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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

PUBLIC COPY

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FILE:

Office: TEXAS SERVICE CENTER

Date: JUL 01 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 Korean [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a reporter/correspondent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 from the priority date onwards. Therefore, the director denied the petition.

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 January 29, 2008 notice of decision, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 2, 2004.¹ The proffered wage as stated on the Form ETA 750 is \$24,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position as well as a bachelor's degree in the humanities.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). This office considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to currently employ 5 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 14, 2004, the beneficiary claimed to have worked for the petitioner from November 2002 through the date he signed that form.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if

¹ United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has petitioned for an additional 4 beneficiaries. One of these petitions has a priority date of May 29, 2003 and it was approved on July 6, 2007. The beneficiary in that matter has not adjusted to lawful permanent resident status. The receipt number on that petition is SRC 07 082 51640. The second petition has a March 31, 2004 priority date. USCIS approved that petition on May 15, 2007. The beneficiary in that case adjusted to lawful permanent resident status on August 31, 2007. The A-number associated with that petition is A88 265 803. The third petition (A94 877 226) has a February 24, 2004 priority date. USCIS approved the petition on December 15, 2006. The beneficiary in that matter has not adjusted to lawful permanent resident status. The fourth petition (A89 136 944) has a January 29, 2007 priority date. USCIS approved the petition on February 13, 2009. The beneficiary in that case has not adjusted to lawful permanent resident status. The priority date year in this case is 2004. Thus, during 2004 through 2006, the petitioner had three additional petitions pending. During 2007, it had four additional petitions pending. The beneficiary of one of these petitions adjusted to lawful permanent resident status in 2007. Thus, from 2008 onwards, the petitioner had three additional petitions pending. The petitioner must demonstrate an ability to pay the wages of its additional sponsored workers as well as the wage of the instant beneficiary.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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 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 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. Here, the petitioner did not pay the beneficiary the full proffered wage throughout all the relevant period. However, the Forms W-2, Wage and Tax Statement, in the record reflect that the petitioner did pay the beneficiary \$21,000 in 2004, or \$3,000 less than the proffered wage; \$20,000 in 2005, or \$4,000 less than the proffered wage; \$18,000 in 2006, or \$6,000 less than the proffered wage; and in 2007: the full proffered wage of \$24,000. Thus, the petitioner has established its ability to pay the wage in 2007.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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).

The record before the director closed on January 11, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. The petitioner had submitted, by that date, its tax returns for 2004 through 2006, analyzed on a cash basis. However, on appeal, the petitioner indicated that it had re-calculated its 2004 and 2005 taxes based on the accrual method of accounting, rather than a cash basis, and had re-filed its tax returns for 2004 and 2005. It provided copies of those amended tax returns for 2004 and 2005 as well as its 2007 tax return.

First, this office will only accept amended tax returns with material changes at this stage of the proceedings if the Internal Revenue Service (IRS) has certified them as being received. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988)(which indicates that in general the petitioner may not make material changes to the petition and accompanying documentation in an effort to make a deficient petition conform to USCIS requirements.)³

The petitioner's income tax return for 2007 is the most recent return available. However, the petitioner has already shown the ability to pay the wage in 2007 by having paid the full proffered wage to the beneficiary in that year. Thus, that tax return need not be analyzed here.⁴ The petitioner's tax returns demonstrate its net income for 2004 through 2006, as shown in the table below.

- The 2004 Form 1120S states net income⁵ of \$39,299.

³ The AAO notes incidentally that the amended 2004 tax return does not show an ability to pay the proffered wage and all the petitioner's sponsored workers' wages in 2004.

⁴ Information on the 2007 return will be considered later in this analysis when this office reviews the totality of the petitioner's financial circumstances.

⁵ 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) or line 18 (2006-2007) of Schedule K. *See Instructions for Form 1120S*,

- The 2005 Form 1120S states net income of \$46,079.
- The 2006 Form 1120S states net income of \$55,129.

Therefore, in 2004, the petitioner had sufficient net income to pay the difference between the wages that it paid the beneficiary and the proffered wage or \$4,000. However, only \$34,299 remains of net income after paying this amount, and the petitioner must also show that it had the ability to pay its three other sponsored workers whose petitions were pending in 2004. The first of these sponsored workers had a proffered wage of \$28,600, and there is no indication that the petitioner paid that worker in 2004. Thus, \$5,699 in net income remains after subtracting the added expense of this \$28,600 wage from net income. The second of these sponsored workers had a proffered wage of \$30,000. The petitioner paid this worker \$27,900 in 2004, or \$2,100 less than the relevant proffered wage, according to the copy of this beneficiary's 2004 Form W-2 in the record. Thus, \$3,599 in net income remains after covering the added expense of the balance of this worker's proffered wage. The third petition pending in 2004 has a proffered wage of \$44,000. The copy of this worker's 2004 Form W-2 in the record reflects that the petitioner paid this beneficiary \$13,950 in 2004, or \$30,050 less than the relevant proffered wage. A negative figure or -\$26,451 results when \$30,050 is subtracted from what remains of the petitioner's net income. Thus, the petitioner has not shown that it had the ability to pay the proffered wage and all its sponsored workers' wages/balance of those wages through its net income in 2004.⁶

