U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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File: [redacted] SRC 08 036 54096 Office: TEXAS SERVICE CENTER Date: AUG 1 2 2009

IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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[1] is a dry cleaning and alteration business. It seeks to employ the beneficiary permanently in the United States as a garment fitter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). 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 demonstrates that the appeal is 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 October 15, 2007, the single issue in this case is 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.

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 either 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,

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[1] The legal name of the petitioner is Soon Enterprises, Inc. (FEIN according the State of Georgia website http://corp.sos.state.ga.us accessed June 8, 2009. According to the record of proceeding the petitioner trades and does business as Winters Village Cleaner(s).

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

Here, the Form ETA 750 was accepted on March 25, 2005. The petitioner filed the Form I-140 on April 25, 2007, and the petitioner identified on that form is Soon Enterprise [sic Enterprises], Inc., 5025 Winters Chapel Road, Doraville, Georgia. The proffered wage as stated on the Form ETA 750 is $25,438.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.[2]

The director found that the proffered wage of $25,438.00 per year could be prorated from the priority date which is March 25, 2005 for the year 2005 and thus stated that the petitioner had to prove the ability to pay the proffered wage in 2005. The director was incorrect. The AAO will not 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 U.S. Citizenship and Immigration Services (USCIS) 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.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a letter from counsel dated October 3, 2007; the petitioner's Employers Quarterly Federal Tax Form (Form-941) for the first and second quarters of 2007; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2005, and 2006; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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[2] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

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 1992 and to currently employ five workers. According to the tax returns, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition are"$2975 corporation," "$180091 owner's income,"[3] and "$427818" respectively. On the Form ETA 750 signed by the beneficiary on March 22, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director incorrectly analyzed the petitioner's tax returns, and that, based upon the totality of financial circumstances (as evidenced by its tax returns for 2005 and 2006), the petitioner demonstrated ability to pay the proffered wage.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well

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[3] Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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.

Counsel contends that depreciation expenses should be considered as cash is misplaced. With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns[4] demonstrate the following financial information concerning the petitioner's ability to pay:

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov> (indicating that Schedule K is a summary schedule of all shareholder's shares

- In 2005, the Form 1120S stated net income (Schedule K, line17.e) of $7,706.00.
- In 2006, the Form 1120S stated net income (Schedule K, line 18) of $2,975.00.

Since the proffered wage is $25,438.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2005 and 2006.

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, USCIS 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, USCIS 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.[5] 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's net current assets during 2005, and 2006 were <$234.00>,[6] and $472.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for years 2005 and 2006. Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net income, or net current assets, to pay the proffered wage.

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of the corporation's income, deductions, credits, etc.). The IRS has provided a uniform resource locator link to both the tax return and its instructions for each year. Because the petitioner had an additional deduction and other adjustments shown on its Schedule K for 2005 and 2006, the petitioner's net income is found on Schedule K of its tax return 2005 and 2006 tax returns.

[5] 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.

[6] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Counsel asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,[7] copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

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.

The instant petition states that the petitioner was established in 1992 and employs five individuals. However, the petitioner has only submitted two tax returns (2005 and 2006) and two quarterly statements, Employers Quarterly Federal Tax Form (Form-941) for 2007. There is a paucity of data in the record relating to the petitioner's finances and operations, good will and business prospects. Further, counsel cites an AAO decision (Matter of X, EAC 01-018-50413 (AAO Jan 31, 2003) in support of his contention concerning consideration of the normal accounting practices of the petitioner, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

A review of the tax returns submitted indicates that because of the cash withdrawn by the sole shareholder of the petitioner as officers' compensation in each year, the petitioner's net income is substantially reduced. We also note that there is evidence that the sole shareholder receives wages in addition to officers' compensation. In the first quarter of 2007, the sole shareholder of the petitioner received wages of $13,314.65. If a portion of the income received by the owner of petitioner, from an examination of the tax return submitted, is wages then it is a business expense, which by its nature is not discretionary.

