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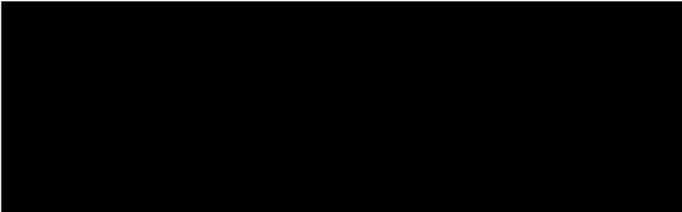
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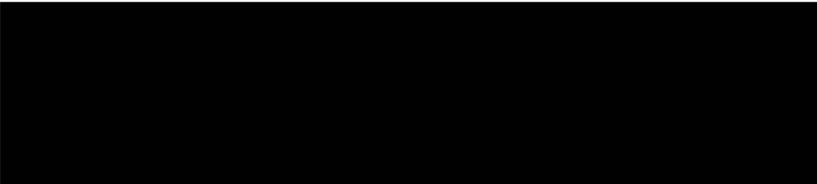
Office: VERMONT SERVICE CENTER

Date: **MAR 25 2008**

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:



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

The nature of the petitioner's business is investment, marketing and international trade.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as an Asian market technical director. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. 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.

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

As set forth in the director's denial dated July 24, 2006, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner had the intent to employ the beneficiary in a specific job offer that corresponds to the position and duties stated in the labor certification.

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

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<sup>1</sup> According to the petition, the type of petitioner's business is "executive search pharm."

Here, the Form ETA 750 was accepted on April 14, 2004.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$38,189.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position, and proficiency in the Chinese language.

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.<sup>3</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; letters from counsel dated October 25, 2005, May 15, 2006 and September 22, 2006; a letter from the petitioner dated May 12, 2006; the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2005; the beneficiary's U.S. Internal Revenue Service Form 1040R and 1040 tax returns for 2004 and 2005 respectively; the beneficiary's Wage and Tax Statements from the petitioner for 2004 in the amount of \$13,008.33 and for 2005 in the amount of \$40,000.00 respectively; four payroll statements issued by Fortune Personnel Consultants to the beneficiary; a compiled financial statement as of December 31, 2004; two of the petitioner's business checking statements for the periods October 30, 2004 to November 30, 2004, and, January 1, 2005 to January 31, 2005; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 1989<sup>4</sup> and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's gross annual income stated on the petition was \$455,954.00. On the Form ETA 750, signed by the beneficiary on April 12, 2004, the beneficiary did claim to have worked for the petitioner since April 2004 as a computer systems analyst.

On appeal, counsel asserts that the director failed to properly interpret and apply the actual payment test and the Sonogawa<sup>5</sup> exception.

According to counsel, utilizing the "actual payment test," wages paid the beneficiary as a part-time computer systems analyst are evidence of the petitioner's ability to pay the proffered wage (for the job of Asian market

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<sup>2</sup> It has been approximately three years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

<sup>4</sup> According to the tax return submitted, the petitioner was incorporated in 1996.

<sup>5</sup> *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

technical director). Counsel cites a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004 in support of this contention.

Accompanying the appeal, counsel submits a legal brief and a letter from counsel dated September 22, 2006.

*Ability to Pay*

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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 evaluating whether a job offer is realistic, 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 employed and paid the beneficiary the full proffered wage from the priority date.

The petitioner has submitted the beneficiary's Wage and Tax Statements from the petitioner for 2004 in the amount of \$13,008.33 and for 2005 in the amount of \$40,000.00 respectively, and four payroll statements issued by Fortune Personnel Consultants to the beneficiary. As of September 30, 2005, Fortune Personnel Consultants had paid the beneficiary year-to-date wages of \$25,500.00. Therefore, for the year 2005, the petitioner has established that it employed and paid the beneficiary the full proffered wage. However, for 2004, the petitioner must establish that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage which is \$25,180.67.

Since the petitioner did not employ the beneficiary in the offered position, and has stated in the record of proceeding that the offered job is a combined computer system analyst and a "market technical director" position,<sup>6</sup> the AAO cannot distinguish from the evidence presented whether the job of Asian market technical director is full time or what compensation the petitioner intends to pay the beneficiary for the position of Asian market technical director.

According to a letter from the petitioner dated May 12, 2006, the petitioner included in compensation paid the beneficiary for his services in 2005 amounts "compensated/reimbursed" for living expenses and medical health coverage.

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 income figure reflected on the petitioner's

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<sup>6</sup> A statement made by [REDACTED] president of the petitioner, in a letter dated May 12, 2006 found in the record of proceeding.

federal income tax return, without consideration of depreciation or other expenses. 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 sales and profits that exceeded the proffered wage 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.

