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

U.S. Citizenship
and Immigration
Services

B6

FILE:

[REDACTED]
LIN-08-027-52080

Office: NEBRASKA SERVICE CENTER

Date: **MAY 28 2009**

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food distribution business. It seeks to employ the beneficiary permanently in the United States as a marketing assistant. As required by 8 C.F.R. § 204.5(1)(3), the petition is accompanied by Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the 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 petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes 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 October 31, 2008 denial, the 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. The AAO will also consider whether the petitioner has established that the beneficiary is qualified to perform the duties of the offered position.¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 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 labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had

¹An 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).

the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was filed with the DOL on September 29, 2004. The proffered wage stated on the labor certification is \$16.30 per hour (\$33,904.00 per year). The labor certification states that the position requires a two-year associate degree in sales or marketing and two years experience as a marketing assistant.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is a C corporation. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of over \$1 million and to employ 12 workers. On the labor certification, signed by the beneficiary on September 17, 2004, the beneficiary did not claim to have worked for the petitioner. The record contains pay stubs and a Form W-2, Wage and Tax Statement, that document the petitioner's employment of the beneficiary after the filing of the labor certification.

Evidence in the record of proceeding includes the following:

- Forms 1120, U.S. Corporation Income Tax Return, for 2004 (August 1, 2004 to July 31, 2005), 2005 (August 1, 2005 to December 31, 2005), 2006 (calendar year) and 2007 (calendar year).
- Unaudited financial statements for 2004, 2005 and 2006.
- Bank statements for the period from August 1, 2004 through November 30, 2004.
- Form W-2, Wage and Tax Statement, for 2006.
- Form 1099-MISC, Miscellaneous Income, for 2006.
- Pay stubs for the pay periods ending May 11, 2007 through July 6, 2007, and August 15, 2008 through September 12, 2008.
- Letter of [REDACTED] Assistant Vice President of Metropolitan Bank and Trust Company, Makati City, Philippines, stating that the company employed the beneficiary as a marketing assistant from July 4, 1994 to February 17, 2003.
- Certification of San Sebastian College – Recoletos, Manila, Philippines, stating that the beneficiary passed nine graduate courses in marketing.
- Transcript, Certificate of Achievement, and Certificate of Honors from Pierce College, Woodland Hills, California, for courses taken in 2005 and 2006.

²The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for the petition based on it, 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, U.S. Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the \$33,904.00 proffered wage.

The record contains the beneficiary's Form W-2 and Form 1099 for 2006, and pay stubs for pay periods ending May 11, 2007 through July 6, 2007. These documents indicate wages paid to the beneficiary by the petitioner, as shown in the table below.³

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2004	0.00	33,904.00
2005	0.00	33,904.00
2006	25,228.54	8,675.46
2007	14,235.00	19,669.00

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the required 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. 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. 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

³The total wage paid for 2006 is the sum of \$19,000.54 from the beneficiary's Form W-2 and \$6,228.00 from the beneficiary's Form 1099. The total wage paid for 2007 is the \$14,235.00 Year to Date figure from the beneficiary's latest 2007 pay stub.

sales and wage expense is misplaced. Showing that the petitioner's gross sales 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. 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. [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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537

The record before the director closed on September 16, 2008, with the receipt of the petitioner's response to the director's request for evidence. Therefore, the petitioner's 2007 Form 1120 is the most recent tax return available. The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.⁴

<u>Year</u>	<u>Net Income (\$)</u>
2004 (August 1, 2004 to July 31, 2005)	10,255.00
2005 (August 1, 2005 to December 31, 2005)	2,611.00
2006	11,678.00
2007	6,232.00

Therefore, for 2004, 2005 and 2007, the petitioner did not have sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.

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, USCIS will review the petitioner's assets. The petitioner's total assets are not

⁴For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120 or Line 24 of Form 1120-A.

