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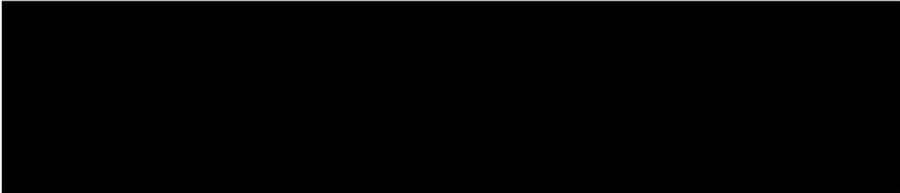
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Petitioner:
Beneficiary:



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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an international ceramic tile import company. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, an ETA Form 9089, Application for Permanent 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).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on September 16, 2005. The proffered wage as stated on the ETA Form 9089 is \$57,346 per year. The Form ETA 9089, signed

by the beneficiary on February 21, 2006, indicates that she has worked for the petitioner since December 1, 2003.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on May 30, 2006, it is claimed that the petitioner was established in 1997 and currently employs eighteen workers.

In support of its continuing financial ability to pay the certified wage of \$57,346 per year, the petitioner provided copies of its quarterly federal tax returns for the last quarter of 2005 and for all quarters of 2006, copies of the petitioner's state quarterly wage and withholding reports and the beneficiary's gross earnings statements for 2005 and 2006. They reflect that the petitioner paid the following compensation to the beneficiary:

2005	\$37,100
2006	\$50,750

The petitioner also submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2004 and 2005. They indicate that the petitioner filed its taxes based on a standard calendar year. The returns show the following:

	2004	2005
Net Income ¹	-\$ 843,213	-\$ 596,978
Current Assets (Sched. L)	\$1,446,845	\$1,396,726
Current Liabilities (Sched. L)	\$2,216,445	\$3,001,787
Net Current Assets	-\$ 769,600	-\$1,605,061

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, CIS will examine a petitioner's net current assets.² 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 corporation's year-end current assets and current liabilities are shown on Schedule L of its corporate federal income 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 the end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. As noted above, the tax return for 2005 is particularly relevant since it covers the priority date of September 16, 2005.

¹ For the purpose of this review, the petitioner's net income is found on line 28 of page one of the Form 1120 (taxable income before net operating loss deduction and special deductions).

² According 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.

The director denied the petition on June 15, 2007, determining that neither the petitioner's tax returns nor its record of payment of compensation paid to the beneficiary established its continuing ability to pay the proffered wage of \$57,346 as of the priority date.

On appeal, counsel asserts that the petitioner's unappropriated retained earnings as set forth on line 25 of Schedule L of its 2004 and 2005 income tax return should be included in the consideration of the petitioner's ability to pay. Counsel cites no pertinent legal authority for the assertion that the petitioner's current liabilities should be reconfigured beyond what has actually been characterized by the petitioner on the pertinent lines of Schedule L and will not be considered persuasive. Retained earnings are the total of a company's net earnings (or losses) since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income or loss. It does not represent an asset and does not represent cash. The amount of cash is reported in the cash account in a company's balance sheet or on line 1 of Schedule L of the corporate tax return. Also, adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in asserting that the petitioner's overall circumstances including gross revenue of \$3.3 million in 2004 and \$2.6 million in 2005 establish its continuing ability to pay the proffered salary. We do not concur with this contention. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner's tax returns for 2004 and 2005 contained in the underlying 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 *Sonogawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* 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 *Sonogawa*.

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 beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability

to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the shortfall between the actual compensation of \$37,100 paid to the beneficiary in 2005 and the proffered wage of \$57,346 was \$20,246. In 2006, the difference between the beneficiary's compensation and the proffered wage was \$6,596.

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 (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)); *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); *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.

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. It is noted herein that the value of the petitioner's own real property upon which the apartments are located is not part of this consideration as they are long term assets and would not be converted to cash during the ordinary course of business and would 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.

In this matter, in 2005, neither the petitioner's net income of -\$596,978 nor its net current assets of -\$1,605,061 demonstrates its ability to pay the difference of \$20,246 between the proffered wage of \$57,346 and the actual earnings of \$37,100 paid to the beneficiary. In 2006, the difference between the wages paid and the proffered wage was \$6,596. As no tax return, audited financial statement or annual report was submitted to demonstrate that either the petitioner's net current assets or net income could cover this shortfall, it may not be concluded that the petitioner established its ability to pay the full proffered wage in 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.

Beyond the decision of the director, it is noted that ETA Form 9089, Part H, requires that the beneficiary possesses 12 months of experience in the job offered. No alternative occupational experience is permitted.

The regulation at 8 C.F.R. § 204.5(1)(3) further provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

We note that the employment verification letters submitted in support of the beneficiary's acquisition of experience as an accountant specifically failed to confirm that she held any position as an accountant or performed the type of accounting duties specified in the Form ETA 9089.

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*, 299 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.