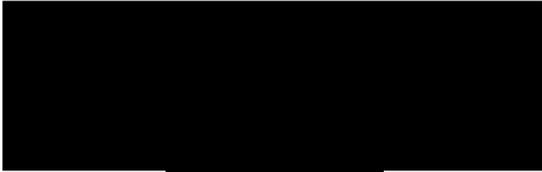


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FILE: [REDACTED]
EAC 04 209 51448

Office: VERMONT SERVICE CENTER

Date: APR 10 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automated large-scale janitorial services business. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 18, 2005 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 granting 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), 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 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, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant

petition is April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$35.75 per hour or \$74,360 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a letter, dated May 6, 2005, from [REDACTED] Certified Public Accountant (CPA), a copy of the petitioner's 2004 unaudited profit and loss statement, copies of two of the petitioner's bank statements for the periods December 1 through December 31, 2004 and January 1 through January 31, 2005, and copies of the beneficiary's pay stubs for the pay periods March 6, 2005 through March 19, 2005 and March 20, 2005 through April 2, 2005. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary for the years 2001 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1120S reflect ordinary incomes or net incomes of \$31,433 (Schedule K),² -\$538, and \$168,803, respectively. The petitioner's 2001 through 2003 Forms 1120S also reflect net current assets of -\$33,841, -\$79,232, and \$84,319, respectively.

The beneficiary's 2001 through 2004 Forms W-2, issued by the petitioner, reflect wages earned of \$7,053, \$44,700, \$38,650, and \$30,800, respectively.

The petitioner's 2004 unaudited profit and loss statement³ reflects total income of \$2,253,590.88, wages paid of \$476,502.34, and a net income of \$80,137.55.

¹ The submission of additional evidence on appeal is allowed by the instructions to the 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).

² Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

³ 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management.

The petitioner's two bank account statements for the period December 1 through December 31, 2004 reflect a beginning balance for one account of \$33,182.57 and an ending balance of \$84,101.26, and for the second account, a beginning balance of \$40,315.32 and an ending balance of \$326.39. For the period January 1 through January 31, 2005, one account had a beginning balance of \$84,101.26 and an ending balance of \$36,654.63, and the second account had a beginning balance of \$326.39 and an ending balance of \$321.53.

The beneficiary's pay stubs for the pay periods March 6, 2005 through March 19, 2005 and March 20, 2005 through April 2, 2005 reflect wages earned each pay period of \$2,000 and year-to-date wages of \$13,000 as of April 2, 2005.

The letter from the CPA states that the beneficiary was employed by the petitioner in November 2001. "His 2001 wages of \$7,053 on annualized bases [sic] are equivalent to approximately \$45,000. 2001 ordinary income of [the petitioner] was \$44,834. Based on this the company is able to meet the proffered wage requirement."

On appeal, counsel alleges that the "brief and/or evidence will show that Petitioner had the ability to pay the proffered wage at the time of the filing, i.e. in June 2004, when the I-140 was filed."

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner submitted copies of the beneficiary's 2001 through 2004 Forms W-2 showing that the beneficiary earned wages of \$7,053, \$44,700, \$38,650, and \$30,800, respectively, in those years. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$74,360 and the actual wages paid to the beneficiary. In this case, those differences for the years 2001 through 2004 would be \$67,307, \$29,660, \$35,710, and \$43,560, respectively.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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 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*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to

The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner's 2004 profit and loss statement will not be considered when determining the petitioner's ability to pay the proffered wage of \$74,360.