Since the petitioner has not presented evidence of its ability to pay the proffered wage according to the regulation stated above (8 C.F.R. § 204.5(g)(2)) for 2004, it has not demonstrated the ability to pay for 2004. The director's request for evidence requested additional evidence of the ability to pay the proffered wage. The petitioner submitted documents such as W-2 statements and the tax returns all as discussed above. A petitioner must provide reasonably obtainable documentation when requested. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*); See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), and, *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 has not submitted regulatory prescribed evidence of its net current assets for 2004.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>8</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel has submitted a compiled financial statement as of December 31, 2004, as evidence of the petitioner's ability to pay the proffered wage. 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

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<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>8</sup> 8 C.F.R. § 204.5(g)(2).

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 statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel has submitted two of the petitioner's business checking statements for the periods October 30, 2004 to November 30, 2004, stating a closing balance of \$22,676.72, and, January 1, 2005 to January 31, 2005 stating a closing balance of \$67,363.12. Two bank statements are insufficient to determine the petitioner's financial status from the priority date. Further, counsel's reliance on the two closing balances in the petitioner's business checking account 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.

As stated, counsel asserts that the director failed to properly interpret and apply the actual payment test and the *Sonegawa* exception. *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

There is insufficient independent and objective evidence submitted in this case to determine if unusual circumstances have been shown to exist similar to those in *Sonegawa*. Despite the director's request for evidence according to the regulation stated above (8 C.F.R. § 204.5(g)(2)), the petitioner only produced one tax return, for year 2005. Counsel asserts in his brief that the petitioner has made profits since 1996 but he has not introduced independent objective evidence to support that assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

*The Petitioner's Intent to Employ the Beneficiary in a Specific Job Offer*

Beyond the decision of the director, the petitioner has submitted documentation into the record of proceeding that raises the issue of whether or not the petitioner had the intent to employ the beneficiary in a specific job offer that corresponds to the position and duties stated in the labor certification. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

At the time of the preparation of the Application for Alien Employment Certification the beneficiary was employed by the petitioner as a computer systems analyst and not as an Asian market technical director, which is the job stated in the labor certification. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). It seems that the petitioner intends to employ the beneficiary as a computer systems analyst outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Asian market technical director. In the instant case, item 14 describes the requirements of the proffered position. It does not require education or training in the position but does require two years of experience and in Item 15 of the Form ETA 750A relating to "Other special requirements" requires "Proficiency in [the] Chinese language."

The job duties stated in Form ETA-750B, Section 13 are as follows:

Direct and develop Chinese and Asian markets for Pharmaceutical, Biotech, Biomedical and Medical Imaging industries. Determine potential investment and sales opportunities including foreign statistical data to forecast future marketing trends by utilizing state of the art and specialized computer software. Collect data on competitors and analyze process, sales and methods of marketing and distribution. Oversee Asian project management activities associated with medical imaging working closely with the President to ensure timely completion of project timelines. Direct technical service activities required for proper maintenance of equipment inventory in the ultrasound equipment category. Communicate and negotiate with Chinese merchants and suppliers to order equipment and supplies.

As already stated, \_\_\_\_\_ president of the petitioner in a letter dated May 12, 2006, stated that the offered job is a combined computer systems analyst and a market technical director position. The job description in the labor certificate is not for a combined computer systems analyst and a market technical director position.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 12, 2004, under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting

information of the beneficiary's work experience,<sup>9</sup> the beneficiary represented that he was employed by the petitioner as a computer systems analyst commencing on April 2004 to the present.

In that section his job description is stated as follows:

Plan, develop and document our senior level executive searches system with focus on pharmaceutical, Biotech, Biomedical and Medical imaging industries and perform modifications to existing programs. Design and develop client-server environment coding multi-threaded java applications. Develop system improvement, system maintenance and debu [sic?] methods.

The petitioner has stated it is not offering the position of Asian market technical director to the beneficiary but it is offering a combined computer systems analyst and a market technical director position.

The petitioner is considering the beneficiary for a position combining two skill sets (computer system analyst and a market technical director) whereas the labor certification only states one position, Asian market technical director. The job of Asian market technical director is not being offered to the beneficiary by the petitioner.

The preponderance of the evidence does not demonstrate that the petitioner had the intent to employ the beneficiary in a specific job offer that corresponds to the position and duties stated in the labor certification.

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.

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<sup>9</sup> From August 1998 to October 2000, the beneficiary was employed as a "director, sales" with the Beijing Sunshine Blaze Trails Science & Technology Develop Corporation.