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



U.S. Citizenship and Immigration Services

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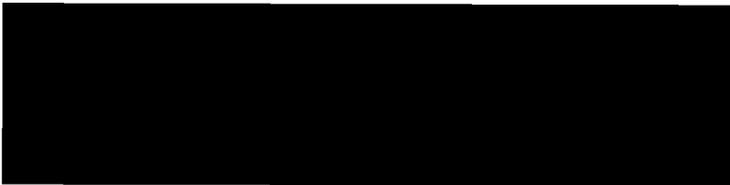
Office: NEBRASKA SERVICE CENTER

Date: **MAR 15 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

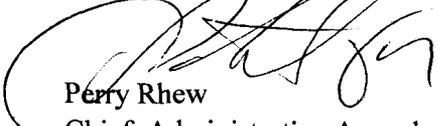
ON BEHALF OF PETITIONER:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 services aircraft interiors. It seeks to employ the beneficiary permanently in the United States as an upholsterer. As required by statute, a Form ETA 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 beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner, through current counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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. *See also* 8 C.F.R. § 204.5(1)(2).

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

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be

submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Here, the ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on Part A of the ETA 750 is \$17.19 per hour, which amounts to \$35,755.20 per year.

On Part B of the ETA 750, signed by the beneficiary on April 10, 2001, the beneficiary does not claim to have worked for the petitioner. He states that from December 2000 to the present (date of signing) that he has been unemployed. It is additionally noted that the director's request for additional evidence, issued on June 14, 2007, asked the petitioner whether it had employed the beneficiary in 2002 and/or 2004 and to provide evidence of compensation, such as copies of W-2s or Form 1099s, paid to the beneficiary in those years as well as in 2005 and 2006. In response, the petitioner, through former counsel, specifically stated in a letter dated September 5, 2007, that the beneficiary has not been working for the petitioner. However, in the Form G-325A biographic information form submitted by the beneficiary in support of his application for permanent residence and signed by the beneficiary on August 27, 2006, he claims that he has been employed by the petitioner since January 2001. The beneficiary additionally lists two other employers that he has worked for since January 2001. None of these employers were included on Part B of the ETA 750 which required the beneficiary to list all positions held for the last three years. No explanation for any of these inconsistencies has been offered.

The AAO finds that the beneficiary's employment history has been misrepresented. Such inconsistencies undercut the reliability of other claims of employment experience as set forth on the ETA 750. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. 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, 591-592 (BIA 1988). We find that the record does not resolve the inconsistencies noted above and does not sufficiently support the petitioner's claim that the beneficiary has two full-time years of employment in the job offered.¹ More specifically, we note that the Form ETA 750 required two

¹ *See also Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) It is noted that the regulation at 8 C.F.R. § 204.5(1)(3) provides in relevant part:

years in the job offered, as an upholsterer for aircraft interior. The Form ETA 750 does not allow for experience in a related occupation such as general upholsterer. The experience letter, dated December 20, 1998, submitted from [REDACTED] of Auckland, New Zealand, states that the beneficiary's duties included "upholstery, assembling of furniture, inward and outward dispatch and quality control." The letter states that the beneficiary "was also in charge of staff ." As the beneficiary had job duties beyond upholstery, it is not clear that he has two years of full-time experience as an upholsterer. Further, the experience was not in aircraft upholstery.

It is further noted that Part A of the ETA 750 provides that the beneficiary must have completed high school. The record does not contain any evidence of a high school diploma. Therefore the petitioner failed to establish that the beneficiary met the educational requirements set forth on the ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 at n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on November 28, 2006, the petitioner states that it was established in 1968, currently employs twenty-five workers, and reports a gross annual income of \$619,402.

With the petition and in response to the director's request for additional evidence, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, 2004, 2005 and 2006. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns additionally contain the following information:

2001	2002	2003	2004	2005
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(ii) *Other documentation*—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Such training or experience must be acquired as of the priority date of the ETA 750. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Net Income ²	-\$187,603	-\$122,788	-\$ 56,176	\$78,757	-\$ 7,453
Current Assets	\$130,033	\$ 29,846	\$ 2,161	\$ 3,599	\$11,466
Current Liabilities	\$ 2,044	\$ 47,402	\$ 57,439	\$ 5,912	\$ 6,909
Net Current Assets	\$127,989	-\$ 17,556	-\$ 55,278	-\$ 2,313	\$ 4,557

2006

Net Income	\$16,544
Current Assets	\$15,093
Current Liabilities	\$33,789
Net Current Assets	-\$18,696

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.³ 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. 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.

