

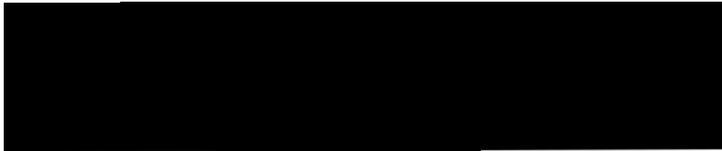


U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC 05 077 53504

Office: CALIFORNIA SERVICE CENTER

Date: APR 24 2007

IN RE:

Petitioner:

Beneficiary:



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:



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*

Robert P. Wiemann, Chief  
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. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 original May 26, 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 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 or seasonal nature, for which qualified workers are not available in the United States.

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 CFR § 204.5(d). The priority date in the instant petition is January 11, 1999.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$1,865.68 per month or \$22,388.16 annually.

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<sup>1</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA-750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

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 appeal<sup>2</sup>. Relevant evidence submitted on appeal includes counsel's brief. Other relevant evidence includes copies of the petitioner's 1999 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the prior beneficiary's, Leodegario Selda's, 1999 through 2002 Forms W-2, Wage and Tax Statements, a letter dated May 13, 2005 from the petitioner's owner, and copies of the petitioner's 2004 Forms DE-6, California Employment Development Department (EDD) Quarterly Wage Reports. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1999 through 2004 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of -\$27,444, \$9,996, -\$34,857, -\$10,903, \$26,827, and \$6,274, respectively. The petitioner's 1999 through 2004 Forms 1120S also reflect net current assets of -\$9,966, -\$16,305, -\$65,962, -\$64,876, -\$32,067, and -\$16,962, respectively.

The prior beneficiary's 1999 through 2002 Forms W-2, issued by the petitioner, reflect wages earned of \$10,050, \$12,400, \$13,700, and \$11,400, respectively.

The petitioner's 2004 Forms DE-6 reflect that the petitioner employed the beneficiary in the fourth quarter of 2004, and that the beneficiary earned \$1,650 during that quarter.

The letter from the petitioner's owner states:

1999-2002 tax returns showing negative net income did not mean we had problem with ability to pay. During those years, [REDACTED] expanded to [REDACTED] and [REDACTED] with down payment of \$100,000 in cash plus monthly amortization. Significant amount of additional fund was committed to renovate both properties to suit as home care facilities.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$22,388.16 based on its net income of \$26,962 in 2003, its net income of \$10,136 plus the wages paid to the prior beneficiary of \$12,400 in 2000, and its net income of \$9,113 plus the wages paid to the beneficiary of \$14,300<sup>3</sup> in 2004. Counsel also claims that the petitioner has established its ability to pay the proffered wage of \$22,388.16 based on its continually increasing revenues and its unusual expenses during 1999 through 2002. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (R.C. 1967) in support of his contention.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The

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<sup>2</sup> 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).

<sup>3</sup> It is noted that although counsel claims the beneficiary earned \$14,300 in 2004, there is no evidence in the record that corroborates this claim. In fact, the petitioner's 2004 Forms DE-6 show the beneficiary as only being employed in the last quarter of 2004 and earning only \$1,650 that quarter.

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, CIS 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, 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 instant case, on the Form ETA 750B, signed by the beneficiary on January 18, 2005, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has provided copies of the petitioner's 2004 Forms DE-6 indicating that the petitioner employed the beneficiary in the last quarter of 2004. Therefore, the petitioner has established that it employed the beneficiary in the last quarter of 2004, but not in 1999 through 2003. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$22,388.16 and the actual wages paid of \$10,050, \$12,400, \$13,700, and \$11,400 to the prior beneficiary in 1999 through 2002 and to the beneficiary of \$1,650 in 2004.<sup>4</sup> Those differences are \$12,338.16, \$9,988.16, \$8,688.16, \$10,988.16, and \$20,738.16, respectively. Therefore, the petitioner has established that it had sufficient funds to pay the difference of \$9,988.16 between the proffered wage of \$22,388.16 and the actual wage paid to the prior beneficiary of \$12,400 from its net income of \$9,996 in 2000.<sup>5</sup>

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 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 net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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

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<sup>4</sup> It is noted that the petitioner has established its ability to pay the proffered wage of \$22,388.16 in 2003 through its net income of \$26,827.

