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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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File:

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Office: NEBRASKA SERVICE CENTER

Date: **SEP 02 2009**

IN RE:

Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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 Director, Nebraska Service Center, approved the immigrant visa petition. After a review of the completed case, the director determined that the petition required additional evidence. On March 15, 2007, the director re-opened the case. Subsequently, the director denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a builder. It seeks to employ the beneficiary¹ permanently in the United States as a stone mason. 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 demonstrated that the appeal was 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 November 27, 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. According to the director's decision, after a request for evidence (RFE) was issued and a response received, a review of the evidence indicated that the evidence was insufficient to demonstrate the petitioner's ability to pay on the priority date in that the only year in which the petitioner established the ability to pay the proffered wage was 2006,

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

¹ According to the record, the beneficiary has used several different social security numbers on his Wage and Tax Statements, the petitioner's pay statements to the beneficiary, and on his federal tax returns. According to an affidavit submitted by the beneficiary dated June 2007, he was unaware that the number(s) he utilized was not his own social number and he was using his tax payer identification number.

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, 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 for processing by DOL on April 28, 2001, and certified on March 16, 2006. The petitioner filed the Form I-140 on July 14, 2006. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200.00 per year). The Form ETA 9089 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

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; a support letter dated April 27, 2006, from the petitioner; W-2 Wage and Tax Statements for 2003, 2004, and 2006 issued by the petitioner to the beneficiary; a letter from counsel dated June 5, 2007; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001, 2002, 2003, 2004, and 2005; pay statements issued by the petitioner to the beneficiary dated May 18 and May 11, 2007; an affidavit from the beneficiary concerning his use of social security and IRS tax payer identification numbers; and, copies of documentation concerning the beneficiary's qualifications.

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 a C corporation. On the petition, the petitioner claimed to have been established in 1994³ and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$31,662.00 and \$133,385.00 respectively. On the Form ETA 750, signed by the beneficiary on April 14, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that payment of wages to the beneficiary in 2006 and 2007 is proof of the petitioner's ability to pay the proffered wage. Counsel emphasizes that the director had initially approved the petition. Counsel contends that the director required that the petitioner to demonstrate its ability to pay the proffered wage through its net income, net current assets and that it employed and paid the beneficiary more than the full proffered wage in 2006 and 2007.

Also, counsel contends without substantiation that petitioners of "other filed I-140 petitions" only have to demonstrate "only [one] of the three conditions." Counsel contends that other I-140 petitions filed by petitioners have been approved after demonstrating payments made to beneficiaries that are greater than proffered wage.⁴ Counsel's assertion is misplaced and not supported by the record or evidence. 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). As the decision demonstrates, the director considered all the evidence submitted, which the AAO has also reviewed as stated above.

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, 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 (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

³ Information stated on the tax returns submitted indicates that the petitioner was established on February 5, 1997.

⁴ The Administrative Appeals Office is never bound by a decision of a service center or district director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 and paid the beneficiary the full proffered wage from the priority date.

Counsel submitted Wage and Tax Statements (W-2) from the petitioner to the beneficiary for years 2003, 2004, and 2006. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above except in year 2006. Since the proffered wage is \$31,200.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage. In years 2003, 2004, and 2006, the petitioner paid the beneficiary \$16,264.78, \$740.10, \$31,840.00 respectively. Therefore, the difference between wages actually paid and the proffered wage for each year (2003 and 2004) is \$14,935.22 and \$30,459.90. In 2006 the petitioner paid the beneficiary the proffered wage. However, the petitioner must also demonstrate the ability to pay the proffered wage for years 2001 and 2002. The petitioner has not provided evidence of wage or compensation paid to the beneficiary for those years.

Counsel contends on appeal that the director required the petitioner to demonstrate its ability to pay the proffered wage through its net income, net current assets, and that it employed and paid the beneficiary more than the full proffered wage in 2006 and 2007. Although counsel has submitted, on appeal, pay statements issued by the petitioner to the beneficiary dated May 18, and May 11, 2007, demonstrating a pay rate comparable to an hourly rate of the proffered wage, the petitioner has not stated the beneficiary's total wages paid by the petitioner for 2007, nor has the petitioner's submitted copies of annual reports, federal tax returns, or audited financial statements according to regulation for any year after 2005. There is insufficient evidence for year 2007 to reasonably make a determination of the petitioner's ability to pay the proffered wage.

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 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.

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

- In 2001, the Form 1120 stated net income of \$3,457.00.

- In 2002, the Form 1120 stated net income of \$29,143.00.
- In 2003, the Form 1120 stated net income of <\$27,723.00>.⁵
- In 2004, the Form 1120 stated net income of \$27,408.00.
- In 2005, the Form 1120 stated net income of \$392.00.

Since the proffered wage is \$31,200 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003, 2004, and 2005.

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.⁶ 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 2001, 2002, 2003, 2004 and 2005 were \$27,035.00, \$15,987.00, <\$42,742.00>, <\$1,588.00>, and <\$21.00> respectively.

Therefore, for years 2001, 2002, 2003, 2004, and 2005, the petitioner did not have sufficient net income, or net current assets, or the difference between wages actually paid and the proffered wage to pay the proffered wage.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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

Counsel asserts in his brief accompanying the appeal 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.

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 (BIA 1967). 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. As in *Sonogawa*, 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.

USCIS and the AAO will examine the petitioner's size, longevity, and number of employees in an examination of the record of proceeding. The petitioner was incorporated in 1994 and employs approximately seven employees. Although USCIS 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, Id.*

In the instant case, the petitioner demonstrated an over-all decline in gross profits in 2001, 2002, 2003, 2004, and 2005 of \$723,116.00, \$998,613.00, \$726,450, \$182,191.00, and \$133,385.00 respectively. In every year the cost of goods sold expense figure on line 2 of each return was substantial. Cost of goods sold incorporated the cost of labor expense entry from Schedule A (line 3), or the salaries and wages expense (line 13) of the tax returns. The AAO notes that compensation of officers figure tracked the gross profits in each year and, with the business' decline, in 2004 was \$2,881.00 and in 2005, zero. The petitioner has not provided an explanation for the petitioner's business decline over the five year period examined.

⁷ 8 C.F.R. § 204.5(g)(2).

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 since it is clear from the financial evidence presented that the petitioner's business prospects are in severe decline.

As already stated, counsel emphasizes that the director had initially approved the petition, and by implication is contending that the petition should be approved for that reason. It is within the director's prerogative to review decisions for sufficiency since in all cases the petitioner has the burden of proof for the benefit requested. Further, since this is a *de novo* proceeding, the Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *off's.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 Sect. 51 (2001).

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.