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 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 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 tax returns demonstrate its net current assets for the required period, as shown in the table below.⁶

<u>Year</u>	<u>Net Current Assets (\$)</u>
2004 (August 1, 2004 to July 31, 2005)	5,200.00
2005 (August 1, 2005 to December 31, 2005)	71,654.00
2006	158,887.00
2007	215,671.00

For 2004 (priority date until July 31, 2005), the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, the petitioner established that it more likely than not had the ability to pay the beneficiary the proffered wage in 2005, 2006 and 2007. The petitioner did not establish its ability to pay the proffered wage for 2004 (priority date until July 31, 2005).

Counsel asserts in the brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that, in 2004, the petitioner paid an officer of the company a salary of \$44,125.00. Counsel claims that

⁵According 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.

⁶On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18. On Form 1120-A, USCIS considers current assets to be the sum of Lines 1 through 6 on Part III, and current liabilities to be the sum of Lines 13 and 14.

"this officer would be most willing to take a cut from her compensation to cover the salary of the beneficiary." In addition, counsel claims that the petitioner paid \$18,997 in wages in 2004, and that the petitioner "is not precluded from making adjustments in its payroll and may do away with a number of employees to accommodate the beneficiary's wages in its payroll." Counsel provides no supporting evidence that the officer would have accepted reduced compensation in 2004, or that the petitioner would have made "adjustments in its payroll" or terminated other employee(s) in order to pay the beneficiary's \$33,904.00 proffered wage. Without supporting documentary evidence, 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). It is noted that the \$33,904.00 proffered salary is substantial compared to both the officer's compensation and the wages paid to the petitioner's other employee(s) in 2004.

The record contains the petitioner's bank statements for the period from August 1, 2004 through November 30, 2004. Counsel's reliance on the balances 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income or the cash specified on the petitioner's tax return used in determining the petitioner's net current assets. Fourth, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

The record also contains the petitioner's unaudited statements of assets, liabilities and equity for July 31, 2004 and July 31, 2005. 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 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 unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the priority date.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1993 and employ 12 employees. It is noted that the petitioner's tax returns state that it was incorporated in 2000.⁷ The submitted tax returns state that the petitioner had gross sales of \$1,116,389.00 in 2004 (August 1, 2004 to July 31, 2005), \$376,153.00 in 2005 (August 1, 2005 to December 31, 2005), \$1,096,453.00 in 2006 and \$1,114,678.00 in 2007. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. The petitioner's 2004 tax return states that the petitioner paid only \$44,125 in officer compensation and \$18,997 in wages. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.⁸

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. INA § 203(b)(3)(A)(i) provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification

⁷The California Secretary of State website at <http://kepler.sos.ca.gov> corroborates the 2000 incorporation date.

⁸It is further noted that the petitioner filed another visa preference petition on behalf of [REDACTED] (LIN-07-180-53850). This petition had a priority date of November 30, 2006, was filed with USCIS on June 11, 2007, and was approved on February 6, 2009. Accordingly, for 2006 and 2007, the petitioner must have been able to establish its ability to pay the proffered wage for both beneficiaries.

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. While no degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the submitted labor certification states that the offered position requires an individual with a two-year associate degree in sales or marketing, and two years experience as a marketing assistant. The record contains a certification of the Registrar of San Sebastian College – Recoletos, Manila, Philippines, stating that the beneficiary passed nine graduate courses that are "equivalent to thirty-two semester units of coursework in marketing leading to an associate degree in marketing from the college." This certification is not sufficient to establish that the beneficiary has a two-year associate degree in sales or marketing. It only establishes that the beneficiary has completed nine courses and thirty-two credits towards such a degree. The record also contains a transcript, Certificate of Achievement, and Certificate of Honors from Pierce College, Woodland Hills, California, for courses taken in 2005 and 2006. However, these documents relate to courses taken after the priority date and therefore are not relevant to whether the beneficiary met all of the requirements for the offered position on the priority date.

Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

The burden of proof in these proceedings rests solely with the petitioner. INA § 291, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.