<sup>5</sup> In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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.

(Emphasis in original.) *Chi-Feng* at 537.

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 1120 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).

In the instant case, the petitioner's 1999 through 2004 net incomes from Schedule K were -\$27,444, \$9,996, -\$34,857, -\$10,903, \$26,827, and \$6,274, respectively. The petitioner could have paid the proffered wage of \$22,388.16 from its net income in 2003, but not in any of the other years.

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.<sup>6</sup> 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 net current assets in 1999 through 2004 were -\$9,966, -\$16,305, -\$65,962, -\$64,876, -\$32,067, and -\$16,962, respectively. The petitioner could not have paid the proffered wage of \$22,388.16 in 1999 through 2004 from its net current assets.

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<sup>6</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.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$22,388.16 based on its net income of \$26,962 in 2003, its net income of \$10,136 plus the wages paid to the prior beneficiary of \$12,400 in 2000, and its net income of \$9,113 plus the wages paid to the beneficiary of \$14,300 in 2004. Although the petitioner's net income was \$9,996 in 2000 and \$26,827 in 2003, counsel is correct that the petitioner has established its ability to pay the proffered wage in 2000 and 2003. However, the record of proceeding does not contain any verifiable evidence that the beneficiary earned \$14,300 in 2004. Instead, the record contains the petitioner's 2004 Forms DE-6 showing its employment of the beneficiary only in the fourth quarter of 2004 and showing that the beneficiary only earned \$1,650 that quarter. Therefore, the petitioner has not established its ability to pay the proffered wage in 2004.

On appeal, counsel also claims that the petitioner has established its ability to pay the proffered wage of \$22,388.16 based on its continually increasing revenues and its unusual expenses during 1999 through 2002. However, the petitioner has only submitted a letter from the owner detailing its unusual expenses during 1999 through 2002. The petitioner has provided no corroborative evidence such as purchase agreements, evidence that the \$100,000 down payment actually came from the petitioner, remodeling contracts, incorporation or ownership of the new companies, etc. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, CIS will not consider gross income without also considering the expenses that were incurred to generate that income.

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, the petitioner's tax returns indicate it was incorporated in 1994. While the petitioner's quarterly wage reports establish that the petitioner employed between 26 and 29 workers in 2004, the petitioner has provided no evidence of its employees for 1999 through 2003. Further, the petitioner has provided tax returns for the years 1999 through 2004. However,

while the petitioner's gross receipts increased each year from 1999 to 2004, out of the six tax returns provided by the petitioner, only 2000 and 2003 establish the petitioner's ability to pay the proffered wage of \$22,388.16, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. 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 petitioner's 1999 tax return reflects an ordinary income or net income of -\$27,444 and net current assets of -\$9,966. The petitioner could not have paid the difference of \$12,338.16 between the proffered wage of \$22,388.16 and the actual wages paid to the prior beneficiary of \$10,050 from either its net income or its net current assets in 1999.

The petitioner's 2000 tax return reflects an ordinary income or net income of \$9,996 and net current assets of -\$16,305. The petitioner could have paid the difference of \$9,988.16 between the proffered wage of \$22,388.16 and the actual wages paid to the prior beneficiary of \$12,400 from its net income in 2000.

The petitioner's 2001 tax return reflects an ordinary income or net income of -\$34,857 and net current assets of -\$65,962. The petitioner could not have paid the difference of \$8,688.16 between the proffered wage of \$22,388.16 and the actual wages paid to the prior beneficiary of \$13,700 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of -\$10,903 and net current assets of -\$64,876. The petitioner could not have paid the difference of \$10,988.16 between the proffered wage of \$22,388.16 and the actual wages paid to the prior beneficiary of \$11,400 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of \$26,827 and net current assets of -\$32,067. The petitioner could have paid the proffered wage of \$22,388.16 from its net income in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of \$6,274 and net current assets of -\$16,962. The petitioner could not have paid the difference of \$20,738.16 between the proffered wage of \$22,388.16 and the actual wages paid to the beneficiary of \$1,650 from either its net income or its net current assets in 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.