The petitioner also provided a copy of an accountant's letter in support of its ability to pay the proffered wage explaining that in addition to net profits and current assets available to pay the

²Where 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 23 (2001-2003), line 17e (2004-2005) and line 18 of Schedule K. See Instructions for Form 1120S, 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.). Here, the net income figure from line 23 of Schedule K was used for the 2001, 2002, and 2003 tax return(s) because the petitioner had additional deductions shown on its Schedule K. Similarly, line 17e of Schedule K was used for the 2004 and 2005 tax returns and line 18 of Schedule K was used for the 2006 tax return.

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

proffered wage, the petitioner could have sold fixed assets such as machinery, equipment and furniture or used shareholder loans or loans from lending institutions.

Following a review of the evidence submitted, and noting that although the petitioner claims being established in 1968, the petitioner's corporate tax returns reflect that it was incorporated in 2001, the director denied the petition on December 20, 2007. He concluded that the financial information contained on the petitioner's tax returns failed to demonstrate its continuing financial ability to pay the proffered wage.

On appeal, the petitioner, through counsel, in support of the corporate petitioner's ability to pay the proposed wage offer, submits various documents related to the individual assets of the principal shareholder and his spouse, including a copy of a home loan and appraisal information related to their personal residence. Counsel asserts that because the petitioner structured as an S corporation for tax purposes that it is appropriate to consider personal assets and the allocation of officers' compensation in support of payment of the proffered wage.

Citing *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel additionally asserts that in 2002 and 2003, the petitioner was uncharacteristically unprofitable due to the events of September 11, 2001, which affected the aviation and travel industries.

The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 and 2002 were its best years in the context of its gross receipts reported on line 1a of the tax returns as approximately 1.7 and 1.9 million dollars.

In asserting that this evidence based on the sole shareholder's personal holdings or officer compensation should be considered in the corporate petitioner's ability to pay the proffered wage, counsel cites no legal authority. Counsel's assertions related to the petitioner's ability to pay the proffered salary are not convincing. 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. As noted above, the language set forth in the regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that the ability to pay the certified wage is demonstrated at the time the priority date is

established and is *continuing* until the beneficiary obtains lawful permanent residence. (Emphasis added.) *See also Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In this case, we do not find persuasive the assertion that the officers' compensation represented on the petitioner's tax returns should be added back to the corporate petitioner's income or net current assets. It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation and that those funds may be considered funds available to pay the proffered wage are misplaced. The record does not specifically identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement in the record which attests to the claim that the individual shareholders would be willing to forego compensation or that the beneficiary would assume any portion of such duties or compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel 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).

Similarly, reliance on the principal shareholders' personal holdings in support of the ability to pay is misplaced where the petitioner is a corporation. Contrary to counsel's suggestion, USCIS 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

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."

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered

wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As mentioned above, no evidence of compensation paid to the beneficiary was provided.

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 (or net current assets) as 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). As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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). 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. The court specifically rejected the argument that the USCIS should have considered income before expenses were paid rather than net income.

As noted above, if the net income the petitioner demonstrates it had available during the relevant does not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, the idea the petitioner's total or fixed assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, as set forth above, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, in 2001, although the petitioner's -\$187,603 in net income was not sufficient to pay the proffered wage, the petitioner's \$127,989 was enough to cover the proffered wage and demonstrate the ability to pay in this year.

In 2002, neither the petitioner's -\$122,788 nor its -\$17,556 in net current assets was sufficient to cover the proffered wage of \$35,755.20. The petitioner failed to establish its ability to pay the proposed wage offer in 2002.

In 2003, neither the petitioner's net income of -\$56,176 nor its net current assets of -\$55,278 was sufficient to pay the proffered wage. The petitioner's ability to pay the proffered salary has not been established for this year.

In 2004, the petitioner's net income of \$78,757 was sufficient to pay the proffered wage and demonstrate the petitioner's ability to pay the proffered salary in this year.

In 2005, neither the petitioner's net income of -\$7,453, nor its net current assets of -\$4,557 was enough to pay the certified wage or demonstrate the petitioner's ability to pay the proffered wage during this year.

Finally, in 2006, neither the petitioner's net income of \$16,544, nor its -\$18,696 in net current assets was enough to cover the proffered salary. The petitioner failed to demonstrate its ability to pay the proposed wage offer in this year.

As referenced above, in some cases, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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.

In the instant case, it may not be concluded that the evidence establishes a framework of profitability as in *Sonogawa*. Only in 2001 and 2004 did the petitioner report sufficient net current assets or net income to cover payment of the proffered wage. In the other years, the petitioner reported all losses as net income which increased slightly to \$16,544 in 2006. Its net current assets in these years were also all negative figures, increasing slightly to \$4,557 in 2005. The AAO does not conclude that the petitioner has established that it has had the continuing

ability to pay the proffered wage of \$35,755.20. Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* are relevant.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is April 17, 2001. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage. Further, the petitioner has not demonstrated that the beneficiary met the educational or experience requirements set forth on the approved labor certification.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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

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.