In 2005, the petitioner had sufficient net income to cover the difference between the wage paid the beneficiary and the proffered wage or \$4,000. However, only \$42,079 in net income remains to cover the added expense of the three other sponsored workers' wages whose petitions were pending in that year. The first of these workers had a proffered wage of \$28,600 and was not paid by the petitioner in 2005, according to the record. Thus, \$13,479 in net income remains after paying the added expense of this salary. The copy of the second sponsored worker's 2005 Form W-2 in the record reflects that the petitioner paid this worker \$27,900 or \$2,100 less than that worker's \$30,000 proffered wage in 2005. Thus, \$11,379 in net income remains after paying the balance of this salary. The third sponsored worker's 2005 Form W-2 in the record reflects that the petitioner paid him \$20,925 in 2005, or \$23,075 less than that worker's \$44,000 proffered wage. When this amount is subtracted from what remains of net income (\$11,379) a negative figure results or -\$11,696. Thus, the petitioner has not shown that it had the ability to pay the proffered wage and all its sponsored workers' wages/balance of those wages through its net income in 2005.

In 2006, the petitioner had sufficient net income to cover the difference between the wage paid the beneficiary and the proffered wage or \$6,000. However, only \$49,129 in net income remains to

2009, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 22, 2010)(which indicate that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2004 through 2007, the petitioner's net income is found on line 21 of page one of the petitioner's Forms 1120S.

⁶ Again, the amended 2004 tax return submitted on appeal does not reflect sufficient net income to cover the instant wage and the petitioner's three other sponsored workers' wages/balance of those wages in 2004, either.

cover the added expense of the three other sponsored workers' wages whose petitions were pending in that year. The first of these workers had a proffered wage of \$28,600 and was not paid by the petitioner in 2006, according to the record. Thus, \$20,529 in net income remains after paying the added expense of this salary. The copy of the second sponsored worker's 2006 Form W-2 in the record reflects that the petitioner paid this worker \$27,900 or \$2,100 less than that worker's proffered wage in 2006. Thus, \$18,429 in net income remains after paying the balance of this salary. The third sponsored worker's 2006 Form W-2 in the record reflects that the petitioner paid him \$44,400 in 2006, or slightly more than that worker's proffered wage. Thus, the petitioner has shown that it had the ability to pay the proffered wage and all its sponsored workers' wages/balance of those wages through its net income in 2006.

In sum, the petitioner has not established that it had the ability to pay the proffered wage and all its sponsored workers' wages out of its net income in 2004 and 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- The 2004 Form 1120S reflects net current assets (liabilities) of -\$133,361.
- The 2005 Form 1120S reflects net current assets (liabilities) of -\$70,509.

In 2004 and 2005, the petitioner had negative net current assets. Thus, it has not shown an ability to pay, in those years, the difference between the actual wages it paid the beneficiary and the proffered wage using its net current assets. It also has not shown the ability to pay, out of its net current assets, the added expense of the balance of the instant wage and the balance of the wages of its three additional sponsored workers. Therefore, the petitioner has not shown the ability to pay the instant wage and all its sponsored workers' wages using its net current assets during 2004 and 2005.⁸

Thus, the petitioner has not established that it had the continuing ability to pay the instant wage and all its sponsored workers' wages from the priority date onwards through an examination of: wages paid to the beneficiary and to its other sponsored workers; its net income; or its net current assets.

⁷According 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.

⁸ The AAO notes incidentally that the amended 2004 and 2005 tax returns also do not reflect sufficient net current assets to pay the balance of the instant wage and all the petitioner's sponsored workers' wages.

On appeal, counsel indicated that because the priority date in this matter is June 2, 2004, more than two-fifths of the way into the year 2004, the petitioner need only show an ability to pay approximately three-fifths of the proffered wage in 2004. This is not correct. This office will not prorate the wage such that the petitioner is only obliged to show an ability to pay a fraction of the proffered wage based on the fraction of the year which follows the priority date. That is, the AAO will not apply 12 months of net income towards an ability to pay a lesser period of the proffered wage, any more than it would apply 24 months of net income towards an ability to pay the annual proffered wage. USCIS will only prorate the proffered wage if the record contains evidence of the net income earned or any wages paid to the beneficiary by the petitioner during that specific portion of the year that occurred after the priority date, such as monthly income statements or pay stubs. In this instance, the petitioner has not submitted such evidence.

