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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 086 54169 Office: CALIFORNIA SERVICE CENTER Date: MAR 16 2005

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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a board and care facility for the developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a lead staff person. 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, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 9, 1998. The proffered wage as stated on the Form ETA 750 is \$27.54 per hour, which amounts to \$57,283.20 per annum. On the Form ETA 750B, signed by the beneficiary on July 13, 1998, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in 1997, to currently employ twenty-eight workers, to have a gross annual income of approximately one million dollars and to have a net annual income of \$1,011. In support of its ability to pay the beneficiary's proposed wage offer of \$57,283.20 per year, the petitioner initially submitted incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for

1998 through 2000. They reflect that the petitioner files its federal tax returns using a fiscal year running from August 1st to July 31st of the following year. They contain the following information pertinent to taxable income before the net operating loss (NOL) deduction and special deductions, current assets and liabilities, and net current assets.

	1998	1999	2000
Taxable Income before NOL	\$ 37,751	\$31,398	\$1,011
Deduction (Form 1040)			
Current Assets (Sched. L)	\$106,352	\$ not present	\$ not present
Current Liabilities (Sched. L)	\$ -0-	\$ not present	\$ not present
Net current assets	\$ 106,352		

As noted above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as a resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1120 corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On May 6, 2003, the director instructed the petitioner to submit evidence of its ability to pay the proffered salary in the form of federal tax returns, audited financial statements or annual reports covering the period from 1998 to 2002. The director also requested that the petitioner resubmit copies of its federal tax returns including the 2001 and 2002 returns, as well as copies of its state quarterly wage reports for all employees for the last four quarters, and copies of current valid business permits.

In response, the petitioner resubmitted copies of its 1999 and 2000 corporate tax returns. It additionally provided copies of its 1997 and 2001 tax returns. These returns reflect the following information:

	1997	1999	2000	2001
Taxable Income before NOL	\$15,639	\$31,398	\$ 1,011	-\$ 32,709
Deduction				

¹ 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.

Current Assets (Sched. L)	\$ 2,211	\$85,401	\$101,521	\$105,514
Current Liabilities (Sched. L)	\$ -0-	\$44,767	\$ 68,787	\$105,400
Net Current Assets	\$ 2,211	\$40,634	\$ 32,734	\$ 114

The petitioner also provided copies of its state quarterly wage reports for each of the quarters ending June 30, 2002 through March 31, 2003. Although several employees listed share the same last name as the beneficiary, the reports do not include the beneficiary's identical name as a paid employee.

The director reviewed the petitioner's financial data contained within its corporate tax returns from 1998 through 2001, concluding that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of January 14, 1998.

On appeal, counsel submits a letter, dated October 21, 2003 from the petitioner's principal shareholders pledging their individual income and assets to pay the proffered wage. Counsel offers a letter from the petitioner's accountant [REDACTED] dated October 21, 2003. Ms. [REDACTED] affirms that the petitioner's business is a profitable operation and for tax purposes has elected to take significant deductions and expenses in certain years such as management fees, officer compensation, depreciation, and legal and accounting fees that otherwise might have been applied to the proffered wage. Counsel urges similar reasoning in suggesting that the petitioner's gross income or gross receipts and sales should have been the director's basis in reviewing whether the beneficiary's proposed wage offer could have been covered. Counsel also advocates that the principal shareholders' pledge of substantial personal assets and consideration of officer compensation should be relied upon to determine the petitioner's continuing ability to pay the proffered salary. Citing *Masonry Masters Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), counsel also asserts that the petitioner's taxable income only "obliquely" speaks to the employer's ability to pay the proffered wage and that the beneficiary's ability to generate income should be considered. Counsel also maintains that petitioner's profits have substantially grown and that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), its ability to pay the certified wage should be based on the expectations of increasing business. Finally, counsel claims that DOL approval of the labor certification precludes CIS from questioning the petitioner's ability to pay the proffered wage.

Counsel supplemented his brief some months later when he submitted notification of a change of address. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vi) indicates that the time has expired for submitting such a brief, in the interest of expediency, the arguments contained therein will be considered.

In his subsequent brief, counsel claims that even by the principles outlined in a CIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memorandum"), the petitioner has established its ability to pay through its net assets. Counsel also suggests that the factors set forth in the minutes from a 1994 AILA teleconference with the Vermont Service Center should be considered as well as a prior 2003 AAO.

The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and by evaluating the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority

includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to the 1994 AILA/Vermont Service Center conference minutes or the 2004 Yates Memorandum, it is noted that these events or documents are not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.² Similarly prior AAO cases are not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

That said, the review process employed in this case is consistent with the guidance offered in the Yates Memorandum. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner 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. In this case, the record contains no evidence that the petitioner has employed the alien.

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, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). Relying only upon the petitioner's gross receipts exceeded the proffered wage is misplaced. Similarly, showing that the petitioner paid wages in excess of the proffered wage or has already paid officer compensation³ or already taken other elective expenses at a specified level is not persuasive. Further, precedent does not support counsel's assertion that to rely on anything other than gross income is "nonsensical". In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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. The court in *Chi-Feng Chang* further noted:

²See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

³It is further noted that no officer compensation³ was reported in 1999 and 2000.

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. We reject, however, counsel's assertion in his supplemental brief that the petitioner's total 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 noted above and in the Yates memorandum, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, as the financial data on the petitioner's 1997 corporate tax return encompasses the priority date of February 9, 1998, it will also be considered. In that year, neither the petitioner's net taxable income of \$15,639, nor its net current assets of \$2,211 was sufficient to pay the proffered wage of \$57,283.20.

In 1998, while the petitioner's net income of \$37,751 was not enough to cover proffered wage, its net current assets of \$106,352 was enough to pay the proffered wage of \$57,283.20 and demonstrated the petitioner's ability to pay during this period.

In 1999, neither the net taxable income of \$31,398, nor the petitioner's net current assets of \$40,634 was enough to cover the beneficiary's proposed wage offer.

Similarly in 2000, both the petitioner's taxable income of \$1,011 and its net current assets of \$32,734, each fell well short of the sum necessary to cover the proposed wage offer of \$57,283.20.

Finally, neither the petitioner's 2001 net income of -\$32,709, nor its net current assets of \$114, could pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage in four out of the five relevant years.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula

used in determining the ability to pay the proffered wage. It is noted that the record contains no evidence of this projected increase in profits by the alien beneficiary or any information from which this asserted increase in business might be estimated. The hypothesis that the alien beneficiary will increase the petitioner's net income cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in claiming that the petitioner's increasing profits support its future prospects for success and establishes its ability to pay the proffered wage. In *Matter of Sonegawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the five tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. Here, the petitioner's net taxable income, reached a high of \$37,751 in 1998 and showed a marked decline to -\$32,709. Similarly, its net current assets went from a high of \$106,352 in 1998 and progressively declined to \$114 in 2001. The AAO cannot conclude that the petitioner has not demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

With regard to the petitioner's individual owners' pledges to pay the certified wage, it is noted that as a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) affirmed the rejection of the offer of the petitioner's director to personally pay the proffered wage stating "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is further noted that a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving the petitioner's own ability to pay through the prescribed financial documentation set forth in 8 C.F.R. § 204.5(g)(2). In any event, whether characterized as a pledge from individual assets or as a promise to redirect projected profits, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, *supra*. As the evidence fails to establish that the petitioning company had the continuing ability to pay the proffered beginning on the visa priority date of February 9, 1998, the petition may not be approved.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.