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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  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 19 2010

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency business. It seeks to employ the beneficiary permanently in the United States as a market research analyst for the [REDACTED]. 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 (the 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 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 denial, 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)(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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of 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.

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 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 21, 2003. The proffered wage as stated on the Form ETA 750 is \$62,192.00 per year.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>1</sup>

Accompanying the petition and labor certification, counsel submitted a letter from the petitioner dated January 25, 2007; a letter from the petitioner's accountant dated December 6, 2006; the petitioner's federal income tax return (Form 1120) for 2003; the petitioner's federal income tax return (Form 1120S) for 2004; unaudited financial statements for December 31, 2005; four copies of [REDACTED]<sup>2</sup> commercial checking statements for the period May 1, 2003, to June 30, 2003; 21 copies of Japanese language advertisements and exhibits with no English translations provided;<sup>3</sup> and three Wage and Tax Statements (W-2) for 2003, 2004, and 2005 in the amounts of \$14,895.00, \$23,494.50, and \$19,852.50 respectively.

On January 9, 2008, the director issued a request for evidence (RFE) to the petitioner. In response, counsel submitted a cover letter dated February 15, 2008; the petitioner's federal income tax return (Form 1120) for 2003; the petitioner's federal income tax returns (Forms 1120S) for 2004, 2005, and 2006; five Wage and Tax Statements (W-2) for 2003, 2004, 2005, 2006, and 2007 in the amounts of \$14,895.00, \$23,494.50, \$19,852.50, \$20,965.50, and \$26,483.00 respectively; and 18 copies of [REDACTED] commercial checking statements issued between March 1, 2003, and December 31, 2007.

On appeal, counsel submitted a legal brief dated May 22, 2008, and resubmitted the above listed evidence.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2003, after which time it made an S corporation election in 2004.<sup>4</sup> On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$1.2 million, and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 9, 2003, the beneficiary has worked for the petitioner commencing on April 2001, to the "present" (i.e. April 9, 2003).

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<sup>1</sup> 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 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).

<sup>2</sup> It is not clear that this entity is the petitioner, or why counsel is providing account statements for another entity.

<sup>3</sup> Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

<sup>4</sup> According to the petitioner's tax returns, its effective date of S election was June 1, 1998.

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

The following is a table of the wages paid by the petitioner to the beneficiary:

Prevailing Wage \$62,192.00	Wages To Beneficiary	Difference From Prevailing Wage	
	2003	\$14,895.00	\$47,297.00
	2004	\$23,494.50	\$38,697.50
	2005	\$19,852.50	\$42,339.50
	2006	\$20,965.50	\$41,226.50
	2007	\$26,483.00	\$35,709.00

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 at 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*,

623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *Taco Especial*, 696 F. Supp. 2d at 881.

Counsel contends on appeal that the petitioner's depreciation expenses were available to pay the proffered wage. 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 118. "[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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on February 20, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's Form 1120 tax return demonstrates its net income as shown in the table below.

*Form 1120*

- In 2003, the Form 1120 stated net income of <\$41,377.00>.<sup>5</sup>

Therefore, for the year 2003, through an examination of wages paid to the beneficiary, or its net income, the petitioner could not pay the proffered wage.

*Form 1120S*

- In 2004, the Form 1120S stated net income<sup>6</sup> of \$2,100.00.
- In 2005, the Form 1120S stated net income of \$2,333.00.
- In 2006, the Form 1120S stated net income of \$23,917.00.

Therefore, for the years 2004, 2005 and 2006, through an examination of wages paid to the beneficiary, or its net income, the petitioner could not pay the proffered wage.

If the net income the petitioner demonstrates it had available during that 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.

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<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.

<sup>6</sup> 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 as is the instance for the petitioner's 2005 tax return. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e for 2005 of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 2, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of that tax return.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> For both C and S entities, 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 tax returns demonstrate its end-of-year net current assets as shown in the table below.

*Form 1120*

- In 2003, the Form 1120 stated net current assets of <\$40,599.00>.

Therefore, for the year 2003, through an examination of wages paid to the beneficiary, or its net current assets, the petitioner could not pay the proffered wage.

*Form 1120S*

- In 2004, the Form 1120S stated net current assets of <\$60,203.00>.
- In 2005, the Form 1120S stated net current assets of <\$306,555.00>.
- In 2006, the Form 1120S stated net current assets of <\$275,767.00>.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner's average monthly bank account balances in 2003 through 2007 could have been used to pay the proffered wage. It is not clear from the record that the bank accounts submitted represent the petitioner's funds since they are in the name of [REDACTED] a Florida corporation that became inactive and was administratively dissolved.<sup>8</sup> Assuming for the sake of argument, that the bank accounts are the petitioner's accounts, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. [REDACTED] statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank

<sup>7</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>8</sup> See the Florida Department of State's informational website at <http://sunbiz.org> ... accessed on November 10, 2010.

statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel asserts generally that the petitioner's accounts receivable are available to pay the proffered wage. Also, according to counsel, in 2006 through 2008, the petitioner's operating profits, accounts receivable and accumulated depreciation constitute liquid assets and are evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on these assets (or expenses as assets) without taking into consideration the petitioner's current liabilities, is misplaced. The petitioner's assets must be balanced by the petitioner's current liabilities for each tax year.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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. 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.

In the instant case, the petitioner was established in 1998, and employs 13 workers. In 2003 through 2006 it stated gross receipts of \$1,027,422 to \$1,361,055 respectively with each year an increase over the last. However, despite paying no officers compensation in 2005, and only paying \$37,800.00 in officers' compensation in 2006, it consistently stated negative or nominal net income and net current assets figures. Its cost of goods has been very high in each year, and it has high

operating costs and wage expenses according to the tax returns submitted. These factors may have contributed to an inability by the petitioner to pay the proffered wage in any year from the priority date. The AAO notes that the electronic records of USCIS shows that the petitioner has filed 31 other visa preference cases, both immigrant and non-immigrant petitions, of which ten are I-140 petitions and the remainder are I-129 petitions. The petitioner has provided no information concerning these petitions. Since the petitioner has not demonstrated that it can pay the proffered wage for the subject beneficiary, it will not be necessary to determine if the petitioner has the ability to pay the proffered wage for all the sponsored beneficiaries (i.e. those who have not adjusted to permanent residency status) it sponsors for the period from the priority date until such time as the beneficiary adjusts to permanent residency.<sup>9</sup> Further, counsel has not contended that there was an occurrence of uncharacteristic business expenditures or losses accounting for the overall poor performance. 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.

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.

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<sup>9</sup> The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.