No evidence has been provided by the sole shareholder of the petitioner was admitted into evidence to support counsel's implication that officers' compensation was available to pay the proffered wage.

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[7] 8 C.F.R. § 204.5(g)(2).

Neither counsel nor the petitioner's shareholder owner has stated that the shareholder has agreed to decrease wage and officer compensation to pay the proffered wage.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa* to establish that the period 2005 and 2006 was an uncharacteristically unprofitable period for the petitioner. The evidence from the tax returns does show that the sole shareholder of the petitioner has withdrawn sufficient cash as officers' compensation or wages to reduce the petitioner's net income to substantially less than the proffered wage. Further the net current assets stated in the tax returns are only nominal or negative figures.

According to counsel, the petitioner's "total net cash flow" in 2005 is calculated by adding the petitioner's net income stated on line 21 of its 2005 tax return which is $15,838.00, the petitioner's depreciation deduction (line 14c) which is $631.00, and "the total gross" which is $410,161.00. According to counsel, together these figures together are evidence of the petitioner's ability to pay.[8] The AAO rejects counsel's assertion since the net income mentioned of $15,838.00 is calculated by subtracting an expense, depreciation and other deductions, from the petitioner's gross income of $410,161.00. The net income figure is not added to the petitioner's gross income and its depreciation expense. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel also states in his letter dated April 18, 2007, that the petitioner's paid wages of $58,100.00 in 2005 and $73,483.00 in 2006. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, counsel has not stated from what source the petitioner will pay the proffered wage since, as is evident above, the petitioner's net income losses and net current assets are not sources from which wage payments could be made. 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).

Counsel cites the case of *Maysa, Inc.* 98 INA 259 BALCA, decided May 21, 1999, to support his contention that an employer does not have to pay a prevailing wage until an alien's permanent residency status is approved. Counsel misstates that decision. In *Maysa, Inc.*, a non-immigrant visa case decision, an employer's failure to pay the prevailing wage while the alien was in H-1B status

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[8] An identical contention was made for 2006 based upon the same items stated by counsel.

was not a basis for denial of the labor certification, since the labor certification is a prospective commitment to pay the prevailing wage. A petitioner must still establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel cites a USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, concerning the petitioner's burden of proof of its ability to pay under the regulation at 8 C.F.R. § 204.5(g)(2). Although that the memorandum states that net income and/or net current assets should equal or exceed the proffered wage, and/or that the petitioner employs of the beneficiary and pays the proffered wage, none of these events occurred in this case. There is insufficient evidence submitted in this case to demonstrate that the petitioner had the ability to pay the proffered wage from the priority date and onwards.

Counsel summarizes minutes from the "Eastern Service Center (ESC)/AILA Liaison Teleconference of November 16, 1994."[9] The AILA minutes are said by counsel to compel the addition of depreciation. Counsel's reliance on the AILA minutes is misplaced. The AAO and USCIS are not bound by AILA liaison minutes. Further, the brief on appeal misstates the AILA minutes. Net current assets, as a measure of the ability to pay the proffered wage, are current assets minus current liabilities. At a deficit of <$234.00> in 2005 and a nominal $472.00 in 2006, they are less than the proffered wage.

Counsel asserts that "the liquidity ratio analysis ... of the petitioner" can demonstrate the petitioner's ability to pay. Counsel claims that the current ratio shows that the petitioner has the ability to pay the proffered wage in each relevant year. Counsel does not provide a published citation relating to the use of the liquidity ratio analysis of the petitioner. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel contends that loans from the sole shareholder in 2005 and 2006 in the amounts of $25,994.00 and $21,096.00 together with retained earnings are evidence of the petitioner's ability to pay the proffered wage but cites no case precedent for this assertion. There is no information to indicate that the shareholder loans are current liabilities and it is not clear how a loan can be an asset before payment.

Further, a petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position.

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[9] "Minutes of ESC/AILA Liaison Teleconference," Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995).

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

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.