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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 20 2007
SRC 06 209 51805

IN RE: Petitioner: [REDACTED]
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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a drycleaners. It seeks to employ the beneficiary permanently in the United States as a dry-cleaning supervisor. 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 the granting of 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 ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on October 20, 2003. The proffered wage as stated

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

on the ETA 750A is \$54,242 per year. Part B of the ETA 750, signed by the alien beneficiary on October 9, 2003, does not indicate that he has worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on June 27, 2006, it is claimed that the petitioner was established on October 6, 2001, claims an annual gross income of \$1,724,000 and currently employs thirty-six workers.

In support of its continuing financial ability to pay the certified wage of \$54,242 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003 and 2004. They indicate that the petitioner uses a standard calendar year to file its taxes. The returns contain the following information relevant to the petitioner's net income, current assets, current liabilities and net current assets:

| | 2003 | 2004 |
|--------------------------------------|------------|------------|
| Net Income ² (Form 1120S) | -\$310,524 | -\$297,460 |
| Current Assets (Sched. L) | \$ 59,668 | \$ 86,097 |
| Current Liabilities (Sched. L) | \$487,399 | \$564,466 |
| Net Current Assets | -\$427,731 | -\$478,369 |

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) 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. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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 did not submit any W-2s indicating that it had employed the beneficiary, but did provide a letter, dated January 13, 2006, from its general manager, [REDACTED] who also identifies himself as the petitioner's accountant. The letter requests the director to note the monies expensed as officers compensation, amounting to \$65,600 and \$69,600 in 2003 and 2004 and to add back these amounts that represented profit to the company and were distributed as a tax avoidance measure. The manager also requested the director to add back the depreciation and amortization expenses totaling \$421,141 and \$316,780 in 2003 and 2004, respectively, because they represented non-cash deductions. Along with this letter, the petitioner submitted unaudited financial statements consisting of a balance sheet and an income statement covering the first three quarters of 2005, as well as a list of employees as of March 2005. Several employees, including the majority shareholder, S. A.

² For the purpose of this review, net income refers to the amount claimed on line 21 (Ordinary Income) on Form 1120S.

are listed as bearing a similar family name of as that of the beneficiary, whose last name is given as on the I-140, but the preceding initials appear to be different.³

The director issued a notice of intent to deny on July 24, 2006. She noted that the petitioner's 2003 and 2004 tax returns reflected negative balances for its net income in each year and negative balances representing the amount by which the current liabilities exceeded current assets in each year. She requested that the petitioner provide copies of the beneficiary's Wage and Tax Statements (W-2s) if it had employed the beneficiary during the period from 2003 through 2005 and additionally requested evidence of the beneficiary's qualifying past employment experience.

In response, former counsel submitted a letter asserting that the previously supplied documentation established the petitioner's ability to pay the proffered wage. Accompanying this letter were copies of two employment verification letters relating to the beneficiary's past qualifying employment.

The director denied the petition on September 1, 2006. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage because neither its net income, nor the difference between its current assets and current liabilities as shown on the 2003 and 2004 tax returns, was sufficient to cover the proposed wage offer.

On appeal, counsel submitted a copy of the petitioner's 2005 federal income tax return. It reflects the following:

| | 2005 |
|--------------------------------|------------|
| Net Income (Form 1120S) | -\$157,612 |
| Current Assets (Sched. L) | \$ 71,743 |
| Current Liabilities (Sched. L) | \$475,286 |
| Net Current Assets | -\$403,543 |

Counsel additionally provided copies of unaudited financial statements for 2003, 2004, 2005, and the first half of 2006. Further supplied are copies of the petitioner's checking account bank statements for 2003, 2004, 2005 and the first eight months of 2006.

On appeal, citing *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the petitioner's owner asserts that in the determination of the

³ Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). If and when future proceedings may involve this petitioner and beneficiary, an advisory opinion from the DOL may be merited before making a decision on a preference petition. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

petitioner's ability to pay the proffered wage, the director failed to consider the additional evidence beyond the tax returns such as the copies of its balance sheets and the general manager's/accountant's letter that had been submitted to the underlying record. The petitioner's owner further asserts that the petitioner's bank balances as shown by its bank statements represented enough cash to cover the proffered wage and renews the assertion that the compensation of officers taken as deductions on the petitioner's tax returns should be added back to the net income.

The petitioner's owner also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in contending that an expectation of an increase in revenue can also form a basis for a petition's approval including the theory that the addition of the beneficiary to its staff would contribute to a petitioner's ability to expand and generate income.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and to evaluate the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, we do not find persuasive the assertion that the officer compensation represented on the petitioner's tax returns should be added back to the corporate petitioner's income. It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. 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)).

It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is additionally noted that attempting to minimize taxable income may be a common strategy, but it remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to

elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position.

Counsel's assertion that the director failed to consider the petitioner's financial statements is misplaced. The financial statements submitted to the record are not audited. Further the director mentioned the 2005 unaudited balance sheet but did not find it persuasive. It is noted that according to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), as amended in 1991, where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. Even the court in *Elatos Restaurant Corp.*, as relied upon by counsel, did not contemplate that unaudited financial statements would be acceptable evidence as a petitioner's ability to pay the proffered wage. As the statements provided to the record are restricted to information based upon the representations of management, they are not probative of the petitioner's ability to pay the certified wage of \$54,242 per year.

Counsel's reliance on the petitioner's bank statements does not overcome the evidence reflected on the petitioner's tax returns. 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 provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 alien 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. As noted above, the record does not indicate that the petitioner has employed the beneficiary.

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, CIS will next examine the net taxable income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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 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.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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. (Original emphasis.) *Chi-Feng Chang* at 536.

As set forth above, if an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's *net current assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources. 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, a 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.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612, is appropriate in this case. In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related 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 Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the four and one-half years that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonegawa* had been in business for eleven years and had shown substantial potential for growth. 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. No 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 unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, although counsel provides a hypothesis of how the beneficiary's employment might positively affect the petitioner's business, no specific documentation has been provided to explain how the beneficiary's employment as a dry-cleaning supervisor will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

In this matter, in 2003, neither the petitioner's net income of -\$310,524, nor its net current assets of -\$427,731 demonstrates its ability to pay the proffered wage of \$54,242 in 2003.

In 2004, neither the petitioner's net income of -\$297,460, nor its net current assets of -\$478,369 establishes its ability to pay the proffered wage in this year.

Similarly, in 2005, the -\$157,612 reported as net income, as well as the -\$403,543 declared as net current assets were each inadequate to cover the certified salary and demonstrate the petitioner's ability to pay during this year. 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. Upon review of the evidence contained in the record and 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.