered wage of \$78,600.

Similarly, in 2005, the beneficiary was paid \$65,991.57 or \$12,608.43 less than the proffered wage. As no regulatory evidence of a tax return, audited financial statement or annual report (based on audited financials) was provided to the record, the petitioner failed to establish its ability to pay the certified salary in this year.

In 2006, the beneficiary was paid \$71,002.64 or \$7,597.36 less than the proposed wage offer. Similar to 2005, no tax return, audited financial statement or annual report (based on audited financials) was provided to the record. The petitioner failed to demonstrate that it could cover the \$7,597.36 difference between the proffered wage and the actual wages paid to the beneficiary. The petitioner additionally failed to submit such evidence on appeal. 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)).

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on

both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. In this case, the petitioner's three tax returns contained in the record consistently reflect losses as net income and net current assets in each year and do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Insufficient evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and assertions submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing 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 not met that burden.

ORDER: The appeal is dismissed.