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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 04 2007

WAC 05 052 52015

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 30, 2001. The proffered wage as stated on the Form ETA 750 is $32.61 per hour, which equals $67,828.80 per year.

The Form I-140 petition in this matter was submitted on December 10, 2004. On the petition, the petitioner stated that it was established on October 31, 1990 and that it employs six workers. The petition states that the petitioner's gross annual income is $1,648,114. The petitioner did not report its net annual income in the space provided for that purpose. On the Form ETA 750, Part B, signed by the beneficiary on March 21, 2001, the beneficiary did not claim to have worked for the petitioner. The petition indicates that the petitioner would employ the beneficiary in La Puente, California.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) copies of the petitioner's owner's 2001 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Return, (2) the petitioner's unaudited 2001, 2002, 2003, and 2004 balance sheet and its 2002 and 2003 income statements, (3) statements pertinent to the petitioner's and the petitioner's owner's monthly expenses, (4) a mortgage loan statement, (5) a printout of houses listed for sale, (6) a document labeled "Equity Computation," (7) a monthly statement pertinent to the petitioner's owner's business checking account, (8) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the last two quarters of 2004 and the first two quarters of 2005, (9) a September 27, 2006 statement by the petitioner's owner pertinent to wages paid to the beneficiary, and (10) the beneficiary's 1999 and 2000 Form 1040 U.S. Individual Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Schedules C attached to the petitioner's owner's tax returns show that he owned the petitioner as a sole proprietorship during all of the salient years.

The 2001 Schedule C shows that the petitioner returned net income of $14,928 during that year. The petitioner's owner declared 2001 adjusted gross income of $13,873, including the petitioner's profit offset by deductions.

The 2002 Schedule C shows that the petitioner returned net income of $11,305 during that year. The petitioner's owner declared 2002 adjusted gross income of $10,506, including the petitioner's profit offset by deductions.

The 2003 Schedule C shows that the petitioner suffered a loss of $57,130 during that year. The petitioner's owner declared a loss of $57,130 as his 2003 adjusted gross income.

The 2004 Schedule C shows that the petitioner suffered a loss of $28,652 during that year. The petitioner's owner declared a loss of $28,652 as his 2004 adjusted gross income.

The mortgage loan statement shows that the petitioner's owner owed $377,908.05 on a parcel of real property at [redacted] on July 14, 2005. That mortgage loan statement indicates that the petitioner's owner has a monthly mortgage payment on that property of $2,390.80.

Two budgets were presented. The first indicates that the petitioner has recurring monthly expenses of $7,677.80, which equals $92,133.60 annually. That budget indicates that the petitioner's owner has a monthly mortgage payment of $1,397.80.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In a statement on appeal counsel indicated that the petitioner's owner had included his business's recurring monthly expenses in what was thought by CIS to be the petitioner's owner's personal budget. A revised budget shows that the petitioner's owner has recurring monthly expenses of $3,368.46 per month, which equals $40,421.50 per year. That second budget statement indicates that the petitioner's owner has a monthly mortgage payment of $978.46.

This office notes that the petitioner's owner previously indicated that he had a monthly mortgage payment of $1,397.80. Subsequently the petitioner's owner indicated that figure was actually the total of the monthly payment of $978.46 on a mortgage on the petitioner's owner's residence and a monthly payment of $419.34 on a mortgage attributable to the business. The monthly mortgage statement submitted, however, indicates that the petitioner's owner has a monthly payment of $2,390.80 on the property located at n La Puente, California.

The discrepant figures pertinent to the petitioner's owner's monthly mortgage payment are not readily reconcilable. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The house listing printout shows that on August 4, 2005 six properties were listed for sale in La Puente, California for prices ranging from $455,000 to $699,999. Whether that is an exhaustive list is unknown to this office. Whether the houses shown on that list are comparable to the petitioner's owner's property is unknown. Whether those houses were subsequently sold, and at what price, is unknown.

The Equity Computation document states that the value of the petitioner's owner's property is $573,888 "based on Comparable Property on the Market (4 beds/3baths, 2,040 sq. ft, 6,000 sq. ft living/lot area)." The document further states that the balance of the petitioner's owner's mortgage on that property is $377,908.05 and computes the equity, therefore, as $195,979.05.

The petitioner's quarterly returns show that it paid total wages of $159,881.24, $97,725.62, $44,748.48, and $80,968.77 during the third and fourth quarters of 2004 and the first and second quarters of 2005, respectively.

In the September 27, 2005 wage statement the petitioner's owner states that the petitioner paid the beneficiary $3,920, $5,880, $4,480, and $5,040 during 2001, 2002, 2003, and 2004, respectively.

