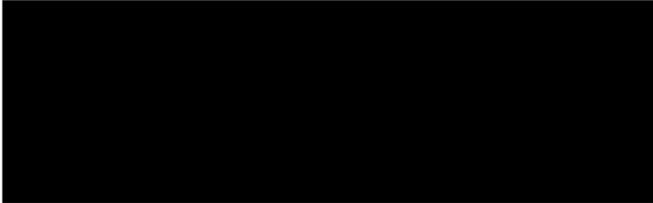




U.S. Citizenship
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Services

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FILE: LIN-06-153-52298 Office: NEBRASKA SERVICE CENTER Date: **MAY 12 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 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.¹ The appeal will be dismissed.

The petitioner is a computer software consultancy business.² It seeks to employ the beneficiary permanently in the United States as a computer software engineer, applications (programmer analyst). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). As set forth in the director's May 1, 2007 denial, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On the Form I-290B, counsel indicated that he would be submitting a separate brief and/or evidence to the AAO within 30 days. With the appeal, counsel also submitted a letter requesting 120 days to submit brief and evidence to the AAO. The appeal was received by the Nebraska Service Center on May 25, 2007. Since the AAO had received nothing further, the AAO sent a fax to counsel on March 14, 2008 informing counsel that no separate brief and/or evidence was received, and to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five (5) days to respond. To date, more than two (2) weeks later, no reply has been received. An appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. *See* 8 C.F.R. § 103.3(a)(1)(v). In the instant case, the Form I-290B shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact, and therefore, the AAO will make a decision solely based on evidence in the record.

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 provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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.

¹ The instant petitioner filed another immigrant petition (SRC-07-217-52768) on behalf of the instant beneficiary based on the same certified labor certification on July 11, 2007 with the Texas Service Center while the instant appeal is pending with the AAO. The petition is currently pending with the Texas Service Center.

² This office notes that the petitioner's corporate status is not in good standing in the State of Texas. *See* http://ecpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaGetTp?Pg=tpid&Search_Nm=yashoda (accessed on April 18, 2008).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on October 12, 2005. The proffered wage as stated on the ETA Form 9089 is \$54,000 per year. The ETA Form 9089 states that the position requires a bachelor's degree in computer science or engineering and two years of experience in the job offered or in a related occupation as senior developer or senior consultant. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner. The petitioner claimed to have been established in 1999, to have a gross annual income of \$609,212, to have a net annual income of \$43,263, and to currently employ three (3) workers.

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 appeal³. As previously noted, counsel did not submit any brief and/or additional evidence on appeal. Relevant evidence in the record includes the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004 and 2005, Form 941 Employer's Quarterly Federal Tax Return for the first three quarters of 2005 and the first quarter of 2006, bank statements of the petitioner's business checking account covering months from October 2005 to November 2006 and some project contracts signed between the petitioner and its clients in 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner established its ability to pay the proffered wage because in 2005 it had gross receipts of \$1,440,666 and that the petitioner maintained an average monthly bank balance of \$7,711.55, more than the monthly proffered wage of \$4,500. Counsel also advises Citizenship and Immigration Services (CIS) to apply a "totality of the circumstances" test to this case because the petitioner opened a new office in India in 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 application for permanent employment certification establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 (Reg. Comm. 1967).

³ 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). However, counsel did not submit any brief and/or new evidence on appeal.

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, neither the petitioner nor the beneficiary claimed that the beneficiary ever worked for the petitioner during the relevant years. Although the petitioner submitted its quarterly wage reports for some quarters of 2005 and 2006, the beneficiary was not listed among the employees hired and paid. Therefore, the petitioner failed to demonstrate that it paid the beneficiary the full proffered wage from the priority date in 2005 to the present, and further failed to establish its ability to pay the proffered wage in 2005 and 2006 through the examination of wages paid to 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 income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to counsel's assertions. 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). On appeal, counsel argues that the petitioner established its ability to pay the proffered wage with its gross receipts in 2005. Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts or total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's corporate tax returns for 2004 and 2005. However, the petitioner's 2004 tax return is not necessarily dispositive since the priority date in the instant case is October 12, 2005.⁴ Therefore, the AAO will review and consider the petitioner's 2005 tax returns in determining the

⁴ In fact, the petitioner's tax return for 2004 cannot establish its ability to pay the proffered wage since the petitioner had a net income of \$43,263 and net current assets of \$(40,517), neither of which was sufficient to pay the proffered wage of \$54,000 in 2004.

petitioner's ability to pay the proffered wage. According to the petitioner's 2005 tax return, the petitioner is structured as a C corporation, and the petitioner's fiscal year is based on a calendar year. The tax return demonstrates that the petitioner had a net income⁵ of \$(8,885), and therefore, the petitioner did not have sufficient net income to pay the proffered wage in 2005.