net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

In the instant case, the petitioner's 2001 through 2003 net incomes from Schedule K were \$31,433, -\$538, and \$168,803, respectively. The petitioner could have paid the difference of \$35,710 between the proffered wage of \$74,360 and the actual wage paid of \$38,650 to the beneficiary in 2003 from its net income, but not the difference of \$67,307 and \$29,660 between the proffered wage of \$74,360 and the actual wages paid of \$7,053 and \$44,700, respectively, in 2001 and 2002. The petitioner's 2004 tax return was not submitted; therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$43,560 between the proffered wage of \$74,360 and the actual wage paid of \$30,800 in 2004 from its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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, CIS 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, CIS 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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. The petitioner's 2001 through 2003 tax returns reflect net current assets of -\$33,841, -\$79,232, and \$84,319, respectively. The petitioner could not have paid the difference of \$67,307 and \$29,660 between the proffered wage of \$74,360 and the actual wages paid to the beneficiary of \$7,053 and \$44,700 from its net current assets in 2001 and 2002, but could have paid the difference of \$35,710 between the proffered wage of \$74,360 and the actual wages paid to the beneficiary of \$38,650 in 2003 from its net current assets. The petitioner's 2004 tax return was not submitted; therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$43,560 between the proffered wage of \$74,360 and the actual wage paid of \$30,800 in 2004 from its net current assets.

Counsel contends that the "brief and/or evidence will show that Petitioner had the ability to pay the proffered wage at the time of filing, i.e. in June 2004, when the I-140 was filed."

Counsel is mistaken. The petitioner is obligated to show that it has the continuing ability to pay the proffered wage from the time of filing the labor certification (not the petition) until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(d).

⁴ 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank 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 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.

The letter from the CPA claims that on an annualized basis the wages of \$7,053 the beneficiary earned in 2001 would equal \$45,000 and that with the ordinary income of \$44,834 in that year, the petitioner would have been able to meet the proffered wage requirement.

In spite of the CPA's statement, there is no evidence that the beneficiary would have actually earned \$45,000 in 2001, and the AAO takes the petitioner's net income from Schedule K and not from line 21 of Form 1120S. In this case, that net income was \$31,433. The assertions of counsel (in this case, the CPA) do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS

deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided three tax returns, 2001 through 2003, only one of which establishes the petitioner's ability to pay the proffered wage of \$74,360. These returns are also not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Although the petitioner has been in business for at least 13 years, additional tax returns prior to 2001 would be necessary to show that the petitioner has met all of its obligations in the past and has consistently shown a profit in order to meet the requirements of *Sonegawa*.⁵

The petitioner's 2001 tax return reflects an ordinary income or net income of \$31,433 (Schedule K) and net current assets of -\$33,841. The petitioner could not have paid the difference of \$67,307 between the proffered wage of \$74,360 and the wage paid to the beneficiary of \$7,053 from either its net income or net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of -\$538 (Schedule K) and net current assets of -\$79,232. The petitioner could not have paid the difference of \$29,660 between the proffered wage of \$74,360 and the wage paid to the beneficiary of \$44,700 from either its net income or net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of \$168,803 (Schedule K) and net current assets of \$84,319. The petitioner could have paid the difference of \$35,710 between the proffered wage of \$74,360 and the wage paid to the beneficiary of \$38,650 from either its net income or net current assets in 2003.

The petitioner's 2004 tax return was not submitted on appeal. Therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$43,560 between the proffered wage of \$74,360 and the wage paid to the beneficiary of \$30,800 in 2004.

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 sustained that burden. Accordingly, the previous decision of the director will be affirmed, and the petition will be denied.

ORDER: The appeal is dismissed.

⁵ The AAO acknowledges the petitioner's gross receipts and cost of labor. However, the differences between the proffered wage of \$74,360 and the actual wages paid to the beneficiary are substantial [ranging from \$29,600 in 2002 to \$43,560 in 2004 (the difference of \$67,307 in 2001 may have occurred because the beneficiary was not employed by the petitioner for the full year)], even after the priority date of April 18, 2001 when the Department of Labor determined the prevailing wage. In addition, since the petitioner's tax returns show no wages paid on page one of the returns as salaries, but instead shows all wages paid under Schedule A, Cost of Goods Sold, line 3, Cost of labor, page 2, it appears that the wages paid were to subcontractors. Furthermore, the petitioner has not shown any additional means of paying the wages nor has it suggested that the beneficiary would be replacing another employee or that the petitioner would be willing to forego part or all of his officer's compensation, which is modest in all years under consideration, in order to pay the beneficiary's wage.