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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

B6

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 07 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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.

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 sustained.

The petitioner operates a residential care business. It seeks to employ the beneficiary permanently in the United States as a nursing aide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was 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 December 2, 2008, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 11, 2003 and certified on April 25, 2007. The proffered wage as stated on the Form ETA 750 is $9.70 per hour ($20,176.00 per year). The Form ETA 750 states that the position requires six months of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a general partnership. On the petition, the petitioner claimed to have been established in 1999 and to employ 10 workers currently. 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 $125,137.00 and $530,174.00 respectively. On the Form ETA 750, signed by the beneficiary on February 5, 2003, the beneficiary did not claim to have worked for the petitioner.

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). 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 paid the beneficiary the full proffered wage from the priority date. Counsel concedes that the beneficiary has not worked for the petitioner.

If the petitioner does not establish that it 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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the

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[1] 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).

proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on September 29, 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 federal income tax return for 2007 was due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003 to 2007, as shown in the table below.

- In 2003, the IRS Form 1065 stated net income of -$24,366.00.[2]
- In 2004, the IRS Form 1065 stated net income of -$24,442.00.
- In 2005, the IRS Form 1065 stated net income of -$14,127.00.
- In 2006, the IRS Form 1065 stated net income of $35,137.00.
- In 2007, the IRS Form 1065 stated net income of $38,454.00.

The petitioner did not have sufficient net income to pay the proffered wage for 2003 to 2005. The petitioner demonstrated its ability to pay in 2006 and 2007 since the petitioner's net income is greater than the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A

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[2] The AAO notes that net income is listed on line 22 of the IRS Form 1065.

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

business's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1065 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17. If the total of a business'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 were $15,113.00.
- The petitioner's net current assets during 2004 were $76,065.00.
- The petitioner's net current assets during 2005 were $67,145.00.

The petitioner did not have sufficient net current assets to pay the proffered wage for 2003. The petitioner did have sufficient net current assets to pay the proffered wage for 2004 and 2005.

Accordingly, from the priority date of February 11, 2003, the petitioner has not established the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

USCIS electronic records show that the petitioner filed four other Form I-140 petitions, which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Two of the other petitions submitted by the petitioner were approved.

A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. While the general partner is liable for partnership obligations, since the general partner is a corporation, its shareholders are not personally liable for corporate obligations. [redacted] are the two general partners of the petitioner's business.

On appeal, counsel asserts that USCIS should consider the petitioner's owners' revocable trust financial statements from 2003 to 2008 in its ability to pay analysis. A trust is an entity created and governed under the state law in which it was formed. A trust involves the creation of a fiduciary relationship between a grantor, a trustee, and a beneficiary for a stated purpose. The grantor is the creator of the trust relationship and is generally the owner of the assets initially contributed to the trust. The trustee obtains legal title to the trust assets and is required to administer the trust on behalf

of the beneficiaries according to the express terms and provisions of the trust agreement. The beneficiaries are those entitled to receive benefits from the trust. A revocable trust may be revoked and is considered a grantor trust, which is a term used in the to describe any trust over which the grantor or other owner retains the power to control or direct the trust's income or assets. 26 U.S.C. § 676. If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor on his or her Form 1040, U.S. Individual Income Tax Return. The AAO notes that the owners of the trust are also general partners in the petitioning business. Thus, the assets contained within this revocable trust may be used as evidence of the petitioner's owner's ability to pay. The petitioner's owners' revocable trust financial statement for 2003 reflects that he had over $48,450.00 in cash, which they could have used as general partners to pay the beneficiary's salary for that year as well as the salaries for the two other approved Form I-140 beneficiaries.

The AAO notes that it sent the petitioner a Request for Evidence (RFE) on September 1, 2009 asking the petitioner to submit an audited financial statement regarding and evidence of the cash on hand from 2003 in the form of bank statements. Counsel for the petitioner responded on November 18, 2009 and submitted the a copy of the petitioner's General Partnership Agreement, and the petitioner's general partners' personal financial statements and bank statements from 2003. There is no indication that the petitioner's general partners' financial statements submitted were audited, and they were not accompanied by an auditor's report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The AAO notes that the petitioner's general partners' bank statements reveal that they maintained at least approximately $8,000.00 of cash on hand and up to approximately $32,000.00 of cash on hand in their bank account for each month in 2003. These funds could also be used to help pay the beneficiary's salary for that year as well as the salaries for the two other approved Form I-140 beneficiaries.

The AAO sent the petitioner a second RFE on March 10, 2010 asking the petitioner to submit evidence of its ability to pay the combined proffered wage for all three approved Form I-140 petitions from 2003 to 2007. The RFE also asked the petitioner to submit evidence regarding its general partners' personal assets for all of those years. The petitioner responded on June 2, 2010. The petitioner submitted the petitioners' general partners' financial statements for 2004 to 2007. The AAO notes that these financial statements do not appear to be audited. The petitioner also submitted its business's bank statements for 2003 to 2007. The AAO notes that the petitioner had between approximately $6,000.00 and $53,000.00 of cash on hand for each month in each of those years to be able to help pay the beneficiary's salary as well as the salaries for the two other approved Form I-140 beneficiaries. The petitioner additionally submitted the petitioner's general partners' bank statements for two separate accounts for 2003 to 2008. The AAO notes that the petitioner's general partners had between approximately $2,000.00 and $70,000.00 of cash on hand for each

month in each account for 2003 to 2008 to be able to help pay the beneficiary's salary as well as the salaries for the two other approved Form I-140 beneficiaries

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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* 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. The petitioner has maintained growing gross sales since the priority date, has been in business since 1991, and has employed 10 workers. Even though the petitioner did not demonstrate its ability to pay the beneficiary's salary in 2003 by means of its tax returns, the AAO notes that the petitioner's owner's revocable trust financial statement for 2003 reflects that he had over $48,450.00 in cash, which he could have used as a general partner to pay it. Additionally, the petitioner's and the petitioner's general partners' bank accounts reflect that there was sufficient cash on hand each month for 2003 to 2007, which could be used to help pay the proffered wage for all three beneficiaries. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay.

The evidence submitted establishes 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 met that burden.

**ORDER**: The appeal is sustained. The petition will be approved.