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



U.S. Citizenship  
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B6

File: [REDACTED]  
SRC 07 062 52338

Office: TEXAS SERVICE CENTER Date: **SEP 17 2009**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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 is a construction company. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as a stress analyst. 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) along with an ETA 750, Part B for the substituted beneficiary. 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 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 August 16, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

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<sup>1</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

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 was accepted for processing by DOL on May 22, 2002, and certified on November 17, 2006. The petitioner filed the Form I-140 petition on January 3, 2007. The proffered wage as stated on the Form ETA 750 is \$43,118.00 per year.

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.<sup>2</sup>

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; an ETA 750, Part B for the substituted beneficiary; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120-A tax return for 2002; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2003, 2004, and 2005; Wage and Tax Statements (W-2) issued by the petitioner to an employee (not to the beneficiary) in 2003, 2004, 2005 and 2006; and explanatory letters from the petitioner dated December 20, 2006, and June 5, 2006.

The director issued a request for evidence (RFE) dated March 8, 2007. The director requested evidence of the petitioner's ability to pay the proffered wage that included, *inter alia*, the petitioner's tax return for 2006. Although the petitioner stated in its letter dated June 5, 2006, sent in response to the RFE that it would submit its 2006 federal income tax return, it was not received.

The record before the director closed on June 5, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence.

Counsel dated the appeal August 30, 2007. Although counsel checked the box on the appeal form that a legal brief and/or additional evidence would be submitted to the AAO within 30 days, no brief or

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<sup>2</sup> 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).

additional evidence was submitted. The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. Accordingly, the AAO will consider the evidence in the record before us.

The evidence in the record of proceeding shows that the petitioner is structured as S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ one worker. 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 \$31,368.00 and \$117,434.00 respectively. On the Form ETA 750, signed by the beneficiary on December 19, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that since the company had been paying the salary of an employee who has since left its employ, this is proof of its ability to pay the proffered wage.

Further, counsel states on appeal, "We are unsure how the USCIS calculated current assets or net current assets" as the petitioner's determination of current assets or net current assets are based upon Generally Accepted Accounting Principles (GAAP) and different than the director's. According to counsel, these figures "must be checked."<sup>3</sup>

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 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.

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<sup>3</sup> USCIS' definitions of current assets, current liabilities and the calculation of the petitioner's net current assets are set forth below in footnote nine below and in the body of this discussion.

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. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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; *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<sup>4</sup> demonstrate the following financial information concerning the petitioner's net income:

- In 2002, <\$53.00>.<sup>5</sup>
- In 2003, \$13,540.00.<sup>6</sup>
- In 2004, \$15,671.00.<sup>7</sup>
- In 2005, \$31,368.00.<sup>8</sup>

The petitioner did not have sufficient net income to pay the proffered wage for years 2002, 2003, 2004, and 2005.

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<sup>4</sup> In 2002, the corporation filed its tax return on IRS Form 112-A. A corporation may file its tax returns on IRS Form 1120-A if its gross receipts (Line 1.a on page one) are under \$500,000.00 and it meets certain other conditions. From 2003 to 2006, the petitioner filed its tax returns on Form 1120S. 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 of the corporation's income, deductions, credits, etc.).

<sup>5</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. Net income, here a loss, was stated on Form 1120-A, Line 24.

<sup>6</sup> Stated on Form 1120S, Schedule K, Line 21.

<sup>7</sup> Stated on Form 1120S, Schedule K, Line 17.e.

<sup>8</sup> Stated on Form 1120S, Line 21.

The petitioner has questioned the director's determination of current assets<sup>9</sup> or net current assets and the manner in which the director calculated current assets and net current assets. 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.

In the review of the petitioner's IRS tax return Form 1120-A for 2002, 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. The petitioner's year-end current assets and liabilities are shown on Part III of the return. A corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 13 and 14. 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.

In the review of the IRS tax return Form 1120S tax returns, net current assets are the difference between the petitioner's current assets and current liabilities. 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 2003 and 2004 were \$14,487.00 and \$6,105.00 respectively.

For the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage from the priority date, that is, from 2002, 2003, 2004 and 2005. While the petitioner has submitted evidence for 2003 and 2004, the petitioner has not provided information concerning the petitioner's current assets and current liabilities for 2002 and 2005. The burden of proof in these proceedings rests solely with the petitioner. Going on record without

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<sup>9</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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. As such the petitioner question of how the director "determined" current assets is a misnomer. Current assets are not "determined," as counsel contends, a corporation's current assets are stated on the petitioner's tax returns, that is Schedule L, Lines 1 to 6, on Form 1120S, and Part III, Lines 1 to 6 on Form 1120-A.

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)). See 8 C.F.R. § 204.5(g)(2).

Counsel asserts in his brief that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>10</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

The petitioner states that its determination of current assets or net current assets is based upon Generally Accepted Accounting Principles (GAAP), that its determination differs from the director's determination, and by implication the petitioner is correct and the director wrong. The petitioner has failed to provide any substantiation for these statements. 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).

Further, if the petitioner desires to rely upon its net current assets to demonstrate its ability to pay the proffered wage, then concomitantly it must submit evidence of its current assets and net current assets from the priority date. No evidence of the petitioner's current assets, current liabilities or net current assets was submitted for 2002 and 2005.

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.

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<sup>10</sup> 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner was established in 2002, and the petitioner has provided its tax returns from 2002 to 2005. The documentation presented here indicates that there are two owners of the company's stock. Other than that, there is a paucity of data in the record relating to the petitioner's finances. There is insufficient information in the record concerning the petitioner's business profits expectations.

For the first two years of operation, the petitioner's gross profits were nominal, 2002-\$24,209.00 and 2003-\$30,811.00, but in 2004 and 2005 gross profits climbed to \$106,989.00 and \$176,371.00 respectively. However, the petitioner's net incomes for 2002, 2003, 2004 and 2005 were below the proffered wage despite no officers' compensation declared for 2002 and 2003, and only \$7,800.00 and \$14,300.00 officers' compensation stated for 2004 and 2005.

As stated, counsel asserts that since the company had been paying a salary of an employee who has since left its employ, this is proof of its ability to pay the proffered wage. By implication, according to the petitioner, these monies may also be added back to the petitioner's ability to pay the proffered wage. Since the former employee left the petitioner's company in 2006, the petitioner must prove its ability to pay both the former employee's wages and the beneficiary's wages from the priority date. Based upon the evidence submitted as recounted above, the petitioner has not demonstrated its ability to pay the proffered wage from the priority date.

Moreover, there is no independent, objective evidence that the position of the former worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him.

Further, while W-2 statements submitted for a former employee for years 2003, 2004, 2005 and 2006 show a consistent history of payroll payments in equal amounts of \$32,000.00, the information does not establish the petitioner's ability to pay the proffered wage of \$43,118.00. Wage paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

According to an owner of the petitioner in his letter dated June 5, 2006, besides the salary of the former employee, the petitioner had available the cost of goods<sup>11</sup> sold for years 2003, 2004 and 2005, to pay the proffered wage. Since the cost of goods sold is an expense and an expense is not an asset, the cost of goods sold cannot be utilized to pay the proffered wage.

The petitioner requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if

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<sup>11</sup> The cost of goods sold is stated in the tax returns without the cost of labor expense which was left blank for each year.

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.

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.