

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5



Date: DEC 13 2011

Office: NEBRASKA SERVICE CENTER

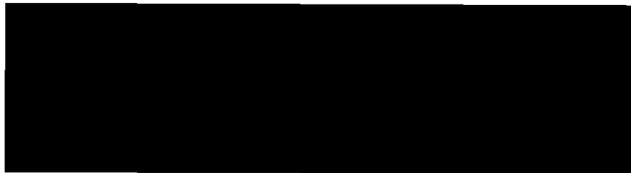


IN RE: Petitioner:
Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition on February 12, 2008. The petitioner filed an appeal with the Administrative Appeals Office (AAO) on March 14, 2008. The appeal will be dismissed.

The petitioner is a software consulting business. 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). As required by statute, an ETA Form 750, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition.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 priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and the beneficiary's 2005 financial statement. The AAO will conclude that the petitioner has failed to demonstrate its continued ability to pay from the priority date onwards. The AAO will also conclude that the petitioner has failed to demonstrate effectively the beneficiary's prior employment experience. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

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

¹ This petition involves the substitution of the labor certification beneficiary. DOL formerly permitted the substitution of beneficiaries. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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, which is the date the ETA Form 750, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. 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 ETA Form 750, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the petitioner filed the ETA Form 750 on June 5, 2002. The proffered wage as stated on the ETA Form 750 is \$75,000.00 per year. The ETA Form 750 states that the position requires a master's degree in computer science, business, or engineering (any branch) or its foreign equivalent and one year of experience in the proffered position or in the related occupation of programmer analyst, consultant, or systems analyst.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to employ 28 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 750, signed by the beneficiary on May 12, 2006, 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 Form 750 alien employment certification application establishes a priority date for any immigrant petition later based on the ETA Form 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'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently.

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); *see also Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Federal courts have upheld the use of federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). *See 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on October 12, 2007 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's 2006 federal income tax return was due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002 to 2006, as shown in the table below.

- In 2002, the Form 1120S stated net income of \$12,556.00.²
- In 2003, the Form 1120S stated net income of \$11,316.00.
- In 2004, the Form 1120S stated net income of \$90,191.00.

² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Internal Revenue Service (IRS) Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on 23 of Schedule K for 2002 and 2003 and on line 17e for 2004 and 2005. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 7, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, depreciation, expenses, and property distributions shown on its Schedule K for its 2002 to 2005 tax returns, the petitioner's net income is found on Schedule K of its tax returns for those years.

- In 2005, the Form 1120S stated net income of \$47,059.00.
- In 2006, the Form 1120S stated net income of \$151,535.00.

Therefore, for 2002, 2003, or 2005, the petitioner did not have sufficient net income to pay the proffered wage. For 2004 and 2006, the petitioner did have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 2002, 2003, and 2005, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$161,306.00.
- In 2003, the Form 1120S stated net current assets of \$136,013.00.
- In 2005, the Form 1120S stated net current assets of \$32,573.00.

Therefore, for 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2002 and 2003, the petitioner did have sufficient net current assets to pay the proffered wage.

Therefore, from the date the DOL accepted the ETA Form 750 for processing, 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, its net income, or its net current assets.

USCIS electronic records show that the petitioner filed approximately 73 other Form I-140 and Form I-129 petitions, which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the

³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145. *See also* 8 C.F.R. § 204.5(g)(2). Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner.

On appeal, counsel submits the petitioner's financial statement from 2005, which counsel states demonstrates that the petitioner had \$577,496.23 in accounts receivable for that year. The petitioner submitted a letter from its accountant, [REDACTED] dated November 9, 2007, stating that she had not performed an audit or review of the petitioner's compiled finances for 2004 to 2006. However, on March 10, 2008, she states that her company reviewed the petitioner's 2005 financial statement. The AAO finds that a reviewed financial statement is substantially less in scope than an audit. The petitioner's reliance on unaudited financial records is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. *See* <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed December 9, 2011). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns prepared pursuant to one method, but then, on unaudited financial statements, seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purposes. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

Moreover, while the Certified Public Accountant who prepared the 2002 and 2003 tax returns indicated that he was using the cash accounting method, he listed accounts receivable in both years. Most significantly, there is a major discrepancy between the petitioner's 2005 tax return and the 2005 reviewed financial statement that is unrelated to the accounting method used. Specifically, according to the 2005 tax return, schedule L, the petitioner ended 2005 with \$5,000 in stock, no additional paid-in-capital and \$31,177 in retained earnings, for total equity of \$36,177. According to

the December 31, 2005 reviewed balance sheet, however, the petitioner had \$557,201 in stockholder's equity as of that date. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not resolve the above inconsistency.

The petitioner has additionally submitted the petitioner's bank account statements from 2005 and 2006. The petitioner's reliance on the balances in its bank accounts 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, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or cash as provided on Schedule L.

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 ETA Form 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 (Reg'l Comm'r 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.

The record contains no favorable factors that fall outside of the petitioner's net income and net current assets. Instead, the AAO notes that the petitioner listed negative cash on Schedule L, line 1 in 2002 through 2005.

In the instant case, the petitioner has failed to establish that it has the ability to pay all of its Form I-129 or Form I-140 beneficiaries. The petitioner has also failed to demonstrate its ability to pay the beneficiary the proffered wage in 2005. 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.

Beyond the decision of the director, the AAO notes that the petitioner has provided contradictory information within the record of proceeding regarding the beneficiary's prior work experience. The record of proceeding includes the following forms on which the beneficiary has attested to his employment:

1. A Form G-325A accompanying a November 14, 2006 Form I-485 Application to Register Permanent Residence or Adjust Status that the beneficiary signed on October 30, 2006;
2. A Form ETA 750B accompanying the instant petition that the beneficiary signed on May 12, 2006;
3. A Form G-325A accompanying a previous Form I-485 adjustment application filed May 25, 2004 that the beneficiary signed on April 27, 2004; and
4. A Form ETA 750B accompanying a previous Form I-140 petition that the petitioner signed on April 27, 2004.

On the 2006 Form ETA 750B and Form G-325A the beneficiary listed that he worked for [REDACTED] from August 2002 to September 2004. On the 2004 ETA 750B and Form G-325A, however, the beneficiary indicated he worked for [REDACTED] from March 2002 to March 2004. Even the letters from this employer are inconsistent. Specifically, the petitioner submitted a letter from that employer dated November 22, 2005, stating that the beneficiary worked there from August 2002 to September 2005. The petitioner had previously submitted a letter from that same employer dated April 28, 2004, stating that the beneficiary began working there in March of 2002 and specifying no ending date.

Additionally, on the 2006 Form G-325A the beneficiary listed that he had worked for [REDACTED] from July 2001 to July 2002. The beneficiary indicated the same starting date on the 2006 Form ETA 750B but indicated that he stopped working there in August 2002. The beneficiary, however, failed to list any employment for [REDACTED] on

the 2004 Form ETA 750B or Form G-325A even though those documents were filed in connection with a petition [REDACTED] filed in behalf of the beneficiary.

Matter of Ho, 19 I&N Dec. at 591-592, 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 record of proceeding does not resolve these discrepancies.

While the beneficiary's education qualifies him for the classification sought without documenting additional experience, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.