U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 0 6 2009
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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 or reopen, 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 martial arts school. It seeks to employ the beneficiary permanently in the United States as a martial arts instructor. As required by statute, an ETA Form 750, Application for Alien 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 and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

In this case, the appeal was filed on March 4, 2008. Counsel indicated on the appeal Form I-290B that he would submit a brief and/or additional evidence to the AAO within 30 days. Nothing further has been received to the record. Therefore this decision will be rendered on the record as it currently stands.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 750 was accepted for processing on September 2, 2003.[1] The proffered wage is stated as $28,530 per year. On Part B of the Form ETA 750, signed by the beneficiary on August 29, 2003, the beneficiary does not indicate that he has worked for the petitioner.

The I-140, Immigrant Petition for Alien Worker was filed on October 24, 2006. Part 5 of the petition indicates that the petitioner was established on March 25, 2003, declares a gross annual income of $118,940, a net annual income of $35,773, and current employs three workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although in some circumstances, other factors affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In support of its continuing financial ability to pay the certified wage of $28,530 per year, and the petitioner provided copies of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2003 and 2004, as well as copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005 and 2006. The returns indicate that the petitioner was initially incorporated as a C corporation and elected to become an S corporation on January 1, 2005.[2]

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[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

[2] For a C corporation, the petitioner's Form 1120-A corporate tax returns indicate that net income is found on line 24 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions

For 2003, the petitioner's fiscal year runs from March 25, 2003 until December 31, 2003. The other tax returns indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

Year	2003	2004	2005	2006
Net Income	$2,452	$1,751	$35,773	$50,169
Current Assets	n/a	n/a	n/a	n/a
Current Liabilities	n/a	n/a	n/a	n/a
Net Current Assets	n/a	n/a	n/a	n/a

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. 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. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. In this case, the petitioner has not itemized its current assets or current liabilities on its corporate tax returns. A corporate petitioner's year-end current assets and current liabilities would normally be shown on Part III, Balance Sheets per Books of the 2003 and 2004 tax returns, except as indicated on Part II, no. 7, they are not required to be listed if a corporation's total receipts and total assets are less than $250,000 for the tax year. On the 2005 and 2006 tax returns, current assets would generally be shown on line(s) 1 through 6 and current liabilities would be shown on line(s) 16 through 18, except where (as indicated on Schedule B, no. 9) the corporation's total receipts and total assets are less than $250,000.

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taken on line(s) 12 through 23 of page 1 of the corporate tax return(s). Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. Where a corporation is an S corporation, and its 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 (2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income is found on line 21 of its tax returns for 2005 and on line 21 for 2006 because line 18 of Schedule K does not indicate any amount.

The petitioner also submitted copies of its January to April 2003 bank statements; copies of financial statements for 2003, 2004 and 2005 consisting of compilations, and copies of a deed of trust and closing statements relating to the purchase of some real property by the sole shareholder indicating a purchase price of $552,000 and a loan secured by a deed of trust for $436,800. According to counsel's transmittal letter, this documentation is supposed to represent the owner's assets available to pay the proffered wage.

The director denied the petition on January 31, 2008, noting that while it had demonstrated the ability to pay the proffered wage in 2005 and 2006, it had failed to establish its ability to pay the certified salary in 2003 and 2004.

On appeal, counsel asserts that the director ignored the petitioner's other assets. Relying on *Matter of Sonegawa,* counsel additionally claimed that the director should have approved the petition based on the petitioner's reasonable expectations of future profit.

Counsel's reliance on the balances represented by the petitioner's January to April 2003 bank statements is misplaced. 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. Bank statements show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or a corporate tax return, if the petitioner had elected to itemize its current assets and current liabilities. In this case, we do not conclude that the bank statements should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

Similarly, 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 unaudited "compiled" financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm. 1988).

It is further noted that the counsel's assertion related to the sole shareholder's personal real property ownership as representing an asset available to pay the proffered wage is not supported by any affidavits or other first-hand evidence from the sole shareholder. Counsel's unsupported claims 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). Further, as noted by the director, real estate is considered a long-term asset and not a cash equivalent assets readily available to pay a proffered wage. It is additionally observed that Schedule K-1 of the 2005 and 2006 corporate tax returns suggest that this property may be the personal residence of the sole shareholder which would be unlikely to be available to pay the certified wage.

Moreover, with regard to the individual assets belonging to the principal shareholder of a corporate petitioner, USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage. Additionally, the petitioner who filed the Immigrant Petition for Alien Worker (I-140) in this case is the corporation, not the principal shareholder, individually. Therefore, only the corporate petitioner's assets and liabilities will be considered. It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court 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." *Id.*

As a general matter, in order to determine a petitioner's ability to pay a proffered wage during a given period, USCIS 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. Here, as noted above, the record does not indicate that the petitioner employed the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during 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 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 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 USCIS should have considered income before expenses were paid rather than net income.

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).

In this case, as shown above, while the petitioner's net income of $35,773 and $50,169 may have been sufficient to pay the proffered wage in 2005 and 2006, respectively, neither its net

income of $2,452 in 2003 nor its net income of $1,751 in 2004 was enough to cover the certified wage offer of $28,530 in either of those years.[3]

As indicated above, *Matter of Sonegawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates 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 *Sonegawa* 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 petitioner had 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, historical growth and outstanding reputation as a couturiere. In this case, the corporate petitioner was established only a few months before it filed an application to sponsor the beneficiary. While its net income has generally increased, it failed to report anything more than a modest profit the first two years of operation. No other reputational factors or evidence of a framework of successful or profitable years was presented that was sufficient to overcome the evidence contained in the record.

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. (Emphasis added.) Upon review of the evidence contained in the record, 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 observed that the beneficiary's spouse and the corporate petitioner's sole shareholder share the same surname of [redacted] While this may be a common family name in Korea, it is also noted that it may bear further examination when or if future proceedings are pursued. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

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.

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[3]The petitioner's own compilations submitted for 2003 and 2004 did not support its ability to pay. They reflected that the petitioner's current liabilities exceeded its current assets for each of those years.

ORDER: The appeal is dismissed.