If the net income the petitioner demonstrates it had available during that 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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets including real estates 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during 2005 were \$(37,143). Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

The record contains bank statements for the petitioner's business checking account covering the months from October 2005 to November 2006 as evidence of the petitioner's ability to pay. On appeal, counsel asserts that the petitioner maintained average monthly bank balance of \$7,711.55, which was sufficient to pay the beneficiary's monthly proffered wage of \$4,500. However, counsel's reliance on the balance in the petitioner's bank 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. In fact, the balance at the end of the year, on December 30, 2005, was \$(131.01), and the balance on November 30, 2006, the closest date to the end of the year 2006 in the record, was \$4,221.22. None of these figures could establish the petitioner's ability to pay the proffered wage even if the bank statements had been accepted as regulatory-prescribed evidence. Third, there is no the petitioner's tax return, annual report, audited financial statements for 2006 or other evidence submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

funds that were not reflected on its tax return, such as the petitioner's taxable income or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The record before the director closed on February 6, 2007 with the receipt by the director of the petitioner's submissions in response to his request for evidence (RFE). Although as of that date the petitioner's federal tax return for 2006 was not due yet, the petitioner did not submit any other regulatory-prescribed evidence for 2006, such as an annual report or audited financial statements, nor did counsel explain why these documents were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the proffered wage in 2006 because it failed to submit any regulatory-prescribed evidence for 2006.

Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets.

In response to the director's RFE dated November 16, 2006, counsel requested that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual 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), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On appeal, counsel requests applying a "totality of circumstances" test to this case. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner was incorporated in 1999 and employs approximately three employees. Its total income was \$229,138 in 2004 and \$172,074 in 2005. Counsel argues that the petitioner opened a new office in India and had higher expenses than normal. However, counsel did not submit any solid evidence to support his

assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Contrary to the counsel's assertion, the petitioner's tax returns show that the petitioner reported its total deductions of \$185,875 for 2004 (salaries and wages of \$84,739, rents of \$21,629, taxes and license of \$7,471, depreciation of \$11,770, advertising of \$2,035, and other deductions of \$58,231) while it reported the total deductions of \$180,959 for 2005 (salaries and wages of \$100,000, rents of \$19,425, taxes and license of \$8,292, depreciation of \$7,620, advertising of \$230, and other deductions of \$45,392). The only higher expenses that the petitioner paid in 2005 were salaries and wages of \$15,261. However, the tax return also indicates that in 2005 the petitioner only paid an average annual salary of \$33,333.33 to each employee, which is much less than the proffered wage in the instant case. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven that it has the ability to pay the proffered wage.

In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner in a framework of profitable or successful years. The petitioner's tax return for 2004 in the record shows that the petitioner had net income of \$43,263 and net current assets of \$(40,517). The record does not contain the petitioner's tax return, annual report or audited financial statements for 2006. Therefore, it is not clear whether the petitioner has been in a framework of profitable or successful years before and after 2005.

In response to the director's RFE, counsel also submitted service agreements signed between the petitioner and its clients in 2006 by which the petitioner provides services to its clients. Counsel claimed that these projects would create a greater expectation of profits in 2006 and would further establish the petitioner's ability to pay the proffered wage that year. The AAO does not concur with counsel's assertions. Service agreements 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 all the agreements were signed in 2006 with 30 day payment terms, the petitioner must submit one type of regulatory-prescribed evidence to establish its ability to pay. In addition, the earnings from the projects finished in 2006 would represent part of the petitioner's income for 2006, however, the petitioner's income from its 2006 projects cannot be used to establish the petitioner's ability to pay the proffered wage in 2005. The projects continuing in 2007 may further establish the petitioner's ability to pay the proffered wage for 2007, however, a petitioner must establish the elements for the approval of the petition at the time of filing. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed four other Immigrant Petitions for Alien Worker

(Form I-140) in addition to the instant petition and another petition filed for the instant beneficiary.⁷ The regulation clearly requires a petitioner to establish its ability to pay the proffered wage for each petition from its priority date to the time when the beneficiary obtains lawful permanent residence. Therefore, the instant petitioner must show that it had sufficient income to pay at least four proffered wages in each of years 2005, 2006 and 2007. However, the petitioner failed to submit evidence to demonstrate that it had the ability to pay one single proffered wage in 2005. Nor did the petitioner provide any evidence to establish its ability to pay the proffered wages in 2006 onwards.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's May 1, 2007 decision that the petitioner failed to demonstrate that it could pay the proffered wages from the day the ETA Form 9089 was accepted for processing by the Department of Labor.

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.

⁷ These petitions are as follows:

SRC-05-237-51884 was filed on August 29, 2005 with a priority date of June 26, 2002 and approved on November 5, 2005, and the beneficiary obtained lawful permanent residence on April 13, 2006;

SRC-06-153-52099 was filed on April 27, 2006 with a priority date of October 12, 2005 and approved on November 16, 2006, and the beneficiary's adjustment of status application is pending;

SRC-06-272-53682 was filed on September 18, 2006 with a priority date of June 9, 2003 and approved on April 10, 2007;

SRC-08-012-56759 was filed on October 15, 2007 and is currently pending.