The beneficiary's 1999 and 2000 tax returns are not relevant to any issue material to this case. If the petitioner had provided the beneficiary's later tax returns they might have confirmed the petitioner's owner's statement about the wages paid to the beneficiary. The record, however, contains no contemporaneous evidence of those wage payments.

The director denied the petition on August 29, 2005.

On appeal, counsel asserted (1) that "The beneficiary was paid $3,920 for contracted work for 2001" and that because the petitioner paid others to perform the duties of the proffered position during the salient years the amounts paid to them should be subtracted from the amount the petitioner must show the ability to pay during that year, (2) that the proffered wage should be prorated during 2001 to reflect the number of months remaining after the priority date, (3) that the equity in the petitioner's owner's real property demonstrates that the petitioner is able to pay the proffered wage, (4) that the petitioner's total wages and labor costs are indices of its ability to pay the proffered wage, and (5) that the petitioner's net current assets were sufficient during each of the salient years to pay the proffered wage. Counsel relied, in making this assertion, on the figures for the petitioner's current assets and current liabilities as shown on its unaudited financial statements.

Counsel also cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date based on the Totality of Circumstances test and that the visa petition may be approved notwithstanding losses or annual profits lower than the annual amount of the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.[2] 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 reported on its tax returns.

Counsel's reliance on unaudited financial records is similarly 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 unaudited financial statements will not be considered.

The petitioner's unaudited financial statements are the only evidence in the record from which the petitioner's net current assets may be calculated. Because those documents are insufficiently reliable the petitioner's net current assets will not be considered.

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[2] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel's citation of the petitioner's total wage and labor costs[3] as an index of its ability to pay the proffered wage, and of amounts allegedly paid to contractors to perform the duties of the proffered position, does not convince this office.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[4] or otherwise increased its net income,[5] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

If the petitioner had demonstrated that some portion of its outside labor expense was paid for the performance of the duties of the proffered position, electrician, and that hiring the beneficiary would have obviated that expense, then the amount of the petitioner's outside labor expense that hiring the beneficiary would have obviated might have been considered a fund available to pay the proffered wage. In the instant case, however, the record contains no evidence, nor even an allegation, that any part of the petitioner's outside labor expense during the salient years was paid to electricians. The petitioner's outside labor expense will not be considered in the determination of its continuing ability to pay the proffered wage beginning on the priority date.

The record does not demonstrate that the estimate of the value of the petitioner's owner's house is reliable. A reliable, disinterested real estate appraisal would typically be performed by a licensed or certified real estate appraiser. Here the record does not make clear who generated the estimate of market value. It is neither alleged nor assumed that the person who provided that value estimate is disinterested or competent to perform real estate valuations.

The amount by which the property is encumbered is insufficiently demonstrated. Although the record contains evidence of one mortgage loan no evidence was submitted to demonstrate that the property is

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[3] The Schedules C submitted show that the petitioner paid employee wages of $165,694 during 2001, $153,034 during 2002, $0 during 2003, and $485,310 during 2004. Appended expense schedules show that the petitioner had outside (non-employee) labor costs of $0 during 2001, $20,025 during 2002, $89,655 during 2003, and $1,574,692 during 2004.

[4] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[5] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

otherwise unencumbered. A list of a property's encumbrances would typically be generated by a real estate title search. This office finds that the petitioner did not demonstrate that the property is encumbered only in the amount represented.

Even if the value of the property and the amount by which it is encumbered were sufficiently demonstrated, that would be insufficient to show that the difference, the amount of the petitioner's owner's equity, was available to pay wages. The petitioner's owner will not necessarily realize the value of that property in cash in the near future and that value has not, therefore, been shown to be available to pay wages.

The petitioner's owner could secure a home equity loan with whatever equity he has in his home. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of the petitioner's owner's equity in real property owned will not be considered in evaluating the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 is unconvincing. *Sonegawa* does, in fact, stand for the proposition that a loss or low profits during a given year does not preclude approval of an employment-based visa petition. *Sonegawa*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Although counsel asserts, on appeal, that the petitioner's business has steadily improved and the petitioner anticipates additional growth in the future, the record contains no evidence that the petitioner has ever posted a large profit and the petitioner's profits and losses as reported on its tax returns show a pattern of decline or, at best, fluctuation. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 through 2004 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (CIS) 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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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's owner stated amounts he paid to the beneficiary during various years, but provided no contemporaneous evidence. Especially in view of the discrepancies in the evidence provided, the petitioner's owner assertion is insufficiently reliable. The amounts allegedly paid to the beneficiary will not be included in the calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained her and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is $67,828.80 per year. The priority date is March 30, 2001.

During 2001 the petitioner's owner declared adjusted gross income of $13,873. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of $10,506. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner's owner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on December 10, 2004. On that date the petitioner's 2005 tax return was unavailable. On January 3, 2005 and May 19, 2005 the service center issued requests for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.