Counsel indicated that the petitioner's sponsored workers' wages should also be prorated during their respective priority date years, and that the petitioner need only show an ability to pay a portion of each of their wages during those years. Again, the AAO will not prorate these sponsored workers' wages for the same reasons that it would not prorate the instant beneficiary's wages in the priority date year.

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.

Here, the immigrant petition indicates that the petitioner was incorporated in 1991 and has 5 employees. As noted by counsel on appeal, the petitioner's gross receipts have been increasing as follows: \$536,819 in 2004; \$583,407 in 2005; \$666,650 in 2006; and \$812,625 in 2007. However, this slight increase in gross receipts is not significant enough to overcome the information on the tax

returns which indicate that the petitioner has not been able to pay the proffered wage of all its sponsored workers from the priority date onwards. Also, the petitioner's Certified Public Accountant (CPA) indicated in a letter dated February 26, 2009 that the petitioner has been increasing its readership and that in 1998, six years prior to the relevant period of analysis, the petitioner won the [REDACTED] for best newspaper. However, the petitioner did not document for the record that its readership is increasing and, if it is increasing, the rate at which it is increasing; further, the petitioner did not document for the record that it had received any awards during or before the relevant period of analysis. While the CPA's assertions relate to the strength of the petitioner's reputation within its industry, the AAO will not consider assertions which are not supported by evidence. *See 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))(which states that going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.) Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner also has not shown that the beneficiary would be replacing a former employee or an outsourced service; and it has not shown the occurrence of any uncharacteristic business expenditures or losses. 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 or all its sponsored workers' wages.

Finally, the AAO notes that on May 11, 2010 this office issued a Notice of Derogatory Information which states that the Texas Secretary of State had forfeited the petitioner's business license on July 24, 2009. The AAO stated in that notice that if a petitioning business is no longer an active business, the petition and its appeal have become moot. That is, where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Also, even if the appeal could otherwise be sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

With its response, the petitioner submitted through counsel a copy of a Tax Clearance Letter for Reinstatement issued by the Texas Comptroller of Public Accounts which is addressed to the Texas Secretary of State. This tax clearance letter dated May 24, 2010 states that the petitioner has met all franchise tax requirements and is eligible for reinstatement. Counsel also submitted a copy of the petitioner's application for reinstatement and request to set aside revocation or forfeiture, dated May 26, 2010, also addressed to the Texas Secretary of State. This application acknowledges that the petitioner forfeited its authority to do business in Texas when it failed to file a franchise tax return and/or failed to pay state franchise tax. The application states that the petitioner corrected its default and paid all fees, taxes and penalties due. By means of this application, the petitioner requested that the Texas Secretary of State set aside its forfeiture or revocation of its authority to transact business in Texas. Finally, counsel submitted a copy of a Certificate of Filing from the Texas Secretary of State which states that the petitioner's application for reinstatement "has been found to conform to law;" and, thus, the Texas Secretary of State has reinstated the petitioner to active status. According to the Texas Secretary of State, this reinstatement was effective on May 26, 2010.

The record indicates that the petitioner failed to pay its franchise tax to the State of Texas. Thus, it forfeited its corporate privileges, and later on July 24, 2009 it forfeited its Charter or Certificate of Authority to do business in Texas. *See Texas Tax Code Ann.* § 171.251 (Vernon 2008); *Texas Tax Code Ann.* § 171.309 (Vernon 2008). A corporation whose charter or certificate of authority to do business in Texas is forfeited under these provisions may have its charter and corporate privileges revived if the corporation pays the tax, penalty, and interest imposed by this chapter and due at the time the request is made to set aside the forfeiture under Section 171.313 of the *Texas Tax Code Annotated* (Vernon 2008). *See also Texas Tax Code Ann.* § 171.312 (Vernon 2008.) The Texas Secretary of State reinstated the petitioner's charter on May 26, 2010. The forfeiture of corporate privileges and the forfeiture of the petitioner's charter did not dissolve the petitioner as a legal entity. *See Hinkle v. Adams*, 74 S.W.3rd 189, 193 (Tex. App.- Texarkana 2002); *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 601 (Tex. App.- Houston 1994). In addition, when the petitioner paid any delinquent franchise taxes owing and filed any delinquent reports, its corporate privileges and charter were retroactively reinstated. *See Hinkle v. Adams* at 193-194; *Mello v. A.M.F., Inc.*, 7 S.W.3d 329, 331 (Tex.-App.-Beaumont 1999). When the Texas Secretary of State reinstated the petitioner's charter, it is as if the forfeiture never existed. *Hinkle v. Adams* at 194.

The AAO finds that the petitioner has demonstrated that it is an active business and that a legitimate job offer continues to exist for the beneficiary in this matter.

The petitioner has not established that it had the ability to pay the instant proffered wage and all its sponsored workers' wages from the priority date onwards. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.